

## Articles & White Papers

### 2014 Year in Review and 2015 Trends for Patents

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2014 was widely viewed as a train wreck for patent owners and patent applicants. Almost nothing went well in 2014. Patent litigants were painted as shakedown artists imposing a hidden tax on the technology sector. Courts struck down many conventional damages models such that even successful litigants (e.g., Apple) saw their awards cut significantly. Patent challenges at the USPTO were wildly successful using new low-cost administrative provisions in the America Invents Act (AIA) in the first half of 2014. The software and biotech industry were practically stopped in their tracks from acquiring new patents in certain subfields as a result of initially conservative interpretations of what constitutes statutory subject matter under 35 USC 101 after a string of confusing Supreme Court rulings that are still being sorted out by lower Courts. The net result of this perfect storm is that average patent valuations have been reported to be down by about 55% within the past year. The environment for patent owners and patent applicants was so bad in 2014 that the widespread view in the patent community is that things can only get better in 2015.

In fact, a thaw is already showing. The recently updated USPTO guidance document for examination of patent applications for statutory subject matter under 35 USC 101 is widely considered to be more pro-patent than the initial guidance documents issued earlier in 2014. Patent owners are faring significantly better in inter partes review (IPR) challenges in the last quarter of 2014 and the beginning of 2015. Patent litigants are rapidly adjusting to the new damages expectations with better case selection and new strategies for presenting damages evidence. The Congressional judiciary committees that vote on patent reform measures are showing less interest in post-AIA legislation to crack down on alleged abuses by patent owners. Patent valuations are also notoriously volatile and can rise as fast they can fall.

I have highlighted a few topics below that are of general interest to my clients.

#### **Patentability of software under Alice**

The USPTO and the Courts are very busy sorting out the patentability of business method software, and software in general, in light of the Supreme Court's 2014 decision in *Alice Corp*, which was the subject of a previous e-newsletter ([click here](#)). After rushing out very restrictive guidelines within a week of the *Alice* decision, the USPTO released an updated interim guidance document in December 2014 which more faithfully tracks Supreme Court jurisprudence on this highly controversial topic. The guidance document explains that inventions which do not wholly preempt an abstract idea, or which add a specific limitation other than what is well-understood, routine and conventional in the field, or which add unconventional steps that confine the claim to a particular useful application, should be patent-eligible under 35 USC 101. In theory, this should be good news for truly innovative software-related inventions, including business-related software inventions. However, it remains to be seen how the USPTO and Courts apply these principles to specific inventions.

#### **Patent monetization**

Monetizing patents through non-conventional channels continues to be a major trend. Patent owners are no longer limited to the options of litigation (either conventional or contingent fee) or licensing (which is often successful only when coupled with litigation). Non-traditional choices continue to grow, such as selling patents through patent brokers, selling patents to defensive patent aggregators (e.g., RPX) and listing inventions for licensing on newly formed financial exchanges (e.g.,

Intellectual Property Exchange International (IPXI)). While the proceeds from these non-conventional channels are typically lower than the proceeds of a successful litigation, they provide a quicker and more certain path to monetization. In fact, 2014 was a very busy year for patent portfolio buyers who were able to take advantage of lower per-patent costs. Litigation avenues for poorly capitalized patent owners also continue to expand beyond contingent fee options. Third party funding entities now back many high-profile patent litigations and hire top-tier firms for the litigation paying straight hourly rates to seasoned patent litigators.

### **Patent litigation**

After many years of double-digit increases, patent litigation finally took a breather in 2014 where filed cases dropped by a double-digit amount. Predictions for 2015 are difficult to make, but corporations are budgeting the same amount of funds for 2015 than 2014 so we may not see another year of a double-digit decline in filed cases.

### **Hot areas of patent application activity**

3-D printing technology has been one of the hottest areas for the past few years, but wearable technology (not just GOOGLE glasses) has easily surpassed 3-D printing in both growth rates and total filings.

### **Patent volume**

Despite the negativity of 2014 towards patent holders, there was a significant uptick in the number of total issued patents in 2014, with an 8% increase from 2013. This is the fifth year in a row with increases of this magnitude, resulting in a doubling of issued patents in the past ten years.