Patent Litigation and Marketplace Update

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U.S. Litigation and Policy Trends Point Towards More Patent-Owner Friendly Environment

➤ US district court litigation is trending upwards in 2019
  ▪ Projected 5% increase over 2018

➤ NPE activity is increasing
  ▪ NPEs have filed 56% of patent litigation in 2019, compared to only 48% in 2018

➤ Recent case law (Berkheimer) has made it harder for defendants to win validity challenges based on unpatentable subject matter
  ▪ Since Feb. 2018, patents invalidated under Alice dropped from 67% to 44%

➤ PTAB IPR filings are down by 25% compared to last year

➤ Legislation is pending that would expand patentable subject matter, make patent injunctions more easily available, and restrict PTAB reviews

Note: Data as of August 2019
Sources: RPX Research, PACER, USPTO
District Court Filings

Defendants Added to Campaigns by Year

Notes: Data as of 11/30/2019. Full-year projection is a linear extrapolation of January-November 2019. Excludes DJs.
Source: RPX Research; PACER
District Court Filings

Defendants Added to Campaigns by Quarter

Notes: Data as of 9/30/2019.
Source: RPX Research; PACER
Alice and § 101

Patents Ruled on Under Alice, Invalidation Rate Before and After Berkheimer

Notes: Decisions from 6/19/2014 to 2/8/2018 (pre-Berkheimer) and from 2/9/2018 to 9/20/2019 (post-Berkheimer).
Source: RPX Research; PACER
PTAB Petitions Filed by Year

Notes: Data as of 11/30/2019. Full-year projection is a linear extrapolation of January-November 2019.
Source: RPX Research; USPTO
Congress is Actively Considering Patent Reform

STRONGER Patents Act reintroduced in House and Senate (H.R.3666 and S. 2082)
- Legislation would revamp IPR, making it harder to invalidate patents at the PTAB
  - Clear and convincing burden of proof, restrictions on serial IPRs
- Also effectively overturns eBay v. MercExchange, making injunctions easier to obtain
- Many among industry, law professors, and Republicans (in particular, Senator Tillis) oppose the bill

Draft bill to abrogate Alice/Mayo and expand patent eligibility
- Proposal dramatically expands the scope of patentable subject matter, eliminating judicial exceptions
- However, changes to functional claiming doctrine would open new non-infringement positions later in the case
- Much broader support from law professors and members of Congress from both parties, though tech industry (excluding pharmaceuticals and early tech startups) generally opposed