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ITC Patent Rebound Shows Signs It's Here To Stay

By **Matthew Bultman**

Law360 (February 7, 2018, 8:03 AM EST) -- The resurgence of patent cases at the U.S. International Trade Commission continued in 2017, settling in at a level many believe will become the new standard amid lingering uncertainty for patent owners in district court litigation and an increased awareness of what the commission has to offer.

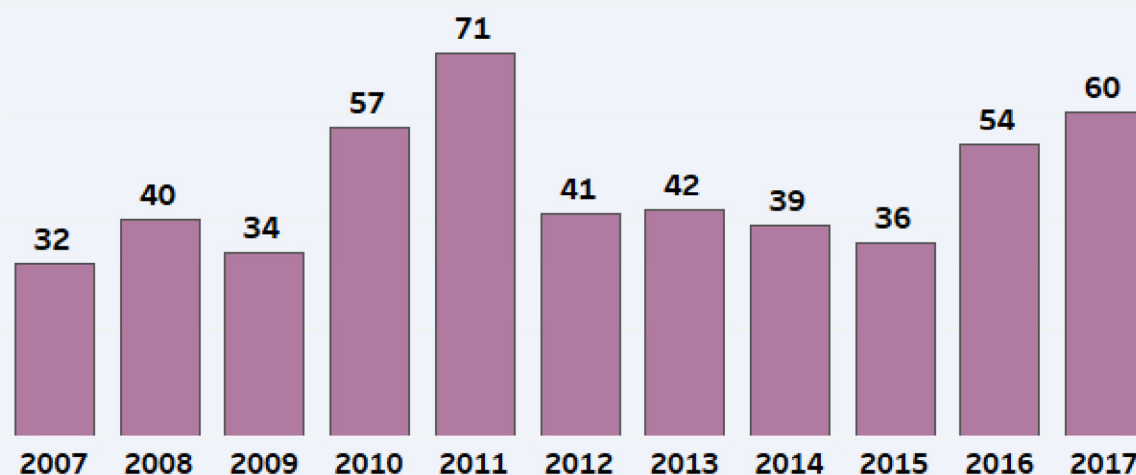
The number of patent cases the ITC instituted climbed to 60 last year, according to a **report from legal analytics firm Lex Machina**. This was an 11 percent increase from 2016, when the commission **rebounded** after a recent lull to institute the most patent cases since 2011.

But attorneys aren't looking at the last two years as an outlier.

"I don't think we're in a bubble," said Bert Reiser of Latham & Watkins LLP. "I think we're in a new normal."

The ITC Bounces Back

The number of Section 337 patent cases shows the venue's renewed popularity over the past two years.



Data source: Lex Machina

Those who practice before the ITC attributed patent owners' interest in the commission to a combination of factors. Certain things, such as the ITC's speedy proceedings and the powerful remedies it offers in terms of injunctive relief, have long been reasons to consider filing at the commission.

But there are other, more recent factors that could help explain the rising demand. Attorneys

pointed to a U.S. Supreme Court **decision** in May that restricted where patent lawsuits can be filed, limiting patent owners' ability to seek out preferred district courts.

Another is that the ITC has demonstrated an unwillingness to put cases on hold if an accused infringer challenges the patent at the Patent Trial and Appeal Board. This is in contrast to district court, where judges will frequently stay litigation pending a decision from the board.

"Patent owners know this is the one place they can go where the proceeding is not going to get derailed, or stayed, or slowed down if there is an [inter partes review] that is filed against the asserted patents," said Eric W. Schweibenz of Oblon McClelland Maier & Neustadt LLP.

Over the last decade, the ITC has, for the most part, handled somewhere between 30 and 40 patent cases per year. The exception came in 2010 and 2011, when the ITC instituted 57 and 71 patent cases, respectively, according to Lex Machina.

What makes the recent upswing different from 2010 is those cases came at the peak of the smartphone wars. Apple Inc. and Samsung Electronics Co. Ltd. sued each other over patents at the ITC, and companies like HTC Corp. were dragged into the mix, driving up the agency's patent docket.

While 2016 and 2017 haven't been devoid of smartphone disputes — Qualcomm, for instance, asked the ITC in July to block imports of certain Apple iPhones and iPads — the list of companies filing complaints and the technologies that are involved have been much more varied.

IRobot Corp. brought a case against Hoover Inc., The Black & Decker Corp. and others over robotic vacuum cleaners. The Gillette Co. LLC has filed a complaint against Schick over razors. Lifetime Products Inc. filed a case over parts for backboards on basketball hoops.

"There is a real diverse group of companies, companies of all different technology areas," said Christine Lehman, a former investigative attorney at the ITC and current partner at Finnegan Henderson Farabow Garrett & Dunner LLP.

And there are "definitely some smaller companies that have realized they can take advantage of" the ITC, including a number of first-time filers, according to Lehman, who said there "seems to be a more widespread appreciation and understanding for what the ITC can do."

Money damages are not an option at the ITC, a bipartisan, quasi-judicial agency focused on trade. The sole remedy the commission offers if patent infringement is found is an order banning imports of the infringing product into the U.S. But these orders can pack a powerful punch.

"Companies ... have litigation funds they keep, they can pay the money," said Jamie McDole of Haynes and Boone LLP. "It's the inability to make and sell a product that I think is most concerning to defendants. Having that injunction in the ITC is still a significant hammer that a plaintiff can bring."

Obtaining that kind of injunctive relief in district court was made more difficult after a 2006 Supreme Court decision. Another high court ruling in May upended a 27-year-old Federal Circuit rule and put limits on where patents lawsuits can be filed, which has led to some venue uncertainties.

Reiser said it has also become harder to get monetary awards in district court that plaintiffs are pleased with.

"While district courts have become a little more uncertain, a little less attractive perhaps, the ITC is a very attractive place to go vindicate your patent rights," he said.

Adding to that attractiveness has been the ITC's reluctance to give much deference to PTAB

decisions.

The position of the commission, which has never put an investigation on hold because the board agreed to review a patent, was highlighted in July when it **refused** to rescind an exclusion order after the PTAB found the relevant patents invalid.

The ITC in that case indicated it would not lift an order banning imports of Arista Networks Inc. computer networking switch products found to infringe two Cisco Systems Inc. patents until Cisco's appeals of the PTAB's decisions were exhausted.

The Supreme Court is currently weighing a challenge to the constitutionality of IPRs. A decision is expected in the coming months, and if the court were to upend PTAB reviews, it would shake up the patent litigation landscape. It's possible there could be a ripple effect at the ITC.

"If we accept the assumption that complainants are seeking to institute more investigations at the ITC because of the IPR process, it is possible that volume could be impacted if [IPRs] are found to be unconstitutional," said Brian Paul Gearing of Crowell & Moring LLP.

The ITC has a target date for decisions 16 months after a complaint is filed, a timeline that is relatively fast compared with district court. Even if the patent docket were to continue to expand, there doesn't seem to be much concern that proceedings would slow significantly.

"The ITC is statutorily mandated to move as expeditiously as possible," said Stefani Shanberg of Morrison & Foerster LLP. "They take it seriously and they do a good job of keeping the speed relatively consistent."

--Editing by Jeremy Barker and Aaron Pelc.

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