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Top Patent Trends for 2016

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The protection of intellectual property rights through the use of patents remains critically important in today's global economy. Court decisions in 2015 affected important elements of patent law and laid the foundation for continuing evolution of the law in 2016.

Here is a roundup of patent trends to watch out for in 2016, and the previous developments upon which those trends are based.

Patentability of Software-Related Claims

2015 was a banner year for defendants looking to quickly dismiss patent infringement cases in District Courts via summary judgment motions based on patent invalidity under 35 USC 101 for reciting non-statutory subject matter. Most of these motions were granted, and all decisions that were ruled on by the Federal Circuit to date were upheld, with the one exception of *DDR Holdings LLC v. Hotels.com LP* which was issued at the very end of 2014. In *DDR*, the Court reasoned that "the claimed solution is necessarily rooted in computer technology in order to overcome a problem specifically arising in the realm of computer networks" and recited an "inventive concept" for resolving an "Internet-centric problem."

Throughout 2015, patent owners have attempted to analogize their inventions to *DDR* in an attempt to defeat District Court summary judgment motions but have been largely unsuccessful. In 2016, the Federal Circuit will be ruling on a significant number of appeals of District Court dismissals based on 101-ineligibility which hopefully will provide further clarity on this issue.

New Rule for "Means-Plus-Function" Claim

A claim that is interpreted as meeting the requirements of 35 USC 112, sixth paragraph, is narrowly construed to cover only the structure disclosed in the specification, and equivalents thereto. Such an interpretation also makes it easier to invalidate the claim for being indefinite. In 2015, the Federal Circuit ruled en banc that the test to determine whether a claim meets this requirement was too strict.

The old rule was that unless the word "means" appears in the claim, the presumption was strong that the claim does not invoke 112(6). The new rule is that 112(6) applies unless the words of the claim are understood by persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure.

The result of this change is that many claims which use functional language but not the word "means" will nonetheless be subject to 112(6), opening them up to more invalidity challenges and potentially narrowing their scope of coverage. Going forward, new claim drafting strategies will need to be employed to more clearly avoid any potential 112(6) claim interpretation by making sure that the specification includes sufficient corresponding structure for all claim elements.

'Divided Infringement' Easier to Capture under 'Direct Infringement'

Direct infringement occurs where all steps of a claimed method are performed by or attributable to a single entity. In the past

few years, some defendants have successfully challenged direct infringement allegations by showing that multiple parties performed separate steps of the method claim, even when the multiple parties were implicitly working together to perform the method.

In 2015, the Federal Circuit ruled en banc that to determine direct infringement, one must consider whether all method steps can be attributed to a single entity. Even if two parties are involved in an infringing activity, direct infringement still can be found if the acts of one are attributable to the other such that a single entity is responsible for the infringement, such as when one entity directs or controls the actions of another, or when two parties form a joint enterprise, or when an alleged infringer conditions participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method and establishes the manner or timing of that performance. This clarification of the law lessens the options available to work around a method patent by dividing up the steps of method among multiple entities.

New Pleading Rules for Direct Infringement Lawsuits

Since Dec. 1, 2015, patent litigants who assert “direct” patent infringement no longer can file a bare-bones complaint by merely stating that infringement exists (so-called “notice pleading”). A complaint must now recite “enough facts to state a claim to relief that is plausible on its face” (so-called “Iqbal/Twombly” standard). This may require plaintiffs to identify specific claims that are alleged to be infringed, identify accused products, and explain how the asserted claims are infringed by the accused products.

This pleading standard already exists for complaints of indirect (i.e., induced or contributory) infringement. Since most complaints assert direct and indirect infringement, patent litigants who don’t already meet this standard on the “direct” side will need to bolster the details in their complaints.

Patent Industry is Alive and Well

The USPTO projects 3 to 5 percent annual increases in patent application filings through fiscal year 2020. Thus, despite a rash of Court rulings in the past few years that collectively have weakened patent holder rights, and despite continued pressure on Congress to pass more laws to even further constrain patent holders (and particularly, non-practicing entities), companies continue to see value in obtaining patents.

Patent litigation continues to show strength as well. There were 5,769 new patent suits filed in federal district courts in 2015, the second-highest tally of all time and a 15 percent increase over 2014.