

2008 PATENT LITIGATION SURVEY

Never a Dull Moment

Traditional manufacturers may make the best clients for patent lawyers, but patent-holding companies are sure stepping up the volume.

—By Joe Mullin

Last year was another extraordinary one for patent litigation. It began with two U.S. Supreme Court decisions likely to change patent practice for years to come—one on a patent licensee’s right to sue, the other on damages for products sold abroad—and ended with a strong legislative push, which ultimately foundered this year, to revamp the patent system. It also was the year when little Marshall, Texas, rose to become the undisputed patent litigation capital of the world.

Our survey has changed as well. For the first time, *IP Law & Business* has done a separate survey of appellate work at the Federal Circuit level, measuring court appearances that not only settle business disputes but also tend to create law. This addition has led to the appearance on our lists of some firms that don’t usually make our district court list, such as Dechert, Minneapolis-based Robins, Kaplan, Miller & Ciresi, and Chicago-based McAndrews, Held & Malloy.

Howrey, perennially strong on the district court list, dominated appeals practice last year, handling 19 Federal Circuit cases for both

WHO ARE THE DISTRICT COURT CHAMPS?

RANK 2008	RANK 2007	FIRM	TOTAL DISTRICT COURT CASES
1	1	Fish & Richardson	98
2	11	Morrison & Foerster	69
3	3	Kirkland & Ellis	63
4	5	Howrey	62
5	2	Jones Day	55
6	7	Niro, Scavone	54
7	27	Winston & Strawn	52
8	N/A	Knobbe Martens	46
9	4	Foley & Lardner	45
	13	Kenyon & Kenyon	45
11	18	Finnegan, Henderson	44
	9	McDermott Will	44
13	11	Baker Botts	42
14	N/A	Morgan Lewis	41
15	15	Heller Ehrman	40
	18	Sidley Austin	40
17	24	Alston & Bird	39
18	18	Kilpatrick Stockton	36
19	N/A	Townsend and Townsend	35
20	N/A	Akin Gump	34
	9	Cooley Godward	34
22	27	Fulbright Jaworski	33
	22	Michael Best	33
	N/A	Quinn Emanuel	33
25	N/A	Brinks Hofer	32

PP Morrison & Foerster, riding high on the afterglow of a rare defense win in East Texas, shot up to the number two spot this year.



WHO REPRESENTS PLAINTIFFS AND DEFENDANTS IN DISTRICT COURT?

RANK 2008	RANK 2007	FIRM	PLAINTIFF CASES
1	7	Niro, Scavone	48
2	3	Fish & Richardson	37
3	N/A	Morrison & Foerster	25
4	2	Cooley Godward	23
5	14	Heller Ehrman	21
6	3	Foley & Lardner	19
	6	Howrey	19
8	7	Connolly Bove	18
	1	Jones Day	18
	17	Sidley Austin	18
11	14	Kenyon & Kenyon	16
	N/A	Townsend and Townsend	16
13	N/A	Fitzpatrick Cella	15
	N/A	Morgan Lewis	15

RANK 2008	RANK 2007	FIRM	DEFENSE CASES
1	1	Fish & Richardson	61
2	2	Kirkland & Ellis	49
3	5	Morrison & Foerster	44
4	4	Howrey	43
	24	Winston & Strawn	43
6	3	Jones Day	37
7	7	Baker Botts	32
	9	Knobbe Martens	32
9	11	McDermott Will	31
10	11	Finnegan, Henderson	30
11	14	Kenyon & Kenyon	29
12	24	Alston & Bird	28
13	N/A	Akin Gump	26
	N/A	Brinks Hofer	26

an appeal in a patent case is an easier decision for a client.”

The district court survey data, while reminiscent of last year’s, shows small but significant changes. Of the five firms that handled the most work last year, four are the same, but Foley & Lardner dropped down several places, while Morrison & Foerster shot back up into the top ranks. Overall filings increased, but just barely—2,896 patent lawsuits were filed last year, an increase of about 2 percent over the previous year and still below the record year of 2004, which saw 3,075 filings.

More than 12 percent of the national total—371 lawsuits—were filed in the Eastern District of Texas, mostly in

appellees and appellants. In addition to following up work from the district court level, like other IP heavyweights, Howrey has a specialized appellate practice group that allows a client to get “an objective opinion of someone who’s not close to the trial team,” says Alan Grimaldi, a Washington, D.C.–based Howrey lawyer who was the firm’s first IP associate, hired in 1978.

For smaller firms like 260-lawyer Robins, Kaplan, appellate work is driven by their clients at the district court level. A district court judge’s claim construction can be all-important in a patent case, yet those decisions are reviewed de novo on appeal—and often overturned. Now, 13 years since the Markman decision, which established that a patent’s claims must be defined by judges rather than juries, claim construction is still a quagmire.

Certainly patent cases are expensive, now averaging about \$4 million to litigate from filing to trial. That expense, combined with a good chance of an upset on appeal compared to other kinds of cases, means that those defeated at trial often aim for a second chance at the Federal Circuit, says Ronald Schutz, head of Robins, Kaplan’s IP practice group. District court decisions on both summary judgment and at trial are modified or reversed more than half the time on appeal. “Most people will say, that’s a shot worth taking,” says Schutz. “The decision to file

Marshall. That’s more than a patent lawsuit for every day, and puts the rural, sparsely populated Eastern District of Texas well ahead of the next closest district (California’s Central District, the nation’s largest by population). “Ironically, I think there was an uptick in Texas because people were concerned about the prospect of [patent reform] legislation,” says Morrison & Foerster patent litigator Harold McElhinny. “A lot of plaintiffs moved to get on file,” anticipating that a change in the law could make it harder to venue-shop.

A few operating companies were more than happy to sue their competitors in East Texas—NetApp, Inc. and Eastman Kodak Co., to name a few. Even Boston-based Northeastern University was willing to give up its home-turf advantage to enforce its patent on Internet search technology against Google Inc.

All around the country, much of the growth in suits was driven by patent-holding companies filing against multiple defendants. A few patent-holding companies, including Ronald A. Katz Technology Licensing, Acacia Research Corp., and Erich Spangenberg’s Plutus IP empire, created huge amounts of defense work last year.

The impact of such multidefendant suits is hard to measure for a number of reasons, not least because some lawyers will go to great lengths to give such litigation a low

WHO REPRESENTS APPELLEES AT THE FEDERAL CIRCUIT?

profile. Fulbright & Jaworski partner Bob Chiaviello filed a lawsuit on behalf of patent holder Antor Media Corporation, naming Metacafe, Inc., a little-known video-sharing Web site, as a defendant; days later, he filed an amended complaint with no less than 20 defendants, including household names like Google Inc. and Sony Electronics, Inc. It's a tactic he's used twice before. Antor may look small-time if you are reading dockets, or headlines, but the patent-holding company has now sued a vast swath of the economy over the last 18 months, naming more than 50 defendants, from Wal-Mart Stores, Inc., to Ford Motor Company to Cisco Systems, Inc. That's just one patent and one patent-holding company.

Big corporations are becoming experienced at handling the proliferation of such suits, and are more likely to share defense costs. "We're seeing a lot of suits that settle pretty early on, within the first few months of filings," says Kathi Lutton, Fish & Richardson's head of litigation. But just because companies are getting used to it doesn't mean they are happy about it; and nobody wants to settle too quickly. "They don't want to be perceived as an ATM," says Lutton.

Still, not many companies are willing to spend \$5 million just to risk losing more at trial. Aggrieved competitors who actually do battle in the marketplace are more willing to stick through years of tough litigation, and are still a patent lawyer's best bet for a steady, and hefty, paycheck.

Under Lutton's lead, Fish has maintained its top position, and flourished. But will the effects of a rough second half of the year show up in the firm's 2008 docket?

RANK 2008	FIRM	APPELLEE CASES
1	Howrey	12
2	Paul Hastings	6
3	Dechert	5
4	Finnegan, Henderson	4
	Fish & Richardson	4
	Goodwin Procter	4
	McAndrews Held	4
8	Baker Botts	3
	Foley & Lardner	3
	Kirkland & Ellis	3
	McDermott Will	3
	Morrison & Foerster	3
	Wilmer	3

The firm fired its principal Scott Harris in September; Harris had set up a side business selling, and perhaps enforcing, his own patents, and is now embroiled in litigation with his former firm. In November, Fish's appeal to the Federal Circuit on behalf of Microsoft Corporation in the z4 Technologies case failed, leaving the software giant on the hook for a \$140 million judgment.

Morrison & Foerster, riding high on the afterglow of a rare defense win in East Texas, shot up to the number two spot this year. Winston & Strawn, famously strong in copy-right, jumped into the top ten this

year, powered mostly by work from established clients like Barr Laboratories.

Cooley Godward and Heller Ehrman continued to take big chunks of plaintiffs' work from an arm of Acacia Research Corp. and Ronald Katz's licensing firm, respectively. Since March, Howrey has been urging clients to scrutinize whether rival law firms litigate for "patent trolls"—and assuring clients that it doesn't do so. So far other law firms have declined to follow that gambit. "Many clients like us to work both sides of the fence," says one patent litigator, "so we will know who we are up against." ■

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METHODOLOGY: Earlier this year we contacted more than 300 law firms, asking for a list of patent cases filed during calendar year 2007 in which they represented clients in federal district courts and in appeals at the Federal Circuit. The district court cases had to be active for at least two months during the year. Some firms listed multiple district court cases with the same plaintiff. If those cases involved the same patent, highly similar technology, or consolidated discovery, we counted all the cases as one.

About Morrison & Foerster's Intellectual Property Practice

Morrison & Foerster's Intellectual Property practice is the work of an interdepartmental group of lawyers whose practice focuses on patent, trademark, copyright, trade secret, unfair competition, and related intellectual property matters. The firm has one of the largest intellectual property practices of any general practice firm, with approximately 350 lawyers stationed in the major financial centers in the U.S., Asia, and Europe. Our size and breadth of expertise enables us to provide a full range of cutting-edge IP services, including representation in patent and trademark prosecution, litigation and alternative dispute resolution, and business and licensing transactions. The firm's practice is ranked by independent observers as one of the top intellectual property practices in the world. Most recently, our Intellectual Property Litigation practice was one of three finalists honored in *The American Lawyer's* prestigious 2008 IP Litigation Department of the Year contest. The firm's Intellectual Property practice has been awarded *Chambers USA's* highest ranking for the past three years and was a Top 3 finalist for *Chambers & Partners'* Global IP Firm of the Year award in 2007.

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