Update on Patent Reform Legislation

Christian E. Mammen

U.S. – China IP Summit
Patent Litigation Trends
Numbers of Cases Filed

Source: LexMachina
Where Cases are Filed

Patent Suit Filings 2008-2015, by Court

Source: LexMachina
Patent Reform Legislation
(and Rule Changes Concerning Pleading Standards)
Pleading Standards

• Form 18 has provided bare-bones pleading standard since the 1940’s (FRCP 84 endorses the Appendix of Forms)
• *Twombly* and *Iqbal* have generally increased level of factual detail required – sufficient facts to show that claim is “plausible”
• But Form 18 trumps *Twombly*
• Form 18 has been held to apply only to direct infringement, not to induced or contributory infringement
• Judicial Council has slated FRCP 84 and entire Appendix of Forms to be abolished, effective December 1, 2015
Pending Patent Reform Legislation

Topics Covered by Patent Reform Bills

• **Litigation reform** → make it harder for NPEs to exploit litigation costs to extract settlements on poor-quality claims

• **Demand letters** → establish and enforce standards regulating the content of pre-suit demand letters

• **PTAB proceedings** → harmonize proceedings with district court litigation and reduce odds that PTAB proceedings are “death squads” for patents

• **Miscellaneous** → studies, technical amendments and small business outreach
Litigation Reform

• Pleading Standards
  – Eliminate Form 18 (Federal Rules of Civil Procedure)
    • Already slated for elimination on December 1, 2015
  – Detailed Pleading Requirements
    • Asserted patents, claims
    • Accused products
    • Infringement claim charts
      • Authority to sue
      • Beneficial owners
      • Litigation history of patent
      • Whether SEP, whether FRAND obligation

• Customer Suits
  – Stay suits against customers if manufacturer willing to step in and defend

• Venue Reform
Litigation Reform

• Discovery Limits
  – Stay of Discovery
    • Until claim construction
    • While certain pre-answer motions are pending
  – “Core Documentary Evidence”
    • 9 specified categories (invention, prior art, profits, notice, licenses)
    • Judicial Council to define
  – Limits on e-mail
  – Limits on source code
  – Cost-shifting (requester must post bond for costs and attorneys’ fees for non-“core” discovery)

• Case Management Procedures
  – Identify case-dispositive issues for early resolution
Litigation Reform

• Transparency of Ownership
  – Increased reporting requirements to PTO and parties when patents assigned

• Attorneys’ Fees to Prevailing Party
  – Current rule: fees awarded in exceptional cases
  – Proposal:
    • Fees awarded to prevailing party unless non-prevailing party’s position “substantially justified”
    • Fees awarded only if “position” and “conduct” of non-prevailing party was not “objectively reasonable”
  – Mechanisms to collect fee awards from interested parties if non-prevailing plaintiff is an NPE/unable to pay

• Drug patent cases (§ 271(e)) exempt from many changes
  – Pleading standard, customer stay, discovery limits, fee shifting
Regulating Demand Letters

• Inadequate Demand Letters
  – Don’t contain enough detail about the alleged infringement
  – Remedies
    • No enhanced damages for willful infringement
    • Extra time to respond to Complaint

• Bad Faith/Abusive Demand Letters
  – Misleading and intimidating
  – Remedies:
    • Unfair business practice
    • FTC enforcement
  – Federal preemption
Modifying PTAB Proceedings

• Align with District Court Standards
  – Claim construction
    • Use POSITA standard instead of BRI
  – Presumption of validity
  – Petitioners must have Article III standing (i.e., have been sued for, or accused of, infringement)

• Patentee May Amend Claims

• Discovery of Petitioner’s Real Party in Interest

• Judges
  – Judge who instituted review cannot sit on 3-judge merits panel
Miscellaneous

• Eliminate PTO fee diversion
• Additional protections for universities and tech transfer offices
• Support small businesses
• Protection of IP rights in bankruptcy
• Other miscellaneous studies
Questions?
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