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Section 101 Is Not Fixing Itself: A Look At Patent System Stats

By **David Kappos** (May 7, 2020, 2:40 PM EDT)

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The many reforms to the U.S. patent system over the past decade-plus have significantly reshaped the patent landscape.

The Patent Trial and Appeal Board of the U.S. Patent and Trademark Office has had a huge impact in preventing and efficiently addressing threats from invalid patents. Even factoring in process changes of the past few years aimed at balancing the interests of patentees and challengers, the PTAB remains the most used venue for patent adjudication.

In fact, while the PTAB continues to manage a caseload that far exceeds what was predicted when the America Invents Act first became law, patent lawsuits have been on the decline since the AIA and lawsuit filings remained modest in 2019.

Decisions from the U.S. Supreme Court and U.S. Court of Appeals for the Federal Circuit affecting fee-shifting, venue and stays granted to peripheral defendants have altered the landscape for patent litigation, also preventing and countering previous abuses.

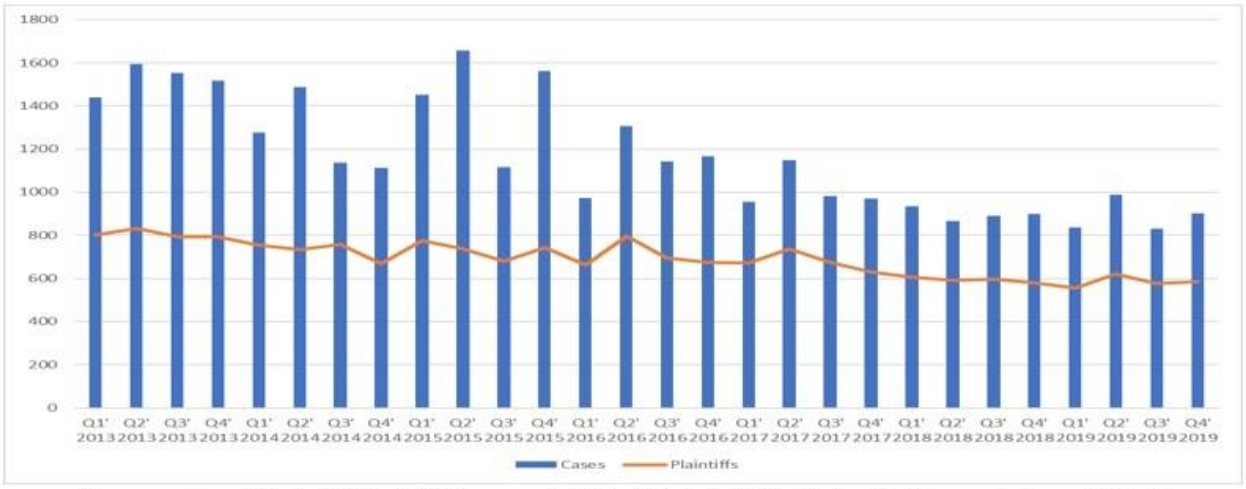
The new abuse that has become apparent in recent years stems from Supreme Court decisions dramatically expanding the reach of Section 101 of the Patent Act and creating massive confusion about what is and is not patent-eligible. Patent invalidity rates under Section 101 abstractness remain alarmingly high. Congress needs to remedy this unworkable situation by returning to legislation that redefines patent eligibility standards to overrule the Supreme Court's decisions that have warped the contours of Section 101 beyond recognition.

This article provides a 2019 year-end review of the state of the U.S. patent system. As of publication, key data for first quarter 2020 was not yet available, and thus could not be presented or analyzed in this report.

Lawsuit Filings Remain Modest

2019 saw the lowest number of patent lawsuits filed since the AIA became effective, with only 3,555 cases and 2,340 unique plaintiffs in the calendar year. Lawsuit filings remain well below peak levels.

Number of Cases & Plaintiffs by Quarter



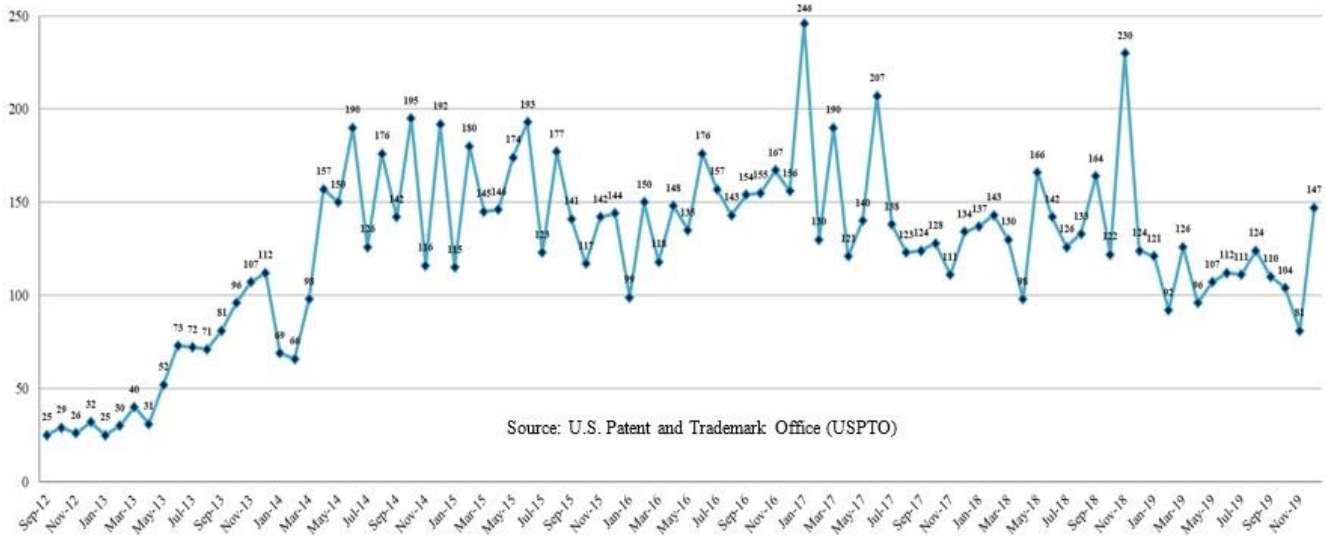
Note: number of plaintiffs for 2017 does not include 156 plaintiffs in *In Re: Qualcomm Antitrust Litigation*

Source: Docket Navigator

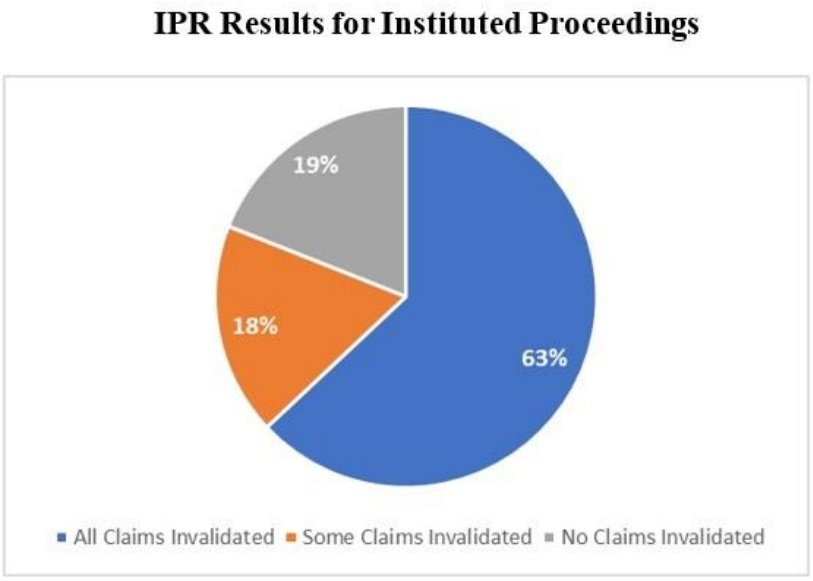
PTO Challenges Stable

By the end of 2019, there had been 10,966 AIA petitions filed (inter partes review, covered business method review and post-grant review); 332 petitions were filed in the final quarter of 2019, (317 IPR, 10 PGR, five CBM) — this was similar to filing numbers from recent quarters, suggesting that AIA petition filings remain stable.

PTO Challenges Filed by Month (since PTAB Formation)



PTO Challenges Remain Potent and Prompt, and Reduce Litigation

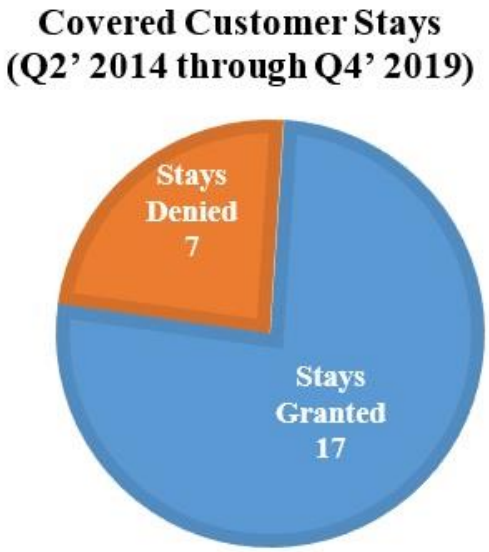


Source: U.S. Patent and Trademark Office (USPTO)

In the fourth quarter of 2019, according to data from the U.S. Patent and Trademark Office, Docket Navigator and Lex Machina:

- 55% of all IPR petitions are instituted (lower than in the third quarter of 2019).
- 63% of instituted IPRs find all claims unpatentable (about the same as third quarter).
- 11.9 month average from institution to final decision (about the same as third quarter).
- District courts grant 75% of motions to stay pending PTAB (higher than third quarter).

Covered Customer Stays Granted

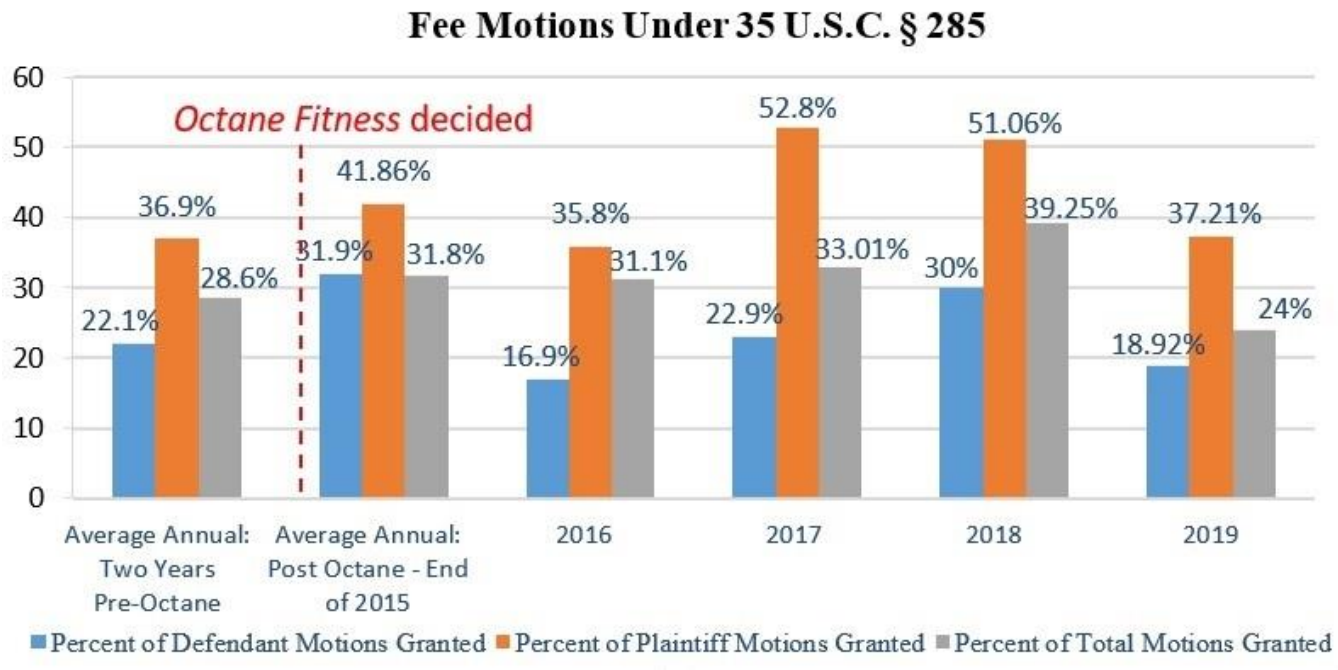


Source: Author Case Analysis

Federal courts have authority to stay litigation against peripheral defendants. In 2014, the Federal Circuit's decision in In re: Nintendo of America Inc. severed claims against a retailer from claims against a manufacturer and stayed retailer claims. Since the second quarter of 2014, in district court cases having facts similar to Nintendo, 17 of 24 motions to stay have been granted.

Litigants Adjust Practices in View of Fee Awards Post Octane

The granting of fee awards had climbed significantly in the years after the Supreme Court's 2014 decision in Octane Fitness LLC v. ICON Health & Fitness Inc. However, data from 2019 indicates that award rates are beginning to level off — again as litigants conform their practices to forgo claims that might otherwise result in fees being awarded against them.

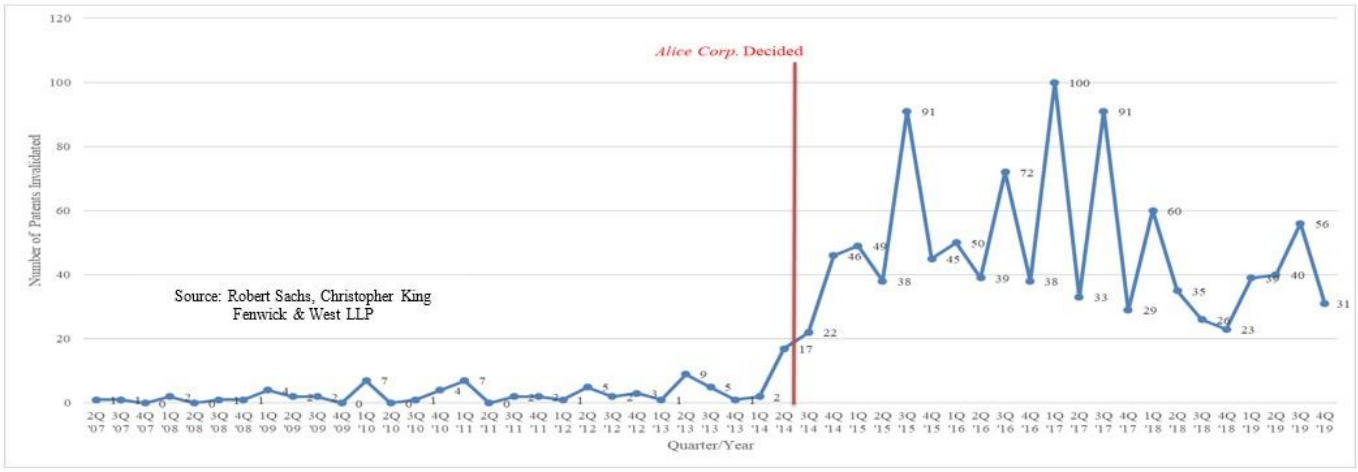


Source: Docket Navigator

Patent Invalidity Rates Based on 101 "Abstractness" Increase Slightly

The Supreme Court's 2014 decision in Alice Corp. v. CLS Bank International caused a nearly four-times increase in patent invalidation based on subject matter eligibility. In view of the Federal Circuit's 2018 decisions in Finjan Inc. v. Blue Coat Systems Inc. and Berkheimer v. HP Inc., there has been some moderation, but the invalidation rate remains high. Confusion and unpredictability stemming from court decisions should prompt urgent congressional focus.

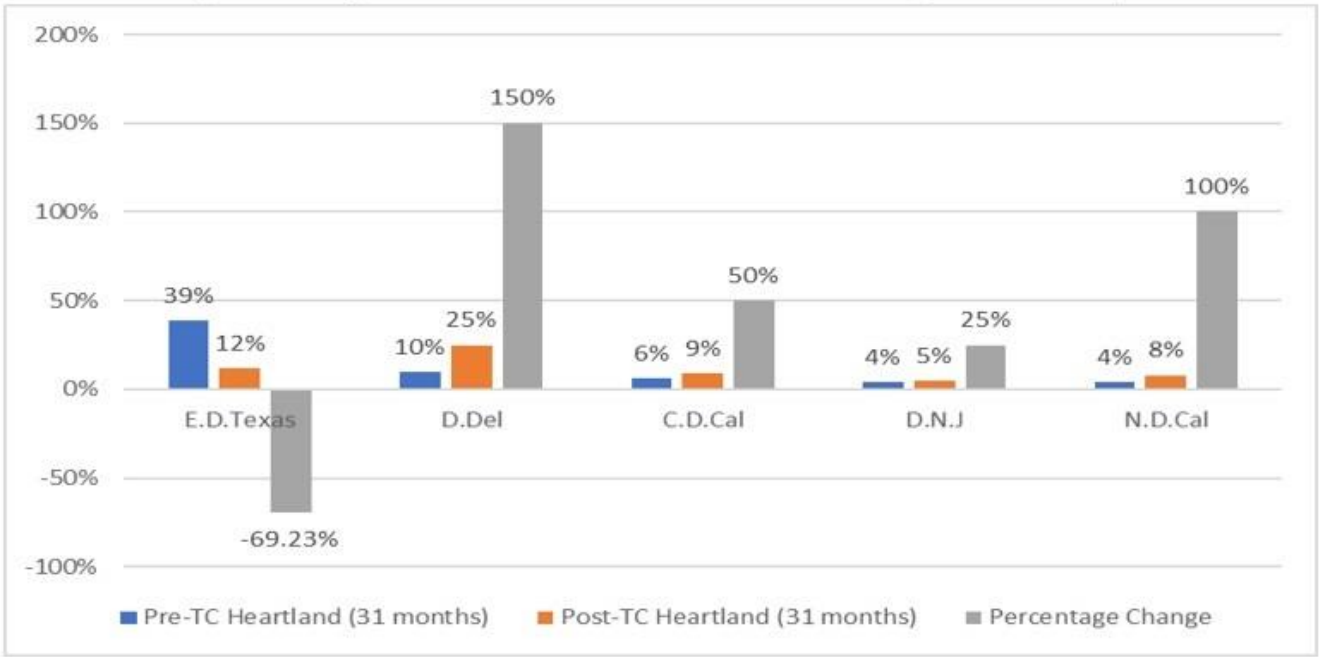
Patents Invalidated for Lack of Patentable Subject Matter



Supreme Court Decision on Venue Has Dramatic Impact

The Supreme Court's 2017 decision in TC Heartland LLC v. Kraft Foods Group Brands LLC set new rules on venue for patent lawsuits. Since TC Heartland, far fewer cases have been filed in the U.S. District Court for the Eastern District of Texas while the U.S. District Court for the District of Delaware has seen the most significant increase in cases filed.

Effect of TC Heartland on Venue
(Percentage of Total Patent Cases Filed Through Q4' 2019)



Source: Lex Machina

Conclusions

- The AIA as well as Supreme Court and Federal Circuit decisions have had a major impact on the U.S. patent system.

- Based on data, safeguards added to the U.S. patent system continue to be very effective, though concerns have become pronounced that the U.S. has overcorrected its patent system primarily through constriction of subject-matter eligibility, potentially threatening the future of American innovation.

- Confusion and unpredictability stemming from court decisions regarding section 101 call for renewed congressional focus on the health of the U.S. patent system.

David J. Kappos is a partner at Cravath Swaine & Moore LLP. From August 2009 to January 2013, he served as undersecretary of commerce and director of the U.S. Patent and Trademark Office.