

Patent Suits Mostly Stayed Level In 2022, Yet Appeals Fell

By Ryan Davis

Law360 (February 15, 2023, 12:14 AM EST) -- The number of new patent lawsuit filings dipped only slightly in 2022, continuing years of relatively stable litigation activity amid few major changes in the law, while a drop in patent appeals from district courts may be tied to court slowdowns during the pandemic, attorneys say.

There were 3,820 patent cases filed nationwide in 2022, 189 fewer than the 4,009 filed in 2021, according to a new report from Lex Machina. But the number of new patent cases has held fairly steady since 2017, hovering between about 3,600 and 4,000 each year.

The slightly lower number of new cases last year can likely be attributed to natural fluctuations from year to year, but the largely consistent figure over six years indicates that "patent litigation activity is stabilizing within that band," said Robert McFarlane of Hanson Bridgett LLP.

Over 5,000 patent cases were filed each year between 2013 and 2015, but the advent of the America Invents Act and recent U.S. Supreme Court decisions limiting what is eligible for patents and where infringement suits can be filed likely contributed to the subsequent drop in new cases, he said.

"The cumulative effects of those court decisions and then the AIA have been felt," McFarlane said. And since a venue decision in 2017, nothing more has happened "that really shakes up the litigation environment for patent cases. So that's probably one of the reasons that they've kind of stabilized where they are now," he said.

Jason Balich of Wolf Greenfield & Sacks PC said it is notable that new patent suit filings have held steady despite worries about the economy in recent months, which he said suggests "folks have realized that patent litigation is totally independent from the stock market."

"The proof of that is all of the interest in litigation funding," he said. Investors have been attracted to funding patent cases "because it is sort of a constant return, no matter what happens in the larger economy," Balich said.

In contrast to the steady flow of new cases, the Lex Machina report found 2022 had an unusually low number of appeals docketed in patent cases originating in district courts. There were only 171 such appeals, down from 316 in 2021, and by far the lowest number in at least a decade.

While the COVID-19 pandemic does not appear to have had much of an effect on new lawsuits, it did impact how pending cases proceeded. Many courts called off jury trials in 2020 and 2021, which may have led to fewer decisions that could be appealed last year, attorneys said.

"During the pandemic, case schedules were frequently extended far beyond typical case durations, and meanwhile, many cases settled that otherwise might not have," said Paul Schoenhard of Fried Frank Harris Shriver & Jacobson LLP. "As a result, I don't find it particularly surprising that the number of new appeals was down."

As trials have begun to ramp back up, judges may now be facing a higher than usual number of motions for summary judgment and post-trial briefing that they have yet to rule on.

The courts "did a heroic job during COVID to keep the trains running on time," said Michael Lindinger of Mayer Brown LLP. "But I think the busier patent courts are probably still digging out of a lot of backlog."

As judges work their way through that, "it'll take a couple years, but [appeals] will probably come back to where those numbers used to be," he said.

The busier patent courts have certainly stayed busy. According to the report, from 2020 to 2022, three courts heard more than 53% of all patent cases: the Western District of Texas, the District of Delaware and the Eastern District of Texas.

The Western District of Texas was the most popular patent court over the three-year period, with 2,711 cases, compared to 2,286 in Delaware. Waco-based Judge Alan Albright, a former patent litigator who has encouraged plaintiffs to file suits in the Western District of Texas, has driven a significant number of cases there.

Yet the number of cases filed in the Western District of Texas dropped from 981 in 2021 to 867 in 2022. That may be due to new rules the district implemented in July that call for patent cases filed in Waco to be randomly assigned to judges instead of automatically going to Judge Albright as they did before, a change that is still playing out.

Even so, because a large number of patent lawsuits are against technology companies, and many of those businesses have a presence in the Western District of Texas and can be sued there under the Supreme Court's venue ruling, the district will likely continue to be an important part of the patent map, Mayer Brown's Lindinger said.

"I think the Western District is going to continue to be an attractive venue to file patent cases, even if some of them ultimately do get transferred. There are so many tech companies down there," he said.

Patent plaintiffs continue to gravitate toward the same few courts because they are known quantities at this point, according to Balich of Wolf Greenfield.

"Plaintiffs are looking for certainty and predictability, and anytime you have a district that is very familiar with patent litigation and has set rules on how it's going to play out, you achieve that predictability, and in some sense, that can be more important than anything else," he said.

While patent suit filings dropped slightly overall, the number of patent infringement suits over abbreviated new drug applications, or ANDAs, for generic drugs ticked upward slightly in 2022 to 264, the report found.

That was only 10 more than the 254 filed in 2021, but the increase stood out since ANDA cases had previously fallen every year since 2017.

The generic drug industry is unique in that it almost requires patent litigation before a product enters the market, so "the number of ANDA cases has more to do with the number of new drugs coming out onto the market than anything else," Balich said.

The report also identified the most prolific patent plaintiffs from 2020 to 2022, a list that was dominated by patent licensing companies. At the top was a company called Cedar Lane Technologies Inc., which filed 336 suits over the three-year period, including 176 in 2022, predominantly over computer imaging patents.

In second place was WSOU Investments LLC, which filed 205 suits involving wireless communications patents over the three years, although the bulk of them were filed in 2020. The next place on the list was taken by Bell Semiconductor, which filed 106 suits over circuit patents, nearly all of them in 2022.

The report's list of the companies sued most often over the past three years was led by the biggest names in technology: Samsung, Google, Apple, Microsoft and Amazon.

--Editing by Jill Coffey and Lakshna Mehta.

Note: Law360 is owned by LexisNexis Legal & Professional, a RELX company, which owns Lex Machina.
