

LAW WEEK

COLORADO

In the World of IP Litigation

Experts offer observations on shifts — some seismic, some subtle — in courtroom battles over intellectual property

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If there is one clear note from both the numbers and experts' observations, the reign of the "patent troll" is coming to an end.

"There was a 25-year cycle of it, and it's basically come and gone," said Tom Franklin, a partner and patent prosecutor with Kilpatrick Townsend & Stockton in Denver.

Although he noted that letters are still coming in from non-practicing entities, "pejoratively known as patent trolls and the bane of a lot of businesses' existence," more clients are looking to knock out those claims administratively instead of settling for a smaller amount than the price tag of litigation.

A non-practicing entity is the owner of the rights to a patent that can litigate infringement but does not actually pursue any type of production, use or sale of a good derived from the patent.

The entity exists to own the patent but not necessarily to bring it to reality; businesses that do might run afoul of those patents.

Other trends in patent litigation are a mixed bag of opposing forces, but filings are on the decline.

In the third quarter of this year, plaintiffs filed 1,127 patent cases — a decrease from the previous quarter of 1,289 but still higher than the first quarter at 960 — for a total of 3,376.

In the intellectual property litigation world — specifically patents, trademarks and copyright — Brian Howard, a data scientist with legal analytics firm Lex Machina, called patents "the most studied" area because of an amalgam of reforms, case law updates and rule changes. Studying the hills and valleys in the numbers is the quantitative mirror for a market driven by human motivations.

As an offset, Howard pointed to trademarks as "only interesting in contrast to patents" with numbers that have maintained a steady line beside a collective of cases against the NFL in 2014 in the District of Minnesota, typically brought by former players over the use of their likeness.

Outside of the 1,422 trademark cases tallied in 2014, the past few decades have seen numbers around 900.

"The story there is that it's not a crazy world in which they practice but rather there is a much more steady and constant landscape," Howard said.

For an example of how what could be considered a drop in the bucket caused noticeable shifts in patent litigation, Howard pointed out a filing spike in early 2013 likely caused by a piece of draft legislation aimed at

patent reform. Without it even passing, litigants rushed to get their cases on the docket, he said.

"In terms of what is happening in 2016, as we get closer to present, it's hard to say," he said. "One thing we do know is that patents is an area in which people are looking for every advantage they can get."

For his part, Franklin and others seem unfazed by the drop. His firm is "as busy as ever" with hiring and case work and he chalks it up to a move to quality after what he described as "a bit of a gold rush" in patent litigation because of a perceived ease of victory and safe bets for profits. But with changes in the case law that make it more difficult for non-practicing entities, success in that context has become a struggle, he said.

"That model has had a lot of difficulty lately," Franklin said. "People who jumped into market during the gold rush are finding the map isn't penciling out."

Holland & Hart's Michael Drapkin, a patent litigator and partner in the firm's Boulder office, said companies with what might be considered legitimate business interests among IP attorneys were padding their patent portfolios for defensive reasons as well, which could have fueled the litigation spikes in the last couple of decades. Although patent attorneys have somewhat varied and nuanced views on what is currently going on the Eastern District of Texas, the historically NPE-friendly jurisdiction has seen a noticeable decline in patent litigation. The district still claims the lion's share of all patent cases filed nationally, but it dropped from 43 percent in 2015 to 30 percent in the first quarter of this year. However, that's still a significant slice and a big business for the rural area.

"At least relative to any other practice area, no one sees concentration like that," LexMachina's Howard said. "In 2016, cases have dropped a little bit but it's not like Texas now is hitting at 10 percent. Right now, it's not a significant shift."

As for what is fueling the current dearth of opportunity for NPEs, the Supreme Court along with other courts have limited what subject matter is considered patent-eligible through 2014's *Alice Corp. v. CLS Bank International* in 2014 and *Bilski v. Kappos* in 2010.

Courts have also changed their internal calculus on how awards are given generally, according to Drapkin, and legislative reform such as 2011's America Invents Act have created new administrative pathways that lessen the cost of litigation, which was a powerful tool for "trolls" looking to leverage expense to compel a settlement.

Specifically, the AIA carved out a proceeding called an inter partes review, heard by the Patent Trial and Appeal Board, that allows an entity to challenge a patent's validity.

According to numbers from Lex Machina, the number of petitions filed with PTAB has held fairly steady nationally with 436 petitions filed in the third quarter of 2016.

Heath Briggs, a chemical engineer who is also currently a shareholder and patent attorney in Greenberg Traurig's Denver office, said he has seen a significant uptick in inter partes review filings as a litigation strategy, sometimes in lieu of lawsuits altogether.

He cites two reasons: cost difference and a shorter window for resolution. Under law, those proceedings cannot exceed 12 months.

"Both of those things bring certainty to clients," Briggs said. "Win or lose — and they certainly hope they win — the certainty is an attractive prospect."

Briggs also said PTAB judges, because of the singular focus on patents, are astute and more typically able to understand the complicated details of a patent claim where district court judges may not have the technical background.

"We are seeing a lot of inter partes review petitions filed this year from clients as they get more comfortable with what's required," Briggs said.

Practitioners likely already know the results of those shifts. Based on a mandate from the federal circuit from 2005, Intellectual Property American Inns of Court have proliferated to the point of having 25 spread across the U.S. and Japan in 2016. An inn of court is an association of jurists and lawyers who share a practice area.

"A lot (of members) in the Inns of Court are IP litigators," Holland & Hart's Drapkin said. "(The decrease in patent litigation) will impact Colorado because we have a very vibrant IP litigation bar, and I wouldn't foresee a lot of growth in those areas for the next few years. If you're straight litigation, I see a lot of moderation, for sure."

But with the momentum of a strong IP market in Colorado and a fairly new patent office in the state's capital city, Drapkin said the impact would be more "tempered" in Denver than it has been elsewhere.

Ian Walsworth, a shareholder and IP litigator with specialty firm Sheridan Ross in Broomfield, had a slightly different view as far as forecasting with a prediction that 2017 will see a reversal of the increasing PTAB filings as more meritorious claims are brought with less influence from NPEs in federal district court.

"In the first 10 years of my practice, I had

one arbitration. In the last two years, I've had two patent trials," Walsworth said. "We have seen companies willing to go the distance, even with the uncertainty and the risk. I think that, particularly with the technology not impacted by the *Alice* decision (which involved software patents), you're seeing clients willing to take that risk, and we'll see some rebound." •

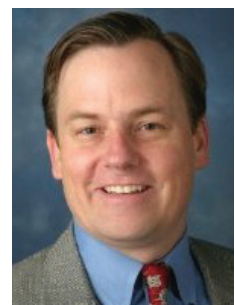
— Hannah Skewes, HGarcia@circuitmedia.com



HEATH BRIGGS



MICHAEL DRAPKIN



TOM FRANKLIN



IAN WALSWORTH

BY THE NUMBERS

3,376 patent cases filed through third quarter of 2016

1,287 PTAB filings through third quarter of 2016

35.4% of patent cases filed in the Eastern District of Texas through third quarter of 2016

25 Intellectual Property American Inns of Court