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Patent Troll Cases Unlikely To Drop Significantly

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The statistics are striking. “Patent trolls” (companies that do not create products or services based on their patents, but instead use patents to extort license fees) are continuing to file large numbers of patent infringement lawsuits, now against advertising agencies, restaurants, retailers, financial institutions, and other businesses not typically subject to patent risk. Indeed, more than 4,500 patent infringement actions were filed in 2016, the fifth straight year with at least that many new patent infringement suits.

Of particular concern is that patent trolls have begun collecting “software” or “business method” patents covering basic digital technologies such as scanning documents or using online shopping carts on websites. In the past, however, despite the broad applicability of these patents, the Supreme Court’s 2014 decision in *Alice v. CLS Bank* provided defendants some cover, labeling many of these technologies unpatentable “abstract ideas” and questioning their validity.

Two recent court decisions, however, indicated that the pendulum may have begun to swing back in favor of patent holders. In one, the U.S. Court of Appeals for the Federal Circuit noted that software and business methods were patentable when they improved how computers operated. In another, it noted that these patents were valid where they did “significantly more” than perform an abstract idea on a computer. These cases provide hope to patent trolls seeking to defend against Alice challenges.

In addition, patent trolls also are finding it easier to recover damages. For example, in *Halo v. Pulse*, the Supreme Court relaxed the standard for proving willful infringement, noting that a patent owner’s reasonable defenses may not be enough to prevent tripled damages. Moreover, the Supreme Court has heard arguments in *SCA Hygiene v. First Quality Baby*, and expressed skepticism as to whether a long delay in filing suit could limit recovery. If the court eliminates this defense, it is likely that patent trolls will delay filing for as long as possible to maximize damages.

The news for defendants, however, is not all grim. The Supreme Court will hear *TC Heartland v. Kraft Food*, where it will assess whether patent trolls may continue their current practice of bringing suit wherever allegedly infringing products were sold. Depending on the court’s decision, patent cases may migrate from plaintiff-friendly Texas, where many patent troll suits are currently filed, to marginally more defendant-friendly Delaware.

Key Takeaways

- Patent infringement is a risk for all industries and requires a comprehensive risk management strategy integrated into every aspect of a company’s business that includes filing for and enforcing patents, identifying and clearing patent risks, instituting contractual strategies for risk-shifting and defending allegations of patent infringement.
- Recent court decisions upholding the validity of software and business method patents and easing restrictions on damages have favored patent trolls.

- Defendants may find relief as the Supreme Court considers rules that would limit patent troll forum-shopping.

Related People

Marc J. Rachman
Partner
212 468 4890
mrachman@dglaw.com

Devin A. Kothari
Partner
212 468 4902
dkothari@dglaw.com