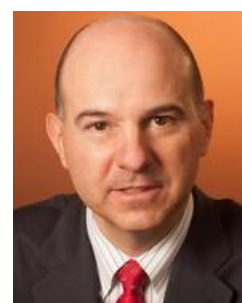


## OPINION: Time For Congress To Leave Patent System Alone

*Law360, New York (March 28, 2016, 10:10 AM ET) --*

The U.S. patent system has undergone a number of dramatic changes in recent years, including passage and implementation of the 2011 America Invents Act, six U.S. Supreme Court cases impacting patent laws, new administrative rules by the U.S. Judicial Conference, and actions by the Federal Trade Commission and state attorneys general. Many of these changes were needed to address abuses in the system, where frivolous patent suits have been used by “bad actors” to essentially extort payments from businesses after unfairly accusing them of infringement. However, the powerful effects from these changes undertaken by multiple branches of government strongly suggest Congress can prudently step back from further reshaping the patent system. It is time to let the system embrace its major recent changes and work out implementation issues before further reform is seriously considered.



David J. Kappos

Perhaps the most significant recent development curtailing the need for further changes in U.S. patent law was the Judicial Conference’s abolition of outmoded patent infringement pleading standards on Dec. 1, 2015. Previous pleading standards for patent cases were significantly lower than those used in other cases, which made it too easy to bring a patent infringement claim with essentially no proof of infringement. While the impending change led to a spike in suits filed before the change took effect (with 259 patent infringement filings on Nov. 30, 2015) and a resulting upswing in overall new patent cases for the last quarter of 2015, the move is expected to improve infringement case quality and reduce volume going forward because of the newly heightened pleading standards.

The fact that filings fell back to normal levels the day after the rule changed and remained low and stable through the remainder of the year supports this point. A further review of infringement case data reveals that the filings made on November 30 were largely driven by a handful of high-volume filers (eight plaintiffs accounted for 54 percent of the filings made) and that the ratio of plaintiffs to cases fell 18 percent from the third quarter to the fourth quarter of 2015, with the average ratio of plaintiffs to cases for 2015 at a post-AIA low. In other words, a small number of plaintiffs are driving the bulk of the patent litigation, and sweeping provisions that would impact all patent holders, as proposed in some legislation under consideration, are not necessary.

In fact, it is now clear that the combination of recent patent law changes has already significantly tilted the scales against legitimate patent holders, making it far more difficult for good-faith innovators to defend their rights. The 2014 U.S. Supreme Court case *Alice Corp. v. CLS Bank Int’l*, which had the effect of labeling many computer software inventions “abstract” and therefore unpatentable, is a notable

example. Sixteen months after Alice Corp., there is an incredible 73 percent invalidation rate in district courts on subject matter eligibility of software inventions, representing a huge jump over the 44 percent invalidation rate in these courts during the 16 months preceding Alice Corp.

At the same time, the overall district court invalidation rate jumped from roughly 15 percent in 2014 to more than 27 percent in 2015. And rulings finding infringement fell from about 23 percent in 2014 to 14 percent in 2015. These figures demonstrate that it is now much easier for defendants to get cases dismissed, and much harder for patentees to win a court judgment of infringement.

One area of patent law that does need further attention is the inter partes review process. The IPR process, enacted as part of the AIA, has had a major impact on the patent system. IPR is a procedure used to challenge a U.S. patent before the patent office, and has proven a potent vehicle for contesting patent validity, providing a speedy alternative to the courts and reducing net litigation.

Although IPR was instituted to help companies fight abusive patent assertions, clever parties have found ways to use the IPR process itself as a tool of abuse, depriving good-faith patent holders of the rights to their innovations. Notably, several hedge funds have been filing IPRs challenging the validity of pharmaceutical patents, betting against the shares of the challenged companies, then publicizing their patent challenges to drive share prices down and make a profit. Even more disconcerting, some extortionists have taken to threatening companies with IPR challenges unless a ransom is paid. IPR abuse is one targeted area Congress could address without harming the broader patent system.

Change can be a good thing, and there is no doubt that the patent system has benefited from change in recent years. But there is a point where change is no longer necessary, and worse, where change can be harmful, as where a period of stability is needed instead. The patent system has reached that point. Congress should forego further sweeping patent legislation and allow the system to absorb and adjust to the changes already made.

—By David J. Kappos, Cravath Swaine & Moore LLP

*David Kappos is a partner at Cravath in New York. From August 2009 to January 2013, he served as undersecretary of commerce and director of the U.S. Patent and Trademark Office.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

---

All Content © 2003-2016, Portfolio Media, Inc.

**CRAVATH, SWAINE & MOORE LLP**