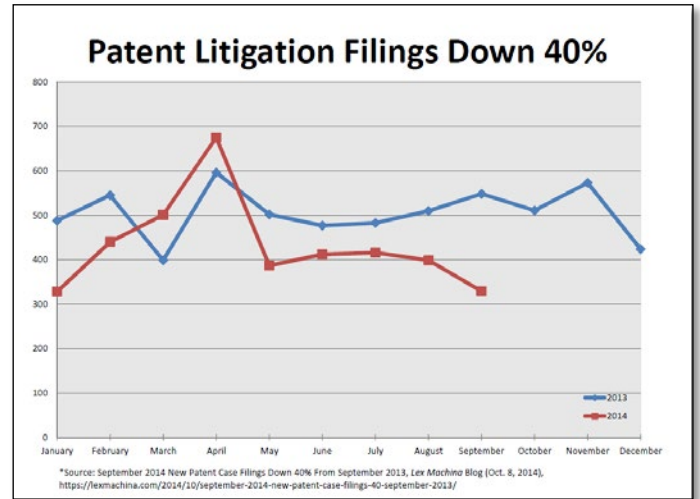


## The Case For Narrow Patent Legislation: Judicial and Administrative Developments

Recent developments in the federal courts, the U.S. Patent and Trademark Office (USPTO), and the Federal Trade Commission (FTC) have dramatically reduced abusive patent litigation while ensuring that job-creating innovators can continue to protect their ideas, eliminating the need for broad new legislation.

Patent case filings alone have fallen 40 percent since September 2013, prompting even prominent longtime patent reform supporter Stanford Law Professor [Mark Lemley](#) to admit that “the need for legislative reform is a lot less right now than it was a year ago and it probably makes sense to wait a bit and see how these cases play out . . . before we try to rewrite the rules.”



### USPTO Initiatives

- The USPTO has been aggressively implementing the America Invents Act (AIA). The AIA created a new procedure—called “*inter partes* review” (IPR)—to allow anyone to challenge weak patents in a faster, cheaper proceeding before the Patent Trial and Appeal Board (PTAB) rather than through litigation. In just two years since the USPTO implemented the new procedure in late 2012, nearly 2000 patents have been challenged. So far, **PTAB has ruled that the vast majority—73 percent—of all challenged patent claims are invalid.**
- In September, the USPTO launched an online “toolkit” designed to “empower and inform ‘Main Street’ retailers and consumers that may have been threatened with a patent lawsuit or received a demand letter.” This toolkit helps consumers and small businesses navigate the early stages of patent litigation, including how to address demand letters or locate a patent attorney.

### U.S. Supreme Court Decisions

- In a series of decisions over the past four years, the Supreme Court has narrowed the scope of patentable inventions. Most recently, in *Alice Corporation v. CLS Bank*, the Court invalidated a business method patent that appeared to do nothing more than implement a “fundamental economic practice” through a generic computer. The Court held that merely implementing an abstract idea through a computer is not patentable. In the wake of *Alice* and other decisions, lower courts and the USPTO have invalidated a number of patents involving simple financial or business practices, exactly the kind of non-technical patents that have historically posed the greatest potential for litigation abuse.
- Also in June, the Court in *Nautilus v. Biosig Instruments* made it easier for courts to invalidate vague patents for “indefiniteness” and far harder for patent holders to enforce the kind of vague or otherwise weak patents that are the kind of patents most often asserted in abusive litigation.

- In another June decision, the Court in *Limelight Networks Inc. v. Akamai Technologies, Inc.* made it harder for patent owners to prove inducement of infringement when a patented method is performed by more than one entity. The case provides greater protection to supply chain participants and downstream users of a technology to defend against patent infringement suits.
- In April, the Court decided *Octane Fitness v. Icon Health & Fitness*, significantly increasing a judge's discretion to award attorney's fees in frivolous patent cases. This decision reduces incentives for abusive litigation by making it easier to force plaintiffs whose patents are invalidated to pay the defendants' attorney's fees, eliminating the need for a statutory fee shifting provision.

### **Judicial Conference of the United States**

The Judicial Conference of the United States, a group of federal judges who recommend changes to litigation rules, has recommended changes to the Federal Rules of Civil Procedure that would make it harder for plaintiffs to pursue frivolous patent claims while protecting the rights of innovators to enforce their patents in court. These proposed rules will take effect on December 1, 2015 if Congress does not vote to stop them:

- The changes heighten pleading requirements by eliminating a standard (Form 18) that requires very little information in patent infringement complaints. If adopted, plaintiffs filing patent infringement complaints will have to meet the heightened pleading standards the Supreme Court laid out in *Ashcroft v. Iqbal* and *Bell Atlantic Corporation v. Twombly*, removing the need for stricter statutory guidelines for patent complaints.
- The changes also ensure that discovery in patent litigation will only include documents that are "proportional to the needs of the case." This will eliminate the ability of patent plaintiffs to use unnecessary discovery requests to drive up costs for defendants and force settlements, making any statutory provision limiting the scope of discovery in patent cases unnecessary and repetitive, since courts have been directed to limit excessive and abusive discovery requests.
- The changes would also direct courts to shift discovery expenses – often the most costly portion of litigation – to the requesting party, if producing documents would be especially burdensome on the producing party. This rule would allow courts to protect innovators from excessive or unduly expensive discovery requests.

### **Demand Letters and the Federal Trade Commission—The Area Where Narrow Legislation is Broadly Supported**

- The FTC is aggressively using its authority to combat abusive patent demand letters and protect small businesses and consumers. In November the FTC announced a settlement with MPHJ Technology Investments, LLC, barring it from making deceptive representations when asserting patent rights.
- The **narrow area in which legislation is desirable and broadly supported is in providing further guidance to the FTC about the circumstances under which demand letters would be considered unfair and deceptive.** The Targeting Rogue and Opaque Letters Act accomplishes this purpose.

Taken together, these judicial and administrative developments in the past year have given courts and defendants effective tools to combat abusive patent litigation. The proof can be seen in the dramatic drop in the patent litigation rate. These changes protect companies of all sizes from the burdens of costly and unfounded litigation, while ensuring that holders of strong, valid patents can enforce their property rights.