

# “Hot Topics” in Intellectual Property

Presented by The Michelson 20MM Foundation & Intellectual Property Owners Education Foundation



## Is Patent Litigation Out of Control

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Critics of the patent system claim we are witnessing an “explosion of patent litigation” unlike any in history that is harming business and diverting resources better spent on innovation.

According to [Lex Machina](#), a respected legal analytics firm, there were 4,537 patent infringement suits filed in 2016, which represents a 22% decline from the 5,819 cases filed in 2015. [But it also represents a 26% drop in patent suits](#) filed since 2013, when an all-time high of 6,114 cases were filed.

Although the number of patent cases declined in two of the last three years, there was an overall increase in patent litigation over the decade. That increase became especially noticeable in 2012 and 2013, when new anti-joinder rules imposed by the passage of the America Invents Act of 2011 curtailed the practice of naming multiple defendants in a single infringement suit.

In this light, the decline in patent suits since 2013 is even greater than it appears, given that 10 patent suits filed today would likely have been consolidated into a single suit before these new joinder rules.

Be that as it may, as the chart below clearly demonstrates, virtually all of increase in patent infringement suits over the last decade is attributable to — and a quite natural response to — a corresponding increase in the number patents granted.

In case you’re wondering if the increase in the number of patents is itself a sign of a patent system being gamed by speculators wanting to cash in on the new “patent gold rush,” bear in mind that the average number of patents issued per billion dollars of GDP has remained at or below the same level — 13 patents per billion dollars of GDP — since 1963.

Interestingly, although the number of suits filed has increased in rough correlation to patent grants, the number that actually go to trial has remained constant over the last 30 years. Roughly 90 percent of suits filed each year are abandoned or settled. Of the three hundred that remain, two-thirds never go to trial, and are adjudicated on summary judgment (of non-infringement in most cases).

The nation is thus left with, at most, between 90 and 112 patent infringement trials per year — exactly the same number that went to trial 10, 20, and even 30 years ago.

To be sure, there can be significant costs to business even in litigating and settling patent suits that never go to trial. But no one has shown that the relative cost of patent litigation today is higher than it was historically, or that the cost of patent litigation is more burdensome than other customary legal costs in business, especially the huge cost of regulatory compliance.

The evidence does not suggest that patent litigation is “out of control” today. As retired chief judge Paul Michel of the U.S. Court of Appeals for the Federal Circuit, the main court for patent appeals, notes: “The level of patent litigation today is rather modest for a nation with two million active patents and

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hundreds of thousands of businesses competing against each other.”

History supports Judge Michel on this point. The estimated 124-plus smartphone patent suits filed between 2009-2012, for example, are less than one-quarter the number of patent suits filed during the first “Telephone Wars” of Alexander Graham Bell’s time. Back then, the American Bell Telephone Company and its successor, AT&T, litigated 587 patent cases alone.

Even more surprising, given the common belief in a patent litigation “explosion” today, patent and legal records from the U.S. Industrial Revolution in the mid-19th century show that the patent litigation rate at that time — defined as the number of patent suits in a decade divided by the number of patents issued in that decade — reached 3.6 percent.

In contrast, Lex Machina figures show that today’s patent litigation rate (i.e., the percentage of patents litigated to patents issued during the decade between 2007 to 2016) was ***barely half that —only 1.9 percent!***

Today’s smartphone wars, then, are simply “back to the future” when it comes to the ways in which disruptive new industries are developed. Historians have noted that every major industrial breakthrough of the last 150 years — from the development of the sewing machine, telephone, automobile, radio, aircraft, medical stent, and even disposable diaper industries, to the birth of the semiconductor and Internet e-commerce industries — witnessed exactly the same surge in patenting and patent litigation that we see in today’s smartphone field.

And just as with smartphones today, the most competitive technology arenas have always been the most litigious. In Edison’s time, the inventors of electrical discoveries were four times more likely than other inventors to be involved in patent litigation, and accounted for 41 percent of all patent suits filed during that period.

As noted previously, patent litigation is again on the decline. Most analysts attribute this U.S. Supreme Court rulings in 2014 that limited the patentability of software and strengthened the power of courts to impose sanctions on abusive litigants. Also driving this decline in litigation was the availability of new post-grant review proceedings under the new America Invents Act, which allow third parties to challenge patents and, if the evidence so warrants, have their claims invalidated by the USPTO’s Patent Trial and Appeal Board.

Although patent litigation is costly, the historical record indisputably shows that it serves a vital function by settling the validity and disputed ownership of patent rights so these can be commercialized into new products, new services, and new medical treatments.

This is, in fact, the proper role of the courts.