

## Patent Litigation Trends To Watch In 2018

By **Matthew Bultman**

*Law360, New York (January 1, 2018, 3:04 PM EST)* -- The U.S. Supreme Court's decision to put limits on where patent lawsuits can be filed will create more fights over venue in 2018, while patent owners may increasingly turn to places outside of district court to enforce their rights. Here are a few of the trends in patent litigation that attorneys will be tracking in the new year.

### Fallout From TC Heartland

In a blockbuster May decision, the Supreme Court shook up the patent world by putting restrictions on where patent lawsuits can be filed.

The justices held in *TC Heartland LLC v. Kraft Food Brands Group LLC* that patent lawsuits must be filed where the defendant is incorporated or where it has committed acts of infringement and has a regular and established place of business.

Previously, lawsuits could be filed effectively anywhere a defendant made sales.

The decision has already affected the patent litigation map, shifting some lawsuits away from the Eastern District of Texas, which has a reputation as being plaintiff-friendly, and pushing more cases into courts in Delaware and California.

It has also forced lower courts to grapple with various issues, including what constitutes a "regular and established" place of business for venue purposes. According to J.C. Rozendaal of Sterne Kessler Goldstein & Fox PLLC, some of this will continue in 2018.

"People are still working through all the implications of *TC Heartland*, and there are going to be continued venue fights as people sort out the contours of that doctrine," he said.

Shortly after the *TC Heartland* ruling, there was speculation that more patent owners would seek out multidistrict litigation, a special procedure not often seen in patent cases that allows similar lawsuits to be transferred to a single court before trial.

While there hasn't been a large spike in the use of MDLs to address patent cases yet, attorneys say they expect to see an increase in 2018. This may be especially true in the context of Hatch-Waxman litigation, as branded-drug companies will often sue multiple generics makers at once.

“I think going forward into 2018 and into 2019, we’re going to start seeing more multidistrict litigation procedures,” said Dominick Conde of Fitzpatrick Cella Harper & Scinto.

There is another issue brewing in the context of litigation involving abbreviated new drug applications under the Hatch-Waxman Act, and this could lead to more venue fights. It deals with what would be considered an “act of infringement” to make venue proper in a particular forum.

In September, a judge in Delaware said the act of infringement could be a generics company’s intent to sell the disputed drug product in that state. But a judge in Texas took a different approach, limiting the act to “where the ANDA submission itself was prepared and submitted.”

“Until that’s sorted out there’s going to be a lot more fighting over venue in Hatch-Waxman cases,” Rozendaal said.

### **Enforcement Outside District Court**

The U.S. International Trade Commission in 2016 saw the most new patent cases since the peak of the smartphone wars. Several attorneys said they expect companies to continue to turn to the ITC to go after accused infringers.

“The ITC will continue to be a prominent place for these big patent cases,” said Michael McKeon of Fish & Richardson PC. “In fact, next year I think you’ll see an uptick in the case filings.”

The ITC offers some significant advantages for patent owners, including a relatively quick timeline for resolving disputes. It can also be easier to get injunctive relief as compared with district court. In addition, the commission has been reluctant to pause an investigation when there is a parallel case at the PTAB.

Some have called the commission the “antidote to the PTAB.”

“I think that’s pretty accurate,” said Ropes & Gray LLP’s Matthew Rizzolo. “The cases proceed on similar timelines and the ITC has shown that they’re not going to defer to what the PTAB says.”

Attorneys also cited economic factors and rising legal budgets as a reason for believing there would be increased patent filings at the ITC in 2018.

But it’s not just the commission that patent owners may be turning to more often. Rozendaal said companies have begun taking a more global view of their patent enforcement efforts and are more willing to go after infringers in courts in places like Europe and Asia.

China, for example, has become more attractive for foreign patent owners as authorities in recent years have beefed up the country’s patent laws and created specialized IP courts. At the same time, Rozendaal said, enforcing patents in U.S. courts has becoming more costly and uncertain.

“The balance of costs and benefits has shifted over time to make a coordinated strategy more interesting to [clients],” he said.

### **Changes and Guidance at the PTAB**

Since the PTAB was established a little more than five years ago, review proceedings at the board have become a dominant part of patent litigation, with thousands of petitions filed to challenge patents. But the board has received its share of criticism.

Patent owners, for example, have expressed concerns about serial petitions challenging the same patent. Others have asked for more consistency on various issues, such as how a case will proceed after being remanded from the Federal Circuit.

In recent months, the PTAB has made an effort to address these and other concerns, through the use of new guidelines and by issuing an increased number of precedential decisions and decisions from expanded panels of judges. Expect those sorts of efforts to continue.

“I think you’ll see a continued effort from the board to sort of rehabilitate its public image by issuing more guidelines and informative decisions in 2018,” said Scott McKeown of Ropes & Gray, who noted the board was also working on issuing updated trial practice guidelines.

Attorneys will also be watching to see how the PTAB reacts to some recent Federal Circuit rulings, including one that discarded rules that put the burden on patent owners in America Invents Act reviews to show that proposed claims are patentable.

Historically, patent owners have had extremely low success rates when seeking to amend patent claims. But some believe that removing the burden from patent owners could improve their chances.

“Seeing how that develops and seeing how many times a patentee attempts to amend claims and how many times the PTAB allows that to happen will be important,” said Benjamin Horton of Marshall Gerstein & Borun LLP.

Michelle Lee’s resignation in June as director of the U.S. Patent and Trademark Office — and the subsequent nomination of Irell & Manella LLP’s Andrei Iancu to fill the void — could also shake up things at the PTAB, attorneys said.

Iancu, who litigated a number of high-profile patent cases over the course of his career, is expected to be confirmed by the Senate in early 2018.

“Michelle Lee was more focused on patent examination quality so it may be that the next director will look at the other side of it, especially given his litigation training,” McKeown said.

What those potential changes might look like remains to be seen. Responding to a question about criticism of AIA reviews from patent owners, Iancu said he would work to “drill down and identify what the reality is and how can we improve” the review process.

McKeon of Fish & Richardson predicted the pendulum might swing toward patent owners.

“I think you might see things that are more significant,” he said. “It could be as sweeping as changing the standard under which review the claims, or just [changing] the procedural inner workings at the PTAB to favor patent owners. We’ll see.”

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