

## Patent Owners Taking Global View In Enforcement Efforts

By **Matthew Bultman**

*Law360 (July 18, 2018, 9:34 PM EDT)* -- The challenges of U.S. patent litigation, combined with increasing levels of comfort with courts in Europe and Asia, are driving companies in high-stakes disputes to increasingly look beyond the U.S. and adopt global enforcement strategies.

Lawsuits between companies, both foreign and domestic, over patents have historically been focused in U.S. courts. But more patent owners in recent years have begun to view infringement disputes with their competitors as a global affair, filing lawsuits in courts around the world.

"So much of the litigation was done here for years," Wayne Stacy of Baker Botts LLP said. "There are other locations now that are attractive."

Globalization and electronic commerce have had a role in the shift. But attorneys say patent owners are also souring on the U.S. court system as a venue for protecting intellectual property, believing that changes in U.S. law have eroded their footing.

The U.S. Supreme Court's 2006 decision in *eBay v. MercExchange*, for example, made it more difficult to get an injunction. More recent high court decisions have created uncertainty about what is eligible for a patent and put restrictions on where U.S. companies can be sued.

There was also the 2011 America Invents Act, which created new proceedings for challenging the validity of patents, as well as the fact that U.S. litigation is often expensive and time consuming. In recent years, the median time to trial in patent cases has climbed to more than 2½ years, according to a patent litigation study by PricewaterhouseCoopers.

"You put all those things together — I can't get the relief I want, it's going to be slow to get any relief and it's going to be incredibly expensive — it does steer businesses away from using patents to protect their market share," Stacy said.

At the same time, other countries have built intellectual property and litigation systems that can provide faster results at a lower cost.

China is a prime example. Fabio Marino of Polsinelli PC said it wasn't that long ago that bringing a patent case in China would have been laughable. But authorities there have begun to place a greater emphasis on IP enforcement, beefing up the country's patent laws and creating specialized courts.

"China is interesting because everything has changed so fast," Robert Greene Sterne of Sterne Kessler Goldstein & Fox PLLC said. "Five years ago none of this existed."

Some recent rulings from Chinese courts have given patent owners additional encouragement.

In March, for example, a Beijing court upheld an order that Sony Mobile Communication (China) Co. Ltd. stop selling mobile devices that infringe an Iwncomm patent that is essential to China's national standard for wireless local area network.

It was the first injunction based on a standard-essential patent ever granted in the country.

China's highest court also issued a ruling that could open the door for higher damage awards, which historically have been extremely low. In addition, studies have found that foreign companies, which have long harbored concerns they won't be treated fairly in China's courts, actually perform quite well.

"It was an eye-opening moment when people could see that foreign litigants do have a chance in Chinese courts," said Randall Rader, a former chief judge of the Federal Circuit.

Germany can also be an attractive place for patent owners. More than two-thirds of infringement cases filed in Europe take place in the country, Anette Gärtner of Reed Smith LLP wrote in a 2017 client alert.

Patent judges there are viewed as technically savvy, and the court system is also relatively quick; cases are generally decided within eight to 24 months. Injunctions are also granted as of right, meaning courts will issue one if the patent owner wins their case, Gartner wrote.

Germany also has the largest economy in Europe, and the fourth largest in the world.

"Because Germany is such a large economy in the world and in Europe, it's not uncommon for battles over things like smartphones, for example, to have a significant amount of footprint in Germany," Michael Plimack of Covington & Burling LLP said.

Rader, who now runs The Rader Group PLLC, a legal consulting and dispute resolution firm, said he has in certain instances advised clients to file patent actions in places like Düsseldorf or Shenzhen rather than Texas or Delaware.

"The more the U.S. system is out of harmony with international standards, the more your international corporations will prefer to litigate elsewhere — and you've seen a big shift in that direction," said Rader, who is also set to launch an international IP arbitration center in Tokyo later this year.

U.S. federal courts are still an important part of patent disputes. Attorneys noted that American courts allow for more extensive discovery as compared to other countries, which can be valuable in an enforcement strategy. But companies should be looking abroad as well.

"If you're not doing global strategies, you're not doing your client full service," Sterne said.

That said, global strategies aren't always feasible. Smaller companies, for instance, might not have the financial resources to file for patents in various countries. Litigating in multiple countries at once can also take a toll on a business.

"The cost of developing the worldwide patent portfolio, and the ability and business strain to enforce outside the United States, may be so much for the small and midsized companies that they don't want to get involved," Stacy said.

*In the coming weeks, Law360 will publish a series of stories detailing what companies need to know about litigating in some of the world's most prominent patent venues.*

--Editing by Brian Baresch and Kelly Duncan.

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