Q1 in Review: New Uncertainties Spark Further Change as Reform Momentum Builds

April 30, 2019

In 2018, the patent system began experiencing a series of changes that tended to favor patent plaintiffs, and some of those same trends accelerated in the first quarter of 2019.

Plaintiffs have continued to adjust to the US Supreme Court's *TC Heartland* decision by exploring new venues for filing infringement litigation, while judicial uncertainty over certain aspects of venue law not addressed by that opinion threatens to reestablish nationwide venue for certain defendants. The Federal Circuit's 2018 decisions in *Berkheimer* and *Aatrix* have continued to fuel an ongoing debate over the proper standards for patent eligibility, with the USPTO attempting to clarify perceived uncertainties with new guidance on Section 101. Additionally, the Patent Trial and Appeal Board (PTAB) saw its 10,000th petition in Q1, reaffirming the key role that America Invents Act (AIA) reviews play in litigation defense. The dust has also begun to settle from recent judicial challenges affecting the Board.

Meanwhile, the patent marketplace continued to see activity from entities both new and established. **Fortress Investment Group LLC**, an increasingly prolific filer of new litigation, encountered significant pushback from certain defendants that have questioned the nature of its partnership with Australian NPE **Uniloc Corporation Pty. Limited**. Leadership turnover at certain NPEs has also spurred further changes, including the apparent resurgence of **Acacia Research Corporation** and the arrival of a new monetization firm formed by an alumnus of **IPValuation Partners LLC** (d/b/a IPVal). Patent divestitures continued to be a driver of new litigation in the first quarter, with multiple NPEs acquiring and asserting patents received from **Intellectual Ventures LLC** (IV) as well as from various operating companies.

Furthermore, momentum has been steadily growing in Congress for legislative reform on patent eligibility, pursued by the Senate Judiciary Committee's newly reconstituted Subcommittee on Intellectual Property. However, USPTO Director Andrei Iancu—once a proponent of a legislative fix for Section 101—has begun urging stakeholders and courts alike to take a fresh look at existing caselaw, arguing that there is far less uncertainty than the popular narrative suggests.

Litigation Update: Overall Filings Dip Due to Operating Company Slowdown, but NPE Activity Ticks Upward

Patent Venue: The Rise of the Western District of Texas and Continued Judicial Uncertainty on Venue Law

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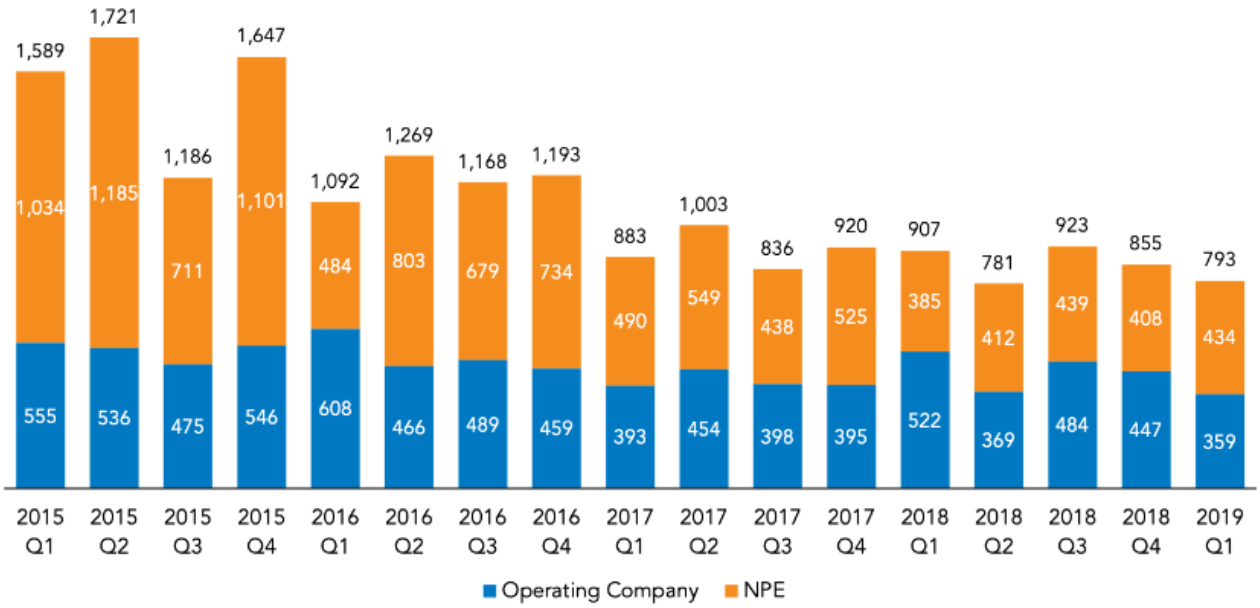
Litigation Update: Overall Filings Dip Due to Operating Company Slowdown, but NPE Activity Ticks Upward

Patent litigation filing levels declined during the first quarter of 2019: 793 defendants were added in Q1 overall, a 12.6% drop from the year-ago quarter and a decrease of 7.3% from the fourth quarter of 2018.

During the first quarter, NPEs added 434 defendants to patent cases, 12.7% more than were added in the first quarter of 2018 and 6.4% more than were added in Q4 2018.

For their part, operating companies added 359 defendants in Q1 2019, down 31.2% compared to the first quarter of the previous year and 19.7% below the fourth quarter of 2018.

Defendants Added to US District Court Litigation Campaigns Quarterly



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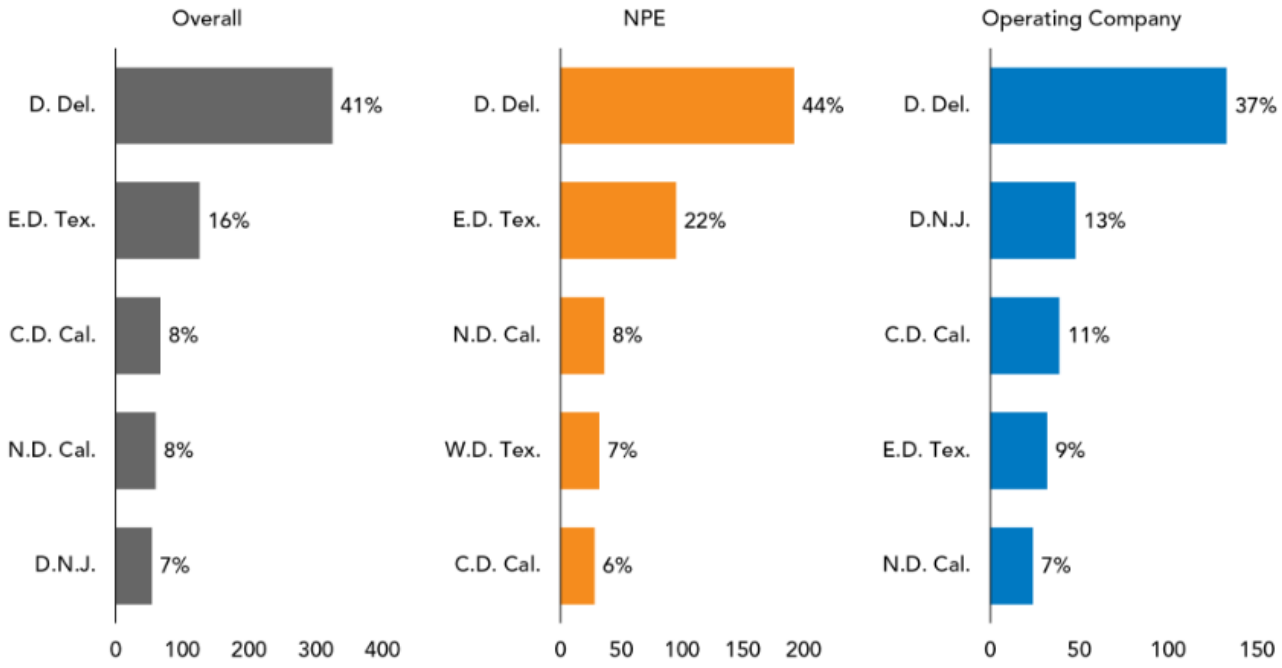
Patent Venue: The Rise of the Western District of Texas and Continued Judicial Uncertainty on Venue Law

The US Supreme Court caused a realignment in patent venue through its decision in *TC Heartland*. By holding that a corporate defendant "resides" for venue purposes only in its state of incorporation, the Court raised the bar for patent plaintiffs to sue certain companies in districts once popular with NPEs. The result has been that the Eastern District of Texas fell well behind Delaware by the number of defendants added to litigation campaigns. As of the end of the first quarter of 2019, nearly two years after *TC Heartland*, that trend has continued: the Eastern District of Texas was the second-most popular district overall, accounting for just 16% of overall litigation by defendants added, with Delaware holding first place at 41%. The Eastern District accounted for a slightly higher share of NPE litigation at 22%, behind Delaware's 44%, but was the fourth-most-popular district for operating company litigation at 9%.

Top Districts



The Western District of Texas: Judge Albright Takes the Reins

Notably, the Western District of Texas now appears in the top five for litigation filed by NPEs, holding the fourth spot with 7% of defendants added (slightly behind the Northern District of California, and just ahead of the Central District of California). The Western District has seen a surge of interest since the September 2018 swearing-in of its new district judge, Alan Albright, a seasoned patent litigator and former magistrate judge. Judge Albright has made no secret of the fact that he wants to make his district the new hotbed for patent litigation, reportedly engaging in outreach to bar associations to encourage the filing of patent cases in his district.

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ahead of the Central District of California). The Western District has seen a surge of interest since the September 2018 swearing-in of its new district judge, Alan Albright, a seasoned patent litigator and former magistrate judge. Judge Albright has made no secret of the fact that he wants to make his district the new hotbed for patent litigation, reportedly engaging in outreach to bar associations to encourage the filing of patent cases in his district.

Additionally, Judge Albright's district has garnered attention through the standing order he issued for patent cases in January, which incorporates some rather unique rules—for example, most discovery cannot take place until after the *Markman* hearing, while parties also have greater freedom to amend their contentions later in a case. In addition, the order makes Judge Albright a gatekeeper for the discovery process, as parties must meet and confer and then contact chambers before filing a motion to compel discovery. Judge Albright has also publicly stated that he will not stay cases pending the outcome of *inter partes* reviews (IPRs) absent special circumstances, as he believes that patent owners deserve jury trials in federal court.

The Western District of Texas's rise may also be aided partly by the second prong of the patent venue statute, which allows patent suits to be filed where a defendant "has committed acts of infringement and has a regular and established place of business". The second prong has increasingly been used to support venue in the wake of *TC Heartland*. Unlike the Eastern District, where fewer businesses have active operations, the Western District includes tech hotspot Austin, where many large companies have a significant presence. As a result, plaintiffs newly eyeing the Western District may be able to establish venue there more easily for many frequent defendants.

Judicial Debates on Venue: The TC Heartland *Workaround?*

Additionally, courts have split as to the proper standard for determining whether a defendant has a "regular and established place of business" in a given district. While the Federal Circuit's 2017 ruling from *In re: Cray* provided some general guidelines—a defendant must have "a physical place in the district"; that place of business must be "regular", meaning "transient activity" is not enough; "established", meaning that the business location must have been stable and established for a "reasonable period of time"; and "of the defendant", meaning a place not solely controlled by an employee—courts have applied *Cray* inconsistently.

Of particular importance is the ongoing debate over how to apply that prong for companies that use servers for e-commerce. Last year, the Federal Circuit declined to overrule a decision by District Judge Rodney Gilstrap of the Eastern District of Texas, in *Seven Networks v. Google*, that Google servers maintained within third-party facilities in the Eastern District constituted a "regular and established place of business". The appeals court **refused to revisit that decision** in early February. Circuit Judge Jimmie Reyna has sharply criticized his colleagues for refusing to take up the issue, warning that venue law would be dramatically overextended if courts were to follow Judge Gilstrap's lead. This approach would effectively reestablish "nationwide venue" for many companies despite *TC Heartland*, he predicted, given the extent to which businesses that engage in e-commerce routinely rely on routers and other computer equipment used analogously to the Google servers at issue in *Seven Networks*.

Supreme Court Preserves Nationwide Venue for Foreign Defendants

While significant uncertainties thus remain for domestic companies, a key issue regarding venue against foreign corporations was resolved in the first quarter of 2019. Last year, in *In re: HTC*, the Federal Circuit decided not to revisit the alien venue rule, a long-standing principle (presently codified in 28 USC Section 1391(c)(3)) under which foreign defendants fall outside all federal venue laws—thus allowing foreign defendants to be sued in any district. On February 25, the Supreme Court declined to take up the issue,

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