

Patent Litigation Trends To Watch In 2022

By Ryan Davis

Law360 (January 3, 2022, 12:03 PM EST) -- Patent attorneys are optimistic that some digital litigation shortcuts put in place due to the pandemic will remain in place going forward to cut down on travel, while the prominence of litigation funding and emerging technologies appear to be spurring new and different types of patent cases and court strategies. Here are the patent litigation trends to watch this year.

Continued Remote Procedures

As the coronavirus pandemic approaches its third year, many courts have begun scheduling trials and clearing backlogs of cases, but patent attorneys expect some remote procedures put in place for safety reasons will be retained, possibly streamlining patent litigation.

Pre-pandemic, many judges required even minor conferences and hearings that fill patent cases to be held in person, requiring attorneys to fly around the country. Zoom meetings and conference calls implemented as a stopgap have helped judges and litigants realize that perhaps not all of that travel was necessary, said Tamara Fraizer of Squire Patton Boggs LLP.

"Patent litigation attorneys and courts who hear patent cases are now comfortable with doing things remotely," she said. "We've all adopted the new technology and learned to do patent litigation in this new world. I think it actually makes the process of patent litigation easier in some ways and perhaps less expensive, and that may actually lead to more patent litigation."

Fraizer recalled a monthly pre-pandemic flight from California to Chicago for status hearings that lasted one minute. She said she expects many judges to now be fine with doing things like that, as well as hearings on claim construction and preliminary injunctions, through videoconferences or even a phone call.

Sheila Swaroop of Knobbe Martens said that in addition to virtual hearings for some matters, completely remote depositions became common during the pandemic and may end up being the norm in many instances going forward.

"It seems like for the litigation tasks that had to be remote before, we may see a hybrid where some of them continue to be remote," she said.

Some judges have even held jury trials over Zoom over the past two years and Fraizer said that while

that is unlikely to continue given the importance courts and attorneys place on connecting with jurors, a new era may have arrived where fewer aspects of patent cases require in-person attendance.

"Is patent litigation ever going to be cheap and easy? No," she said. "But certainly making it a little bit more manageable is probably a good thing for everyone involved."

Litigation Funding Reshaping Patent Cases

For some time now, patent owners have been looking to litigation funding businesses, which finance court costs in exchange for a portion of any recovery, to help them afford bringing litigation, but the financial pressures brought on by the pandemic might make the practice more widespread.

"Smaller plaintiffs in the beginning had been seeking litigation funders to help with their cases, especially given the high cost of litigation," said Allison Altersohn of King & Spalding LLP. "But we've been seeing now that it's not just the small companies and it's actually moving to the larger companies as well."

The pandemic has made executives look more closely at their bottom line and even companies that could afford litigation "probably like more of the security of having some of the costs being handled, if they're willing to share in the potential upside of the awards," she said.

Having big money behind a patent case can reshape strategies, since patent owners may be less willing to settle early when they have the resources to fight in court. Ten-figure patent verdicts in recent years may have opened the eyes of patent owners to how lucrative a patent suit can be and led them to explore funding options.

"With the size of a number of the jury verdicts recently, I think people are taking more chances," Altersohn said.

Joseph Kuo of Saul Ewing Arnstein & Lehr LLP said he's gotten a lot more inquiries about litigation funding, which is especially advantageous for smaller companies or individual inventors that otherwise wouldn't be able to sue major corporations.

"I don't necessarily think it's a bad thing," he said. "The reality is litigation is super expensive, especially if you're going against a larger corporation. It's just not feasible for a smaller company or individual to bring suit against a company like that. So it does give an avenue that might not otherwise be there."

Kuo noted that funding can change the dynamics of litigation by potentially blunting the effectiveness of strategies large companies use to drive up the cost of litigation for patent plaintiffs, like filing an inter partes review or engaging in extensive motion practice.

As litigation funders become more active in looking for patent litigation to invest in, it could lead to an increase in patent enforcement, said Sailesh Patel of Schiff Hardin LLP.

"That could have a big impact," he said. "There's a lot of money that people have invested, hoping that patent litigation will have payoffs."

New Types Of Patent Litigation

Driven in part by litigation funding, in part by companies becoming more creative due to pandemic financial pressures and in part by lucrative emerging technologies, attorneys said there could be more variety in patent cases in the coming year.

While much of patent litigation involves either generic drugs or tech disputes brought by licensing companies against major players, there may be more suits by companies against their competitors, or disputes over emerging fields where patent infringement allegations haven't been much of a factor to date.

"I think generally we're seeing a diversification of patent lawsuits," Fraizer said. She noted that it started with the pandemic, which "may have been because folks saw an opportunity to monetize their patents in a hard time" and appears to have continued, with companies that haven't traditionally brought patent suits looking to do so.

"It seemed there was a desire and newly-recognized ability by many patent owners that patents could be enforced and perhaps monetized to their advantage," she said, adding that the continued trend "certainly suggests whatever realization made at the beginning of the pandemic changed how some view patent litigation as an option."

Clement Roberts of Orrick Herrington & Sutcliffe LLP said that whatever the reason, it's been intriguing to see more cases where one big-name operating company is suing another for patent infringement, something that had been unusual to see in recent years and will be worth watching.

"One thing that I think is really notable is that we're seeing more big, substantive competitor cases," he said, pointing to, for example, Broadcom Corp.'s ongoing patent litigation against Netflix Inc., and IBM's infringement suits against a number of major companies like and Priceline and pet retailer Chewy.com.

Patel noted that new types of technology often spur an attendant rise in patent litigation, pointing to the recent spate of patent suits over e-cigarette technology as an area to watch, as well as the possibility of more litigation over cannabis as legal sales take root.

While it's at the very early stages, Roberts said he'll also be watching for the emergence of patent litigation in the lucrative market for cryptocurrencies. The companies that operate various cryptocurrencies have begun issuing patents for certain aspects of the blockchains that operate them.

Before long, there will be cases where one crypto company is suing another "over their infringement of the technology and asking for disgorgement of their tokens," he said. "That's going to be a big, big deal next year and the year after because the seeds are being planted right now."

At the same time, Altersohn said that "while it's probably inevitable that this area will be subject to litigation at some point in time, I think it's on a longer horizon" since many cryptocurrency operators have alliances where they agree to share technology and not sue each other.

More To Watch

Essential patents in the spotlight: In January 2021, Eastern District of Texas Judge Rodney Gilstrap barred Samsung from enforcing an injunction it won in a Chinese court against Ericsson in a dispute over standard-essential patents that later settled. Since related suits are often filed in many countries over this critical type of intellectual property, and foreign courts have spoken out in favor of

their ability to handle them, "it's just a matter of time before U.S. courts re-assert their own voice about the appropriateness of SEP issues being resolved here," said Richard S.J. Hung of Morrison & Foerster LLP. The U.S. government's call for comments on the issue will ensure it remains a focus of patent law in 2022.

Dawn of COVID patent disputes: In December, the Federal Circuit upheld a patent that Arbutus Biopharma had suggested was infringed by Moderna's COVID vaccine. While no suit has been filed yet, attorneys say it appears inevitable that infringement disputes between those two companies and other vaccine makers are waiting in the wings over the expensive new product distributed to vast swaths of the population.

Venue stays hot: The venue tug of war between the Western District of Texas and the Federal Circuit is a story all of its own, but other novel venue issues will get attention in the coming months. The Eastern District of Texas ruled in October that Netflix having servers in the state mean it can be sued there, a seemingly expansive view that could impact other companies. And the pharmaceutical industry will be contending with Federal Circuit decisions limiting where generic drug suits can be filed, potentially prompting new strategies or more multidistrict litigation.

--Editing by Lakshna Mehta.