

Expect More Patent Filings After a Decade-Long Low, Say Baker Hostetler IP Practice Leaders

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What You Need to Know

- Patent litigation and artificial intelligence will be big topics in IP law this year, according to BakerHostetler practice leaders.
- Practice chair Mark Tidman also said he predicts there will be an upswing in patent filings in 2024.
- The firm also detected copyright and trade secret trends in their 2023 annual report.

Artificial intelligence and patent litigation trends will be hot topics in the world of IP law in 2024, according to BakerHostetler IP practice chair, Mark Tidman.

Tidman and fellow practice leaders Leif Sigmond Jr., Kevin Kirsch, Ronald Kern and others recently released their first annual public report on developments in IP law throughout 2023. Tidman described his co-authors as a group of “thought leaders” in the space, outlining observations on industry trends and significant court rulings. The latter included a case brought by the firm’s client, Hermès International, that succeeded in preventing an artist from selling NFTs of the company’s Birkin bags, in “an early test of how IP laws apply to NFTs.”

Patent Filings on the Horizon

Patent filings were at a decade-long low in 2023. According to the report, there were “fewer than 3,000 for the first time since the enactment of the America

Invents Act in 2011” — “Less than half of the more than 6,000 cases filed in 2013 and more than 20 percent below the number filed in 2022.”

The most common rationale for the dearth of patent filings has been “the economy.” However, the report also notes that the Western District of Texas, one of the nation’s

busiest patent dockets, just saw a change in assignment rules, leading it to be another suspect for the drop in filings.

“I think everybody who writes about these types of issues is speculating,” Tidman said. “On some level, we’re looking at correlations between rules changes, correlations between a judge’s focus on certain issues in a popular filing court, and up ticks and down ticks in patent friendly courts and we’re extrapolating a cause and effect, as opposed to just a correlation.”

Tidman continued: “I imagine there’s more to it than that. I think that the economic climate has had a lot to do with it. Particularly, there’s been a lot less appetite for competitor-on-competitor litigation and a lot of scrutiny over large damage awards that has perhaps sidelined some filings. [I also think]



Mark H. Tidman of BakerHostetler.

Courtesy photo

that the investment that is required to monetize or enforce a patent is also impacted by the economic environment.”

As to whether the downturn in filings is a good or a bad thing, according to Tidman, “It depends on who you ask.”

“Lawyers would probably say ‘It’s bad for business,’ [while] industry would say ‘Great, we’re not defending a bunch of lawsuits and spending money on that when we can spend it on our business,” Tidman said. “There are probably some patent holders out there who believe that they have assets that they think should be monetized, but don’t have the resources to do that now.”

However, for those hurting from the drop in filings, Tidman noted there’s likely an end in sight. “It does feel like there’s a lot of money [available] out there in the litigation funding space. Anecdotally, my sense is that some of that money is going to surface in 2024,” Tidman said. “I may be wrong, but I speculate that as we come into what we’re hoping is a more favorable economic environment, some of those cases that are on the sidelines will be filed this year.”

Grappling with AI

“AI is an extremely hot topic, and it’s going to remain so in 2024,” Tidman said. “To give you an idea of the exploding growth there, ChatGPT had 180 million users just this month alone.”

According to the report, counsel will also be tasked with grappling with AI’s increasing integration with the development, management and protection of IP, as questions of copyright and patent ownership clash with the efficiency of incorporating AI into business workflows and documenting its involvement.

“In enforcement proceedings, accused infringers are likely to attack the scope of copyright protection and the enforceability of patents based on whether human involvement in the creation of the IP was sufficient,” the report said. It noted companies will also likely need to revisit data usage



Photo: Jason Doiy/ALM

and rights clauses in technology agreements and lawyers will need to consider how they use their clients’ privileged information when using AI tools to manage their practices.

“AI providers are responding with indemnification and other contractual protections for their customers who find themselves accused of infringement,” the report said. “Contractually allocating infringement risk between AI providers and their customers, as well as developing internal governance to mitigate risk, are becoming integral parts of companies’ AI policies.”

The Cutting Room Floor

There were also major developments that didn’t make it into the publication.

One such developing story is “the issue of obviousness type double patenting and how judge created doctrine impacts patent term.”

“There was a controversial decision on that relating to whether a continuation patent can become prior art if the original application term is extended that the Federal Circuit recently chose not to hear en banc,” Tidman said. He noted that the opinion was “kind of an academic-ey practitioner’s issue,” though he would have probably included it if the case hadn’t been pending re-hearing at the time he was finalizing publication of the report.