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Patent Troll Activity Likely to Continue to Rise

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For nearly half a decade, patent troll suits have been on the decline. Indeed, as we reported last year, the Supreme Court has gone out of its way to curb the worst patent troll abuses in order to protect innovators and call the viability of many patent troll litigations into question. This started in 2014, with the seminal *Alice v. CLS Bank* (*Alice*) decision that questioned the patent eligibility of certain software and business methods. Then in 2018, the Supreme Court took aim at forum shopping by patent plaintiffs in *TC Heartland v. Kraft Foods* (*TC Heartland*). These two cases led to an overall decline in patent troll lawsuits over a period of years.

However, developments from the Federal Circuit in 2019 introduced some uncertainty into the patent landscape, providing an opportunity for patent trolls to bring and maintain their litigations. For example, In *Cellspin Soft v. Garmin USA* (*Cellspin*), Garmin won its motion to dismiss the case on the ground that Cellspin Soft's patent for uploading data from a device, such as a GPS tracker, was too abstract as a pure matter of law and, therefore, should be invalidated. However, the Federal Circuit court disagreed, holding that the patent eligibility analysis under *Alice* presented questions of fact.

The case followed similar decisions from the court in *Berkheimer v. HP* and *Aatrix Software v. Green Shades* (*Berkheimer*), refusing to invalidate patents covering abstract ideas or intangible embodiments and showing a growing trend toward disallowing patent eligibility claims to be decided at the motion to dismiss or summary judgment stage.

Despite hopes that the Supreme Court would provide additional guidance on *Alice* or *TC Heartland*, the Court has refused to take on cases addressing these issues. In January 2020, the Court denied the petitions for certiorari in *Cellspin* and *Berkheimer*, as well as several other patent eligibility cases, signaling that the Court is disinterested in providing additional clarity on these issues, or is hoping that Congress will address the issue through the legislative process. Draft bills introduced in Congress last year to codify and reform patent eligibility were also unsuccessful.

In this environment of uncertainty, patent trolls have gained momentum in 2020, and the COVID-19 pandemic and resulting economic upheaval has done little to deter patent suits. In fact, non-practicing entities have exploited the boom in Covid-related innovation. In the first few months of the pandemic, patent trolls targeted technology and healthcare companies responding to the crisis, with the makers of tests and ventilators among those facing patent suits. Although public backlash led some patent plaintiffs to voluntarily drop their claims and offer royalty-free licenses for COVID-19-related uses, the specter of patent litigation presents an ongoing concern for companies involved in pandemic response efforts, and innovators across all sectors.

Key Takeaways

- The ability to quickly dismiss a patent troll lawsuit under *Alice* and *TC Heartland* has been curtailed, which may lead to increased costs in defending claims.

- COVID-19 has not slowed the tide of patent troll suits, which have continued to be filed at a steady pace.
- Companies should establish a comprehensive strategy to manage patent risk, including filing for and enforcing patents, identifying and clearing patent risks, instituting contractual strategies for risk-shifting, and defending allegations of patent infringement.

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