Intellectual Property
'Trolls' adapting to limit on multidefendant cases; Nonpracticing entities have filed more than 400 cases against individual defendants since law took effect.

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The sweeping patent reform law enacted last September cheered critics of so-called "patent trolls," but those opponents have since realized it's too soon for a victory lap.

The Leahy-Smith America Invents Act includes a provision stating that multidefendant patent infringement cases must involve the same product or process and common fact questions. Congress included the provision to rein in suits brought by patent trolls—companies that use patents solely to demand licensing revenue and sue opponents who won't pay—that named multiple unrelated defendants.

In the days between Sept. 8, when the Senate passed the America Invents Act, and Sept. 16, when President Barack Obama signed it into law, the trolls—also known as nonpracticing entities (NPEs) because they're not using the patented technology in a business—flooded the courts with multidefendant lawsuits that were about to be restricted by the law. Then they quickly adapted to the new environment under the law.

Since mid-September, nonpracticing entities have filed more than 400 separate cases against individual defendants and have asked courts if they can add defendants to pre-existing cases.

Such case filings spiked just before the America Invents Act took effect and "fell off a cliff" for a short time afterwards. They have since resumed, with nonpracticing entities filing batches of single-defendant complaints, said Craig Smith, a partner at Cambridge, Mass.-based intellectual property boutique Lando & Anastasi.

"The number of defendants getting sued will potentially go down as NPEs are more strategic in the companies they decide to file suit against," Smith said.

PatentFreedom is an organization based in Newtown, Pa., that conducts research on nonpracticing entity lawsuits, which it views as a threat to companies that manufacture goods. According to its research, during the first seven months of 2011 nonpracticing entity case filings ranged from 37 to 90 per month, and total defendants ranged from 193 to 606.

In August, the month before the new law was enacted, nonpracticing entities filed 66 lawsuits, encompassing 223 total defendants. That compares with 100 lawsuits filed between Sept. 8 through 16, for a total of 982 defendants. In December, NPEs filed 96 cases, with 212 total defendants. [See chart at right.]

Through extensive research, Patent-Freedom has identified more than 560 distinct nonpracticing entities worldwide that are parent entities to more than 1,500 affiliates, said Daniel McCurdy, the founder and chairman. PatentFreedom defines nonpracticing entities as companies that receive most of their revenue from patent licensing or enforcement.

McCurdy doesn't believe the America Invents Act is going to be the silver bullet that significantly reduces the threat of NPE litigation. "It may help, but it's not going to help in any tremendously significant way," he said.

Ray Niro, a senior partner at Chicago's Niro, Haller & Niro who represents nonpracticing entities as long as their revenue stream benefits an inventor, said the America Invents Act has "accomplished nothing.

"It's not going to affect my decisions about who I sue," Niro said. "I now have to bring five cases instead of one."

'INCREASING THE BURDENS'

The extra lawsuits are "increasing the burdens" on everyone, including defendants, plaintiffs and the courts, Niro said.

The change means more work for district court judges now and the possibility that the U.S. Court of Appeals for the Federal Circuit will have to sort out different claim-construction decisions on the same patent later, Niro said.

In the Northern District of Illinois, Niro is contending with a Dec. 5 opinion by Judge John Grady in Pinpoint Inc. v. Groupon Inc. that broke up a multipledefendant case. Grady split Pinpoint Inc.'s claims against L.L. Bean Inc. into a separate case and shipped it to the District of Maine. He also ordered Pinpoint to dismiss two of the remaining three defendants with the option of refiling separate cases.

Niro filed the Pinpoint case on Aug. 16, a month before the America Invents Act was enacted, and the district is known for splitting patent cases, but Grady still cited the law in a footnote. "There's additional expense to everyone involved including each of the defendants," Niro said. "It's sort of like: Be careful what you wish for."

L.L. Bean's lawyer, Peter Brann of Brann & Isaacson in Lewiston, Maine, agreed that Grady was following the district's case law with the ruling, and said similar rulings are "the wave of the future under the AIA."

Overall, the defendants' chances are improved because Grady split up the case, said Clifton McCann, a partner at Washington's Venable, who represents defendants fighting nonpracticing entities in other cases, but isn't involved in the Pinpoint case. McCann said that nonpracticing-entity cases involving the same patent against different defendants that progress at different speeds enable defendants in the slower-moving case to learn from the other cases. "It's a cost disadvantage, but a strategic advantage," McCann said.

Battles are also brewing over whether plaintiffs who beat the enactment date deadline can add more defendants after the fact. In the Eastern District of Texas, Brann is helping clothiers Coldwater Creek Inc., Draper's & Damon's Inc. and J. Crew Inc. fight an Oct. 25 amended complaint that would tack them onto a case filed on Sept. 13, GeoTag Inc. v. Circle K Stores Inc.

GeoTag sued convenience-store operator Circle K for allegedly infringing a patent for a computer network organizer and now wants to add 54 other defendants. Brann plans to file a motion to have his clients dropped. "It's hard to see it for anything other than it is, which is an end-run around the federal law," he said. "I'd like to think it won't succeed."

"The nice thing about statutes is that the words on the face of the statute are what they are," countered Chris Joe, a partner at Buether Joe & Carpenter in Dallas and one of GeoTag's lawyers on the case. "If Congress had intended [that case] amendments like this should not be permitted it would have been in the statute," Joe said.

Joe cited a Sept. 30 order by Judge Leonard Stark of the District of Delaware in SoftView LLC v. Apple Inc., which allowed SoftView to add 18 defendants, including several subsidiaries. On Dec. 7, Stark denied a motion by Apple and AT&T Mobility LLC asking the court to reconsider that ruling. Stark wrote that the defendants' arguments that the new law bars additional defendants in such circumstances is "not persuasive."

SoftView's lawyers at Los Angelesbased Irell & Manella declined to comment. Blank Rome of Philadelphia, which also represents the company, did not respond to a request for comment. Nor did Apple's lawyers at Gi bs on , D un n & Cr ut ch er in Los Angeles and Potter Anderson & Corroon in Wilmington, Del., which also represented AT&T Mobility.

Dell Inc. is still fighting its addition to the SoftView case, which involves two patents related to "display of Internet content on mobile devices." The company's November motion to dismiss or sever because of improper joinder "is fully briefed and is currently pending," said James Morando, a San Francisco partner at Farella Braun + Martel.

Dell argues that the joinder section of the America Invents Act prohibits plaintiffs from adding defendants that don't meet the nexus criteria to existing cases, and Stark hasn't ruled squarely on that issue, Morando said. "While the judge touched on it in the [ruling about the] motion for consideration, he has yet to rule on the issue," Morando said.

SOME SETBACKS

Recent rulings by the International Trade Commission, the Federal Circuit and district courts overseeing multidistrict litigation have dealt setbacks to nonpracticing entities.

Although the America Invents Act does not apply to the International Trade Commission, whose mission is to prevent the importation of goods that infringe a U.S. patent, recent rulings have made it more difficult for nonpracticing entities to bring cases there.

ITC plaintiffs must satisfy a requirement that a "domestic industry" related to the patents exists or is being established. On Oct. 4, 2011, the Federal Circuit, in John Mezzalingua Associates Inc. v. ITC, affirmed an ITC ruling that John Mezzalingua Associates, which does business as PPC Inc., did not satisfy the domestic-industry requirement. PPC claimed that it had made a substantial investment in its licensing of a design patent, but the court held it "had not met its burden to show that its litigation expenses relating to [its patent] were related to licensing."

The Federal Circuit ruling "is a significant hurdle for us," said PPC's general counsel, Gabe Kralik. PPC, based in Syracuse, N.Y., manufactures connectors for broadband and wireless applications, Kralik said. "Our strategy is to protect our markets with utility and design patents," Kralik said. "We don't practice every one of our patents, but it's important to us to enforce them."

Locke Lord represented PPC at the Federal Circuit. The ITC, which represented itself in the appeal, declined to comment.

Nonpracticing entities may also find that district courts will not defer to their choice of venue even when cases are consolidated in multidistrict litigation. Last month, in In re Webvention LLC ('294) Patent Litigation, the U.S. Judicial Panel on Multidistrict Litigation denied a bid by an nonpracticing entity, Webvention LLC, to keep cases it filed in the Eastern District of Texas in that venue. The panel transferred those cases, along with declaratory judgment actions filed in the District of Delaware, to the District of Maryland.

Webvention's lead lawyer, Bo Davis of The Davis Firm in Longview, Texas, did not respond to a request for comment.

Brann, who represented L.L. Bean, Nordstrom Inc. and J. Crew Inc. in that case, said the Dec. 15 Webvention ruling is at the cutting edge of what's to come in nonpracticing entity cases. "You're going to see coordination done in a different way than that a plaintiff picks the defendants and picks the locale and they're stuck together forever," Brann said.

Cases filed by nonpracticing entities since January 2011

Month	Average number of defendants per lawsuit	Number of lawsuits	Total number of defendants
January	5.2	48	250
February	5.2	37	193
March	8.5	71	606
April	5.6	90	505
May	5.2	53	277
June	4.1	63	259
July	3.3	63	209
August	3.4	66	223
Sept. 1-7	10	20	199
Sept. 8-16	9.8	100	982
Sept. 17-30	2.5	38	95
October	1.5	138	205
November	1.2	152	176
December	2.2	96	212
Jan. 1-13, 2012	1.6	35	57

Source: PatentFreedom
Notes: Data include cases in which the nonpracticing entity is the plaintiff. It excludes declaratoryjudgment actions filed by defendants. Data may contain administrative duplicates such as venue transfers and related caxses between parties.

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