Intellectual Property continues to be a hot segment of the legal marketplace. However, making the decision to protect or enforce intellectual property rights has increasingly become a strategic discussion between patent owners and their IP counsel, especially in light of recent legislation and Supreme Court decisions. This paper looks at who is benefiting in the current landscape and what trends to watch over the next few years.

**Figure 1: Total Patent Applications**

![Graph showing total patent applications from 2010 to 2015](source: U.S. Patent and Trademark Office)

**Figure 2: Trademark Applications**

![Graph showing trademark applications from 2010 to 2015](source: Thomson Reuters Westlaw™)
Peer Monitor reports that the growth in demand for the patent prosecution market segment has outpaced the corresponding demand growth in the overall legal marketplace (Figure 3).

**Figure 3: Patent Prosecution v. All Practices 2015 – Mid-Year Key Performance Measures**

![Figure 3](image)

Source: Peer Monitor; all timekeepers, billable time type, U.S.-based firms

Looking closely at law firm segments within the patent prosecution market, Am Law 200 firms have experienced positive growth since roughly the mid-point of 2012 (Figure 4), primarily driven by the firms in the Am Law Second 100, which has seen positive patent prosecution growth since the end of 2011.

In contrast, midsize firms have experienced contracting demand for most of the past four years before finally returning to positive growth so far in 2016. Both 2012 and 2013 were difficult for midsize firms, with year-to-year declines in the patent prosecution market nearing or exceeding 10%. Over the past two years, stability has returned for these firms, though positive growth has been elusive until very recently.

IP specialty firms have experienced growth on par with or slightly greater than the growth experienced by the Am Law Second 100 firms, and slightly better than that seen by the Am Law 100.

**Figure 4: Patent Prosecution Demand Growth**

![Figure 4](image)

Source: Peer Monitor, all timekeepers, billable time type, U.S.-based firms
In the copyright and trademark prosecution space, all tiers of firms have experienced erratic growth trends dating back to 2008 (Figure 5). In the past two years, midsize and IP specialty firms have experienced positive growth, while Am Law firms have seen a slight downturn in this area, though they are essentially flat with regard to year-over-year demand changes so far this year.

**Things to Watch: Patent and Trademark Prosecution**


- While some areas of patent prosecution may contract, growth potential exists in other segments. The number of Graphical User Interface (GUI) patents issued by the USPTO has more than doubled over the past four years. As companies face increased challenges in prosecuting software applications, there may be a continued shift to protect IP by using GUI and other design patents.

- Due to the ongoing confluence of technologies, there seems to be a shift to broaden the scope of trademark coverage, with a reevaluation of filing strategies. This includes an increased focus on globalization/filing in foreign countries, counterfeiting, and online commerce.

**Trends in Patent and Trademark Litigation: Growth or Decline?**

Patent litigation filings experienced a banner year in 2015, capping off what has been essentially a steadily growing trend in patent litigation filings for most of the last 5 years (Figure 6). For 2016, the year appears to be off to another hot start, with the potential to at least match the volumes seen in 2013 and 2014. The anti-joinder rules implemented under the America Invents Act, which placed restrictions on plaintiffs filing single lawsuits against multiple unrelated defendants, has been identified as a possible driving factor behind the recent rise in litigation filings, but whether 2016 will lead to another record year remains to be seen.
Peer Monitor’s figures on patent litigation include hours worked related to (PTAB) litigation (inter partes reviews, covered business method reviews, and postgrant reviews before the Patent Trial and Appeal Board). While litigation filings are experiencing record numbers, that has not necessarily translated into more law firm hours worked on patent litigation matters. For most of the past three years, only IP specialty firms saw year-over-year increases in patent litigation work (Figure 7), but even those firms have now settle back into negative territory.

Much of this decline in demand may be due to the fact that trademark dockets have not seen the explosive growth experienced in patent docket filings. With the exception of a strong 2014, trademark dockets have been on a steadily declining trend for the past six years. Filings so far in 2016 suggest that the year may outperform 2015, but it is questionable whether the high-water mark of 2014 can be matched.

**Figure 7: Patent Litigation Demand Growth**

![Graph showing patent litigation demand growth from 2008 to 2016.](image)

Source: Peer Monitor, all timekeepers, billable time type, U.S.-based firms

**Figure 8: Trademark Docket Trending**

![Graph showing trademark docket trend from 2010 to 2016.](image)

*Data for partial year only
Source: Thomson Reuters Monitor Suite
Things to Watch: Patent and Trademark Litigation

- As accused infringers utilize challenges at the Patent Office to attack the patents-in-suit, district court plaintiffs may continue to be faced with the prospect of enduring stays as the PTAB litigation (and possible appeals) run their course. Anecdotal evidence suggests the typical length of time to complete a patent enforcement action is typically between 5 and 8 years.

- To avoid the lengthening timeline for patent enforcement, plaintiffs may shift their strategy to use venues with accelerated timelines, such as the ITC or the proposed European Unified Patent Court. Patent enforcement may be moving from the US to Europe based on a perception that patent owners fare better in these tribunals, especially in Germany and the UK.

- Due to recent decisions in the TTAB (Trademark Trial and Appeal Board), we will likely see a more thoughtful and thorough approach to opposition and cancellation proceedings before the board.

Trends in PTAB Litigation: Is the Growth Slowing?

According to Thomson Reuters Monitor Suite, since PTAB litigation became available in September 2012, nearly 4,700 petitions have been filed through Q1 2016. It took almost a year and a half for the first 1,000 petitions to be filed. Each subsequent seven-month period has seen around 1,000 petitions filed, indicating that the growth rate of PTAB filings may have plateaued. The current year has only seen 364 petitions filed through the end of Q1.

Electronics and computer-related technology patents have been most frequently challenged at the PTAB, with over one-third of PTAB petitions attacking patents in these areas. Filings against patents in these spaces were down slightly in 2015. Patents in the telecom and automotive industries were challenged at a greater rate in 2015, relative to 2014.

Figure 9: PTAB Docket Filings by Industry

<table>
<thead>
<tr>
<th>Industry</th>
<th>Occurrences</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Technology</td>
<td>1,399</td>
<td>36.7%</td>
</tr>
<tr>
<td>Industrial/Manufacturing</td>
<td>457</td>
<td>12.0%</td>
</tr>
<tr>
<td>Consumer Products</td>
<td>380</td>
<td>10.0%</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>193</td>
<td>5.1%</td>
</tr>
<tr>
<td>Automotive and Transport</td>
<td>262</td>
<td>6.9%</td>
</tr>
<tr>
<td>Healthcare</td>
<td>235</td>
<td>6.2%</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>194</td>
<td>5.1%</td>
</tr>
<tr>
<td>Business Services</td>
<td>159</td>
<td>4.2%</td>
</tr>
<tr>
<td>Retail</td>
<td>116</td>
<td>3.0%</td>
</tr>
<tr>
<td>Other Industries (Full List)</td>
<td>421</td>
<td>11.0%</td>
</tr>
</tbody>
</table>

Source: Thomson Reuters Monitor Suite

While IP specialty firms started with a solid lead in representations for the first year of PTAB litigation, Am Law firms have been chipping away at that advantage over the last two years. IP specialty firms made up over 72% of representations among the most active firms at the PTAB in September 2013 (according to PTAB filing data). More recently, that figure was around 56%, with Am Law firms in that sample increasing their share of representations from 23% to 37% of representations in that span. Midsize firms had the smallest number of representations over that time period, with their share fluctuating between 4% and 8%.
Things to Watch: PTAB Litigation

• As the rate of PTAB litigation filings appears to level off, both petitioners and patent owners are becoming accustomed to a patent landscape that includes invalidity proceedings before the PTAB. Law firms appear to have made the adjustment as well. Am Law firms that historically relied on district court litigation are moving into the PTAB litigation space, as the related district court litigation is often stayed pending the outcome of an IPR or CBM.

• The extent to which PTAB litigation is a sustainable part of the patent landscape remains to be seen. While the USPTO hopes stability in prosecution and examination standards will lessen the need for invalidity proceedings before the Office, district court litigation might continue to drive challenges at the PTAB.

Conclusions

• Patent prosecution continues to grow for Am Law and IP specialty firms. Meanwhile, midsize firms, though struggling for several years, have finally returned to positive territory in this area.

• While trademark prosecution growth has been erratic over the last five years, both midsize and IP specialty firms have experienced positive growth for most of the last two years.

• Patent litigation filings continue at a high pace, with IP specialty firms experiencing positive growth in this area, most likely due to PTAB litigation.

• Am Law firms are starting to take on more PTAB litigation, although the IP specialty firms continue to dominate this type of work.