

## IT'S STILL A GAME OF WHACK-A-TROLL

Patent reform helps spur a burst in litigation since our last survey.

### PATENT REFORM HASN'T HELPED—

at least not yet, when it comes to curbing litigation.

After more than a decade of discussion and debate over U.S. patent reform, the most dramatic change to the patent system in more than half a

century took effect last year with passage of the Leahy-Smith America Invents Act (AIA). Phase-in of the law began in September 2011, and the aim was to bring about significant change. But in 2011 the legislation did not help reduce the number of patent suit filings. In fact, patent cases kept law firms busier than ever, according to results of the 2012 edition of our Patent Litigation Survey.

The study, which ranks law firms according to how many federal district court patent suits they handled in 2011, shows a steep rise across the board in the number of new cases they took on. Fish and Richardson, for example, which ranked number one for the fourth consecutive year, handled 173 cases in 2011, compared to 128 in 2010—an increase of 35 percent. Jones Day, which took second place in this year's rankings, saw its caseload jump from 66 to 125—up 89 percent. The other firms at the top of our list, such as Kilpatrick Townsend & Stockton; Niro, Haller & Niro; Kirkland & Ellis; and DLA Piper, also saw a sharp rise in their caseloads.

The increase is perhaps not surprising, given that the number of patent infringement actions filed in 2011 reached 4,015—the highest number ever recorded, and a 22 percent jump from the previous year, according to a study by PricewaterhouseCoopers LLP. Smartphone wars, including battles between Apple Inc. and Samsung Electronics Co., and other technology-based patent suits were widespread, as were lawsuits related to infringement of pharmaceutical and other life sciences patents. Nonpracticing entities, commonly called “patent trolls,” also continued their efforts to extract value from their patent portfolios by suing companies for infringement, thereby contributing to the dramatic rise in patent litigation for the year.

Ironically, the sharp increase in cases per firm is due in part to the reforms that took effect under the America Invents Act. The new law changed the joinder rule for patent cases and now restricts plaintiffs from naming numerous unconnected defendants in a single suit. Previously, defendants that weren't factually connected to each other could be named in a single suit, and NPEs, especially, benefited from filing one suit against multiple defendants.

In fact, on September 15, 2011—the day before the new law took effect—nonpracticing entities filed a record number of patent infringement lawsuits. According to Dennis Crouch, who writes a popular blog about patent law, at least 54 new patent cases were filed on that day, accusing more than 800 corporate entities of patent infringement. “More patent suits were filed on that day than any other in history,” says Ann Cathcart Chaplin, head of the litigation practice at Fish & Richardson. Each complaint was filed against multiple defendants.

The rash of filings before the law took effect contributed to the overall increase. But the numbers continued to rise after the law was implemented because NPEs were undaunted by the nonjoinder rule. They were now filing separate suits against each defendant, even if they were all being accused of infringing the same patent.

Many of the firms in our rankings defended clients against those nonpracticing entities. This is to be expected, given that NPEs accounted for 40 percent of all patent lawsuits filed in 2011, according to a recent study published by the University of California Hastings College of Law. Those NPEs, defined as “entities whose primary focus is deriving income from licensing and litigation as opposed to making products,” accounted for only 22 percent of patent suits filed in 2007, according to the study, which was part of a Government Accounting Office research project using Stanford Law School's Lex Machina database.

One particularly active NPE in 2011 was Stamford, Connecticut-based Walker Digital LLC, which has more than 400 patents in its intellectual property portfolio. On April 11, 2011, it filed 15 patent infringement suits against more than 100 companies, including Apple Inc., Google Inc., Microsoft Corp., and Amazon.com Inc. The patents that were allegedly infringed covered a range of areas, from gaming to telephony to image capture. Many of the firms near the top of our rankings, including Fish & Richardson; Finnegan, Henderson, Farabow, Garrett & Dunner; and Kilpatrick Townsend, defended clients against Walker Digital in 2011. Fish alone handled 11 of those suits, Chaplin says.

The growth in NPE activity explains the high placing of plaintiff firm Niro, Haller & Niro in our survey. It was number four overall in the number of cases it handled in 2011 and number one in the number of cases in which it represented the plaintiff. Chicago-based Niro, a firm known for its representation of nonpracticing entities, helped

inspire the term patent troll. In 2011 Niro handled a total of 105 cases and represented plaintiffs in 100 of them.

A dozen of those cases were filed on behalf of just one client: Delaware-based Innovatio IP Ventures LLP, which sued businesses that offer wireless Internet to customers, including major national and international hotel chains, restaurant chains, and coffee shops. In 2011 Niro also filed nine separate suits on behalf of the NPE Cascades Computer Innovation LLC, a company run by Anthony Brown. Niro and Brown, who used to head up the NPE TechSearch, are both considered the original patent trolls.

NPEs weren't the only patent asserters in 2011, however. Industry competitors also filed patent suits to protect their intellectual property and presumably their market share. Another firm that benefited from these battles was Kilpatrick Townsend & Stockton, which was formed in 2011 through the merger of Kilpatrick Stockton and the intellectual property firm Townsend and Townsend and Crew. Kilpatrick not only made it into the top tier of our list for the first time but also ranked second in the number of clients it defended in 2011 patent suits. Many of its clients are big players in the technology sector.

Who sued? Technology-based lawsuits related to semiconductors, smartphone wars, and the Internet kept most of our top-ranking firms busy in 2011. Pharmaceutical and life sciences litigation was also active, says Anthony Insogna of Jones Day, who in 2011 represented Celgene Corp. in several Hatch-Waxman patent infringement cases. Fish's Chaplin, whose firm represented Allergan Inc. in two big cases in 2011, agrees. "We've seen our pharma practice increase quite a bit," she says.

IP lawyers are benefiting from all the patent litigation activity, but in-house counsel are reeling at the size of awards. While the median award in a patent case plummeted in 2010 to \$1.9 million, it once again skyrocketed in 2011, to \$8.8 million, according to the PricewaterhouseCoopers study. The last time it was higher was in 2005, when it hit the equivalent of \$10.2 million, adjusted for inflation.

NPEs are responsible for much of that increase. The PricewaterhouseCoopers study notes that awards to NPEs in the last decade have been almost double the size of damages awards to practicing entities. The major changes contained in the patent reform law ultimately did not address the calculation of damages in patent infringement cases, although the topic had been discussed in earlier drafts of the legislation. So damage awards may continue to remain high.

There is some good news for companies defending themselves against charges of patent infringement, however. Lawyers believe that the days of runaway damages are starting to become a thing of the past. They say the Federal Circuit is starting to clamp down, throwing out outsize verdicts. "District courts will eventually get the message," says Jones Day partner and IP attorney Brian Poissant.

Even so, it doesn't appear as if patent litigation will decline in the near future. "The number of patent trolls are increasing," Poissant says. "The old standbys are still there, but a lot more have gotten into the business."

So, with NPEs remaining active and the nonjoinder rule firmly in place, it's likely that patent suit filings will continue to rise. If history is any guide, the sluggish economy may also keep patent lawyers busy. "Companies tend to look harder for value in their patent portfolios when the economy is down," Chaplin says, noting that they often

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assert their patents against competitors to generate income and protect their market share.

In addition, the smartphone wars and other high-stakes battles will continue, lawyers say. The \$1.05 billion jury award that Apple won in California in its patent suit against Samsung in August may even encourage more litigation, they say.

And what about all those patent reforms, including the ones implemented recently that were designed to help cut down on the number of questionable patents issued? "Reexaminations and reviews at the PTO will take place at the same time as district court litigation," Chaplin says. "But patent suits aren't going away." □w

### For the Defense

Rank 2012	Rank 2011	Firm Name	Defense Cases
1	1	Fish & Richardson	131
2	14	Kilpatrick Townsend*	98
3	2	Jones Day	94
4	9	DLA Piper	80
5	8	Kirkland	77
6	5	Perkins Coie	74
6	4	Winston & Strawn	74
8	10	Alston	68
9	10	Greenberg Traurig	66
10	16	Foley & Lardner	65
11	10	Cooley	61
12	6	Baker Botts	58
13	18	K&L Gates	57
14		Morgan Lewis	56
15	3	Finnegan Henderson	54
16	13	Morrison & Foerster	51
17	22	Wilson Sonsini	49
18		Gibson Dunn	47
19	20	Fulbright	46
20		Wilmer	45
21	27	Reed Smith	44

**The Busiest Firms Overall**

Rank 2012	Rank 2011	Firm Name	Total District Court Cases
1	1	Fish & Richardson	173
2	3	Jones Day	125
3	21	Kilpatrick Townsend*	111
4	31	Niro, Haller & Niro	105
5	6	Kirkland	96
6	9	DLA Piper	91
7	7	Perkins Coie	90
8	2	Finnegan Henderson	88
9	5	Winston & Strawn	87
10	8	Greenberg Traurig	81
10	12	Foley & Lardner	81
12	9	Cooley	78
13	13	Alston	77
14	14	K&L Gates	74
15	9	Baker Botts	64
15	18	Knobbe	64
17	16	Morrison & Foerster	63
17	29	Wilmer	63
19	31	Connolly Bove	62
19	36	Robins Kaplan	62
19		Morgan Lewis	62
22	37	McCarter & English	61

**HOW WE DO IT**

Earlier this year, *Corporate Counsel* contacted more than 300 law firms and asked them to provide us with a list of patent lawsuits they either filed on behalf of plaintiffs in federal district court in 2011 or were hired to defend against. To be considered for this survey, the cases in question had to be active as of the end of 2011. We did not count cases before the International Trade Commission or appellate courts. Some firms listed multiple district court cases with the same plaintiff. We did not rank firms that served as local counsel in the bulk of cases submitted. As such, some firms this year were excluded from our rankings. For example, Delaware-based Potter Anderson & Corroon would have ranked third overall, with 115 cases.