

Corporate Counsel Litigation Forum: A peer-to-peer conversation on trends in intellectual property

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Panelists

Isabella Fu, Associate General Counsel, Microsoft

Kevin Rhodes, VP and Chief Intellectual Property Counsel, 3M Corporation

Mike Walker, VP, Assistant GC and Chief Intellectual Property Counsel, DuPont

Moderator

Terry Rea, former acting and deputy director of the USPTO, and former acting and deputy under secretary of commerce for intellectual property. Crowell & Moring partner and director with C&M International, Ltd.

KEY TAKEAWAYS

Effectiveness of IPRs and their Impact on the Litigation Landscape

- IPRs represent a sea change in the litigation of patent cases and a shift in validity determinations back to the patent office. They also represent a faster and more cost-effective way to weed out low-quality patents.
- Could prove to be an effective forum for deciding issues of validity and will be interesting to see how the Federal Circuit will handle appeals from the PTAB.
- Further rulemaking and fine-tuning from the PTO is something to watch for as the IPR process matures, especially with regard to the PTAB's standard of review.
- IPR is becoming an increasing presence in yearly litigation budgets and must be considered in initial litigation strategy and planning.

Shifting Business Models of NPEs and PAEs

- Regarding investment in PAEs, the panel noted that investors have seen the values of settlements and licenses go down and may reassess future investment.
- The value proposition of PAEs appears to be changing, in some part due to IPRs and in part due to new case law regarding patent eligible subject matter and indefiniteness.
- *Octane Fitness* and potential changes to FRCP 84 (eliminating Form 18's model for pleading patent infringement) could further weaken PAEs.

New Legislation

- Federal trade secret litigation is on the table in the form of the Hatch-Coons Bill. One recent study indicated that for some companies almost 2/3 of their intellectual property value can be tied to trade secrets, which underscores the need for adequate federal protection.
- Further patent reform is also under consideration in the new Congress and Republican control is likely to yield new legislation. Infringement warning or demand letters is one area that is prominent for reform.

Changing Case Law

- Judicial exceptions to § 101 continue to evolve through Supreme Court jurisprudence. Patent owners are still trying to figure out what the developments mean in practice and the panel is already noting changes in claim drafting to adhere to new case law.

- The shifting § 101 landscape at the present time upholds the patentability of software.
- In the biotech and chemical industries, the developments in § 101 case law have prompted more creative claim drafting and consideration of protecting research and development through trade secrets rather than patents.
 - The panel noted that the PTO's new December 15 guidelines are an improvement over the March § 101-related Myriad guidelines.

Landscape for 2015 and Beyond

- The panel indicated that their patent filings would likely remain the same or decrease slightly as compared to last year.
- There was general consensus among the panel that litigation activity would also slightly decrease as compared to 2014.

If you have any questions regarding the matters discussed in the webinar, please contact Terry Rea or your regular Crowell & Moring contact.

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