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## 3 Patent Litigation Trends To Watch In 2016

By Erin Coe

Law360, San Diego (January 8, 2016, 12:57 PM ET) -- While plaintiffs in infringement cases have faced greater scrutiny over the validity of their patents following the establishment of the Patent Trial and Appeal Board and the U.S. Supreme Court's Alice decision, attorneys expect that more favorable decisions for patent holders are on the horizon.

Here, attorneys point to this trend and more to follow this year:

### Patent Owners Poised to Gain Leverage in Infringement Fights

Plaintiffs have had a tougher time keeping their patents intact since the America Invents Act in 2012 created the PTAB as an expedited avenue to challenge the validity of patents and since the U.S. Supreme Court **found in the Alice case** in June 2014 that abstract ideas implemented using a computer are not patent-eligible under Section 101 of the Patent Act.

But attorneys say appellate courts may be ready to put limits on Alice and make it easier for patent owners to show enhanced damages this year.

"We've seen an 'Alice bloodbath' for software patents," said Jonathan James, co-chair of Perkins Coie LLP's intellectual property practice. "But there are some signs that there may be a 'correction' coming, and we could see the Federal Circuit uphold more patents against Alice challenges."

The Federal Circuit **is reviewing a case** where a district court judge ruled that McRo Inc.'s patents on lip-sync animation technology were invalid under Alice for claiming the abstract idea of using rules to create computer animation.

"This case may be where the Federal Circuit draws the line," said Steve Cherny of Kirkland & Ellis LLP. "Courts have been cleaning out the underbrush of dubious patents, but now we could see the pendulum swinging back a little on Section 101."

Patent owners are struggling to determine whether a software-related patent is valid or invalid based on Alice, and they also have faced roadblocks in the U.S. Patent and Trademark Office, according to Jeffrey Snow, a partner at Pryor Cashman LLP.

"In the patent office, a tremendous number of applications have slowed down as patent applicants are trying to get past Section 101 rejections," he said. "The USPTO has given examples of what is and is not patentable subject matter and that's a step in the right

direction, but it's hard to get a clear delineated rule, except for the broad standards set forth in Supreme Court cases."

The cloud of uncertainty over whether a particular software patent is patent eligible could prompt the Federal Circuit to provide more predictability, according to James.

"It's difficult to apply the case law and be able to predict the validity of a patent with any certainty," he said. "We may see the Federal Circuit provide more usable guidance to patent owners and defendants on that issue."

Patent owners also could see movement on the standard for enhanced damages, which has been harder to establish since the Federal Circuit's 2007 en banc decision in *Seagate* **overruled** decades of precedent that had required the infringer to prove that its infringement was not willful.

The U.S. Supreme Court set oral arguments for February in *Halo Electronics Inc. v. Pulse Electronics Inc.* and *Stryker Corp. v. Zimmer Inc.* **to review the test for enhancing damages** in patent cases, and if the justices scrap the Federal Circuit's existing rules, patent owners could be able to recover larger damages awards in many cases.

"Since *Seagate*, willfulness has been pled a lot less, and it's been easier for defendants to defeat willfulness claims on summary judgment and on post-trial motion after an infringement verdict," James said. "If the willfulness standard becomes more like the *Octane Fitness* standard for attorneys' fees, we will see an increase in willfulness assertions and the risk of a willfulness finding against defendants will increase. ... This could be a significant change in the landscape."

*Halo* and *Stryker* have argued that the Federal Circuit's test for awarding triple damages is essentially the same as a test that the appeals court once used for awarding attorneys' fees, which the Supreme Court threw out in 2014 in the *Octane Fitness* case.

The Supreme Court in previous decisions has criticized the Federal Circuit for relying on rigid regimes to make determinations in patent cases, according to Michael Sacksteder, head of Fenwick & West LLP's patent litigation group.

"I think the Supreme Court's grant of certiorari indicates it is likely to do something to change the law," he said.

It's still possible that the Supreme Court could uphold the existing enhanced damages standard, but if the high court does upend it, such a ruling would change the direction of case law on willfulness, according to Brian Pandya, a partner at Wiley Rein LLP.

"The ruling could be very consequential ... and affect many patent cases with new claims of enhanced monetary damages," he said.

### **More Invalidity Disputes Headed to the PTAB**

The PTAB saw an increase in AIA petitions filed in fiscal year 2015 compared to the previous period, and the number of petitions is expected to continue to climb in 2016 as companies move their invalidity fights from the courts to the patent office, according to Naveen Modi and Joe Palys, co-chairs of Paul Hastings LLP's PTAB group.

In fiscal year 2015, which ran from October 2014 through September 2015, the PTAB

received a total of 1,897 AIA petitions — 1,737 inter partes review petitions, 149 covered business method review petitions and 11 post-grant review petitions, according to USPTO data. Those figures are mostly a step up from the previous fiscal year, when the PTAB took in a total of 1,489 AIA petitions — 1,310 inter partes review petitions, 177 covered business method review petitions and two post-grant review petitions.

“One area that is going to be keeping patent lawyers busy is the PTAB area,” Modi said. “The number of petitions will keep going up in 2016, along with the appeals to the Federal Circuit as well.”

For fiscal year 2016, which began on Oct. 1, 2015, the PTAB has received 237 inter partes review petitions, 21 covered business method review petitions and one post-grant review petition, according to USPTO data from the end of November.

Those figures signal that the PTAB is on track to see steady growth in AIA filings, and not just by defendants accused of infringing patents in litigation, but by hedge funds that have targeted patents in the pharmaceutical industry and so-called reverse patent trolls that attempt to extract quick settlements from patent owners after filing a petition, according to Modi.

“Over the last year, people have been figuring out ways to use these new tools,” he said. “It’s interesting to see petitioners coming in and using the tools in a way Congress hadn’t envisioned or intended.”

PTAB statistics also show that the percentage of petitions that are denied is increasing. In fiscal year 2015, 32 percent of inter partes review petitions and 30 percent of covered business method review petitions were denied, up from 25 percent for each in the previous period.

“Eventually, we will get to an equilibrium point, where the PTAB will be equilibrating how many patents it’s knocking out,” Cherny said. “But until then, I think people will continue to file IPRs at a fairly high rate.”

The Federal Circuit has been affirming nearly all of the PTAB’s findings, but this year and next year will be critical in shedding more light on how the Federal Circuit and the Supreme Court view what the PTAB is doing, according to Modi.

Cuozzo Speed Technologies LLC, the first company to have its patent invalidated in an AIA review, in October **asked** the Supreme Court to change the claim construction standard used in the proceedings and hold that decisions instituting them can be reviewed on appeal. The petition argues that the PTAB's practice of construing claims in AIA reviews by giving them their broadest reasonable interpretation, rather than the narrower standard used in district court patent cases, has made the proceedings "surprisingly lethal," resulting in 85 percent of decisions invalidating some or all of the patent claims under review.

Attorneys also will be watching for more guidance from the Federal Circuit on the estoppel provision, which bars an inter partes review petitioner from asserting in a later suit any ground of invalidity it raised or reasonably could have raised during the inter partes review.

“Petitioners may want to know what it means to have prior art that they reasonably could have known about,” Palys said. “We could see cases in the next year or two that fit those facts, and it will be interesting to see what the court thinks.”

## More Patent Filings at the International Trade Commission

While the ITC has instituted fewer patent investigations in recent years compared to its record 71 investigations in 2011, that number may go up as a spike in patent filings is expected to come its way following a Federal Circuit decision expanding its jurisdiction.

In August, the en banc Federal Circuit in *Suprema Inc. v. ITC* **overturned** a panel decision that said the ITC cannot hear patent cases involving induced infringement. The court instead held that the ITC can prevent the importation of products that hold the potential to induce infringement of U.S. patents after they are imported.

"Now that the ITC covers inducement based on the en banc decision in the *Suprema* case, it makes the ITC more attractive [for patent owners]," Cherny said. "I think the ITC will probably become more popular."

The Federal Circuit also ruled on another case involving the ITC's authority that may be the subject of further appeal, and a reversal could expand the kind of cases the ITC hears. In November, the Federal Circuit **held** in *ClearCorrect Operating LLC v. ITC* that the commission cannot block the import of infringing digital files. The court ruled that the commission can only hear patent cases involving "material" things.

The case had drawn attention from the tech industry and Hollywood, largely on the grounds that it could theoretically give the agency broad power to regulate Internet traffic. Many believed, for better or for worse, that the decision could turn the agency into a venue for fighting online piracy of movies and music.

"I don't think this case is over with, and I'm sure a petition for rehearing en banc is going to be filed," Cherny said. "If it is found that the ITC does have jurisdiction over digital imports, that would expand the ITC's purview greatly."

--Additional reporting by Ryan Davis. Editing by John Quinn and Emily Kokoll.

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