

## In The News

# New patent infringement lawsuits in East Texas shatter records

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Patent holders flooded East Texas federal courts with an unprecedented number of new infringement lawsuits during the first six months of 2015.

In fact, there were more lawsuits alleging patent violations filed in the Tyler-based courts during the second quarter of the year than in all the other federal courts across the country combined.

From April to June, lawyers shattered all records when they filed 839 patent infringement cases in the Eastern District of Texas. That's a 53.6 percent increase from the first three months of 2015, which had also set a record for a single three-month period, according to Lex Machina, a California-based supplier of data about intellectual property litigation.

Nationwide, a record 1,656 lawsuits alleging patent encroachment were filed during the second quarter.

Intellectual property law experts attribute the trend to rumblings from Congress, which could pass laws limiting the locations where patent suits can be filed. They also cite a decision by many IP lawyers to stop filing cases in Delaware because of recently enacted court rules they view as negative.

"My guess is that, rightly or wrongly, [plaintiffs] have read the tea leaves," said Owen Byrd, Lex Machina's general counsel. "The patent owners and their counsel have the perception that they will get a better shake in the Eastern District."

Bob Goodlatte, a Republican congressman from Virginia, sponsored a bill earlier this year restricting patent suits.

Although that bill was dropped in July, "it's safe to expect that it will return in some form after the summer break," said Jason Cassady, principal at Caldwell Cassady & Curry in Dallas.

While patents are a cornerstone of U.S. capitalism, battles over infringement are increasing, with the costs often passed down to consumers. In 2011, Apple and Google spent more money purchasing patents and fighting patent lawsuits than they spent on research and development, according to The New York Times.

### 'High-volume plaintiffs'

Leading the stampede into the Tyler district were what Lex Machina calls "high-volume plaintiffs," or patent owners that file more than 10 cases in a calendar year.

High-volume plaintiffs accounted for 650 patent cases in the Eastern District in the April-to-June period, or 77 percent of the new caseload.

High-volume plaintiffs are often, but not always, businesses that make money exclusively by wringing licensing fees and settlements out of businesses accused of infringing patents. Defendants and lawmakers call them patent trolls.

Legislative proposals such as Goodlatte's are designed to curb some of their tactics.

"One of the major issues that Congress debated regarding patent reform was where lawsuits could be filed," said Jamil Alibhai.

"One proposal would have removed the Eastern District of Texas because patent cases would generally be filed only where the defendant has its principal place of business or where the defendant has a physical presence."

The surge in Eastern District filings has apparently come at the expense of the District of Delaware, which has been the No. 2 venue for patent litigation for years.

Only 101 patent cases were filed in Delaware in the second quarter, and just six of those were from high-volume plaintiffs, Lex Machina data show.

That's in line with a steady downward trend for that district.

"It may be due to the new scheduling order and patent procedures implemented by some judges in [Delaware] to curb litigation abuse and streamline patent litigation," said Tyler T. VanHoutan, a Houston-based partner at Winston & Strawn.

A key change in Delaware is that judges can schedule early hearings to determine the meaning of words in patent claims.

Known as claim construction or Markman hearings, these pretrial sessions are important in patent cases because definitions of a patent's words are big elements in juries' decisions on whether a defendant has infringed a patent.

Plaintiffs may see Delaware's early Markman hearings as a negative in getting defendants to settle cases there, VanHoutan said.

The Eastern District, he noted, generally holds claim construction hearings after the parties have done a large amount of pretrial discovery.

Discovery is expensive, and allowing plaintiffs to do a large amount of fact-finding before the Markman hearing can drive up defendants' legal costs — and push them to settle cases rather than fight in court.

## Friendly to filers

"While the Eastern District of Texas may not be the rocket docket it once was, and even though the size of jury verdicts has generally declined in recent years, the Eastern District of Texas still boasts an environment that is very friendly towards plaintiffs," VanHoutan said.

The Eastern District of Texas became popular with patent lawyers a decade ago when the federal judges there created a so-called rocket docket, allowing patent holders to move through the pretrial process more quickly and get to trial sooner. Patent holders also believe that juries in Marshall and Tyler are plaintiff-friendly and more likely than juries in other regions to award large damages, although they have become more conservative in recent years.

High-volume plaintiffs in particular like the efficiency of Eastern District judges, said Thom Tarnay, a Dallas-based partner at Sidley Austin.

“The judges have experience in high-volume litigation and are able to move cases to trial,” he said. “The judges’ capability to keep these cases moving is a reason [plaintiffs] go there.”

Terrell R. Miller, a partner at Gardere Wynne Sewell, said the district’s reputation, fairly or not, scares smaller defendants.

The district also permits a broader scope of discovery, which “can make litigating cases very expensive,” he said.

Another lure of the Eastern District for many patent plaintiffs is Judge Rodney Gilstrap, renowned for his ability to get cases concluded quickly.

“Judge Gilstrap keeps a tight ship,” said Wei Wei Jeang, a veteran IP lawyer who recently joined Grable Martin Fulton, a Dallas company that rents general counsels to companies.

Gilstrap “schedules trials early in the process and is firm on those trial dates,” Jeang said. “He sets five cases for trial each given month, so that there is always a trial taking place in his court.”

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