An ALM Publication

CORPORATE COUNSEL

PATENT LITIGATION
10 | 2013

BEYOND HIGH TECH

Patent litigation spreads to other products—with higher stakes.

PATENT LITIGATION WAS ALIVE AND WELL LAST YEAR.

The year 2012 saw a little bit of everything: massive damages awards, increasingly brazen patent assertion entities, and the major patent reform law passed in 2011 beginning to make its mark.

The high stakes that companies faced, and the constant barrage of suits, kept law firms' patent practices busy, according to results from *Corporate Counsel*'s 2013 Patent Litigation Survey, which ranks law firms according to how many federal district court patent suits they handled in 2012.

Many of the firms that took the top spots in last year's survey are back this time around. Fish & Richardson, which once again ranks number one, according to the data, handled 220 cases in 2012, compared to 173 in 2011—an increase of more than 27 percent. Finnegan, Henderson, Farabow, Garrett & Dunner, which took second place in this year's ranking, saw its caseload jump from 88 cases in 2011 to 95 in 2012—moving up from eighth to second place. And Kirkland & Ellis moved from fifth place to tied at second, although the total number of cases it handled dropped by one to 95. Winston & Strawn ranked ninth in 2011 with 87 cases, but moved to the number four spot in this year's survey with 94 cases in 2012.

The totals demonstrate just how pervasive patent litigation has become. The number of patent cases filed in 2012 reached 5,189—an increase of 29 percent over 2011, according to statistics compiled by PriceWaterhouseCoopers. This is the highest number ever recorded.

Meanwhile, the number of patents granted by the U.S. Patent and Trademark Office has also grown. In 2012, according to PwC, the number of patents granted by the PTO increased by 11 percent to 270,258.

"Innovators now realize that their intellectual property is their most valuable asset," says Ann Cathcart Chaplin, IP Practice Group Leader at Fish & Richardson, which has now topped *Corporate Counsel*'s patent litigation survey for 10 consecutive years. "They are getting more proactive in pursuing infringers and more aggressive in defending themselves against infringement claims."

Last year, three cases grabbed headlines with verdicts awarding damages that surpassed $1 billion: *Monsanto v. DuPont*, *Apple v. Samsung*, and *Carnegie Mellon University v. Marvell Technology Group*. As is often the case, the size of the awards changed after the verdicts. (Monsanto

PATENT WARRIORS

FROM SMARTPHONES TO BIOTECH, THESE LAW FIRMS FOUGHT THE MOST BATTLES.

2013 RANK	2012 RANK	FIRM NAME	DEFENDANT	PLAINTIFF	TOTAL
55	65	McAndrews Held	12	7	19
56	N/A	Hogan	14	4	18
57	49	Steptoe	10	7	17
58	44	Husch	11	5	16
59	48	Michael Best	11	4	15
60	**N/A**	**Cantor Colburn**	**5**	**6**	**11**
60	52	Jackson Walker	11	0	11
60	N/A	Katten	10	1	11
60	N/A	Morris Manning	4	7	11
60	61	Nixon Peabody	10	1	11
65	62	Sterne Kessler	9	1	10
66	N/A	Dechert	4	5	9
66	67	Smith Gambrell	6	3	9
68	N/A	Kirton McConkie	0	6	6
68	62	Oblon	2	4	6
70	N/A	Bradley Arant	3	0	3
70	68	Moore & Van Allen	1	2	3

Company and E.I. du Pont de Nemours & Company settled for a 10-year $1.75 billion license; Apple Inc.'s $1.05 billion award was reduced to $450 million, then raised to about $600 million and will likely be modified further in an upcoming retrial on damages; and the Carnegie Mellon University case is still going through post-trial motions and will likely be appealed at the Federal Circuit.) But given that only three patent infringement damages awards passed the $1 billion mark prior to 2012, the sizeable verdicts are noteworthy and indicate that high-stakes patent litigation isn't going away.

"The stakes keep getting higher," Chaplin says.

In fact, while the median damages award had been trending down over the past five years, averaging $4.9 million between 2007 and 2012, the 2012 figure saw a jump—to $9.5 million, according to PwC's statistics. The growth in litigation is not limited to one or two areas, either. It hits medical device companies, computer software firms, pharmaceutical makers, telecommunications companies, biotech developers, and the electronics industry, to name just a few.

To be sure, the reason there has been an overall increase in the number of filings is due at least in part to the "anti-joinder" provision of the America Invents Act (AIA)—the major patent reform law passed in 2011. That rule, which limits the number of defendants that can be named in the same lawsuit, took effect in September 2011.

As a result, plaintiffs that used to file one lawsuit against multiple defendants (most notably patent assertion entities, or "patent trolls") were forced to file separate lawsuits for the same patents. One study noted a decline of more than 40 percent in the average number of defendants per case between 2011 and 2012, with the average dropping from 3.9 defendants in 2011 to 2.3 defendants in 2012, according to the PwC patent litigation study.

That does not diminish the role these patent trolls played last year, however. Fish & Richardson, for example, says it has handled 411 cases involving patent assertion entities between 2007 and the end of 2012. That's a significant number, but the number is even more telling when it's broken down by year: Fish says it handled only 37 "troll" cases in 2007, but litigated 106 such cases in 2012.

This isn't surprising, given that patent trolls have grown more aggressive over the past few years, lawyers say. The entities that had traditionally gone after big technology companies have broadened their reach, filing lawsuits against podcasters, retailers, small businesses that scan documents, and even coffee shops that offer Wi-Fi. This has prompted a backlash that has moved into the mainstream media, the halls of Congress and even the White House.

A variety of studies have been conducted that examine how prominent a role patent assertion entities play in overall patent infringement litigation. The results vary from study to study, but in all cases the numbers are significant. One study, published by the University of California Hastings and Lex Machina and conducted by Colleen Chien, a highly respected law professor at Santa Clara University, found that as of 2012, patent assertion entities accounted for the majority—56 percent—of patent infringement litigation filed in the United States. In 2007, they accounted for less than a quarter of patent litigation, the study said.

PriceWaterhouseCoopers' numbers were lower, concluding that 16 percent of identified decisions in 2012 involved patent assertion entities. But PwC noted that there is a higher tendency for actions brought by patent trolls to be resolved without a formal court decision.

Taking the lead among plaintiff firms in our survey was Niro, Haller & Niro, which also was number one in the plaintiff category last year. Chicago-based Niro is known for its representation of patent assertion entities and helped inspire the term "patent troll." In 2012, it handled 56 cases and represented plaintiffs in 51 of them.

But patent troll litigation isn't the only area experiencing growth. ANDA litigation—lawsuits in which a generic drug manufacturer challenges a brand drug maker's patent—has increased substantially, lawyers say. Their assessment is backed up by PwC's data, which shows that between 2007 and 2012 there were 77 court decisions from ANDA litigation, compared to only 43 between 2001 and 2006.

The full impact of the AIA has not yet been felt, of course, because many key aspects of the patent reform law did not take effect until late 2012 or early 2013. But the new law, while doing little to curb patent lawsuits, has opened up a whole new litigation specialty for lawyers as they increasingly try cases in the patent office itself.

"New post-grant procedures have become important in patent litigation strategy," Chaplin says.

While not reflected in our survey, which looks only at cases filed in federal district court, inter partes review, which became available in September 2012, is a new trial proceeding conducted before the Patent Trial and Appeal Board at the PTO to challenge the validity of patent claims based on patents and printed publications. And it is becoming increasingly popular, patent attorneys say—altering the dynamics for challenging a patent's validity. In the first six weeks of it being available, 41 inter partes review requests were filed—each challenging a single patent. Between September 16, 2012, and September 18, 2013, a total of 493 IPRs were filed. In that time, 150 trials have been instituted, and the process is being closely watched both by in-house and outside patent counsel.

The International Trade Commission has also continued to be a popular venue for combatting patent infringement, with the threat of an exclusion order a powerful weapon. The overall number of ITC cases was down in 2012 compared to 2011, with only 40 cases instituted compared to 69 in 2011. But lawyers say 2011 saw an unusual spike, and the ITC continues to work well in many instances. In the calendar year 2013, the total number of ITC cases appears to be on track, with 33 cases instituted as of September 16.

So where is patent litigation headed? The AIA hasn't curbed it much, lawyers say, although the patent reform law wasn't around long enough in 2012 to have much of an impact. It could be that IPRs and other post-grant review proceedings will have a larger influence over time, and other changes in the law will not be felt for years to come.

Legislation, too, might change the landscape somewhat, as lawmakers continue to search for creative ways to halt the onslaught of patent trolls. Even individual states have weighed in, with Vermont passing an anti-troll bill and Nebraska warning against frivolous infringement claims. There is momentum in Congress to do something as well, but even if Washington gridlock prevents progress on the federal level, action by states like Vermont could resonate nationwide.

Lawyers are creative, however. The dynamics of patent litigation may change over time, but for companies wishing to protect their investments, litigation will continue to be a necessary evil.

"Intellectual property, says Chaplin, "is much too valuable to ignore." ■