

Highlights from the RPX 2017 Year in Review and the Patent Litigation Landscape

RPX has published their **2017 Year in Review**, and there are some interesting findings. Foremost in this year's highlights is – not surprisingly — the continued decline in new patent lawsuits, especially non-practicing entity (NPE) filings. This trend has persisted for several years now and, in my view, can be attributed to three main factors – a shift in the supply of enforceable patents for purchase, the PTAB, as well as the fact that manufacturing defendants in the electronic industry have largely moved overseas. Of course, as RPX also points out, the Supreme Court decisions, *Alice v. CHS Bank* and *TC Heartland v Kraft*, have been and continues to be impactful on the patent litigation landscape, affecting NPEs and operating companies alike.

The report argues that the *Alice* decision has impacted NPE settlement prices because it enables defendants to raise patent ineligibility at an early stage (i.e., summary judgment). The report notes that before *Alice*, the average settlement price was \$2 million, but since the *AIA*, that price has dropped to \$1.5 million. In that regard, the impact of the recent panel decision by the Federal Circuit (CAFC), *Berkheimer v. HP, Inc.* (2017-1437, decided February 8, 2018) should be interesting. The *Berkheimer* court held that “whether something is well-understood, routine, and conventional to a skilled artisan at the time of the patent is a factual determination.” Applying Seventh Circuit summary judgment law, Judge Moore suggests that disputed subsidiary facts underlying the patent eligibility determination should be submitted to the jury. This may signal a beginning of the pendulum swinging back a bit in plaintiffs' favor, if the rest of the CAFC follows Judge Moore's lead.

RPX notes, in the back drop of unfavorable court decisions and increasing difficulty in securing litigation financing, a fundamental shift in the NPE business model. Many NPEs have scaled back on their enforcement campaigns. Wi-LAN, for example, is putting more emphasis on acquisition of operating businesses, rather than enforceable patents. In another vein, Intellectual Ventures continues to downsize by selling off sizable portions of its formidable portfolio.

RPX also points out a decline in the number of IPRs filed throughout 2017. While 541 were filed in Q1, only 344 were filed in Q4. As filing a PTAB petition has become virtually a defense routine, this falling off simply follows from the decline in number of patent lawsuits filed. Few defendants would incur the expense of an IPR unless sued or are at least virtually certain that they would be sued. RPX states that the pending *SAS* and *Oil States* Supreme Court cases could be behind this decline in 2017. I think this is unlikely, as defendants have a statutory one-year filing bar, few can afford to wait and see what the high court does. Regardless, these Supreme Court cases will settle some of the few lingering PTAB jurisdictional questions.