No One Told John Oliver About the America Invents Act: *Last Week Tonight* Stuck in 2012

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The heady days of 2012 saw "Gangnam Style" dominate the U.S. music charts, Patricia Krentcil rocket to fame as the "New Jersey Tanning Mom," and the New York Giants win the Super Bowl. That year also is the source of nearly all the statistics John Oliver cited on the April 18, 2015 edition of his HBO program *Last Week Tonight* during a very humorous but potentially misleading piece about abuses in the patent system.

John Oliver echoes complaints others have raised against the patent system, namely that (A) patent owners that don't practice their patents shouldn't be able to assert them; (B) patent owners enforcing their patents are extorting parties, including small businesses and end users, that lack the funds or capability to litigate; and (C) patents, especially software patents, are too vague, resulting in uncertainty as to what products or actions are encompassed. The solution to most of these problems, he posits, is the Innovation Act, H.R. 9, the latest version of which was introduced on February 5, 2015. Seemingly, John Oliver is unaware that the last several years have seen judicial action and legislation that address the costs of patent litigation and the vagueness of software patents. Whether these measures are sufficient without additional legislation is up for debate, but John Oliver's hypothesis is weakened by his reliance on outdated and largely irrelevant facts and data.

In the interest of making sure that truth isn't sacrificed for the sake of a few good laughs, the following points are worth noting:

1. Not every patent owner that licenses its patents rather than practicing them is a "patent troll."

John Oliver, like many comedians and Congressmen, attaches the epithet "patent troll" to a broad class of actors, namely, any patent owner that asserts patents that it does not practice in the course of making something. John Oliver suggests that, because a subset of these actors engages in unfair or deceptive practices, the entire class should pay the price. This is at odds with most notions of fairness, as well as a system of property rights that has served the U.S. economy well since the Eighteenth Century.

Restricting patent rights to practicing entities would exclude some of the most innovative segments of U.S. society: universities, those that lack the capital to manufacture products that practice their patents, and even — famously — Thomas Edison. As the Government Accountability Office ("GAO") found, "[h]istory is filled with examples of successful inventors who did not develop products based on the technologies they patented." Perhaps for this reason, in April, the Association of American Universities and the Association of Public and Land-Grant Universities collectively announced their opposition to the Innovation Act legislation recently championed by John Oliver. In an economy as specialized as ours, it makes little sense to require every innovator to be a manufacturer or else risk relinquishing the rights to their innovations. Those that excel at innovation should be entitled to focus on doing so without diverting their attention.

John Oliver's definition of "troll" would also sweep in financial backers of innovators who may have invested in a company that practiced its patents with the understanding that, even if that company's business failed, its patent portfolio would have value. That value currently serves as a significant hedge against the substantial risk of investing in new, often unproven technology, and erasing it would inexorably reduce investment in innovation.

In a 2013 report, the GAO reached the conclusion that, when considering patent reform, "the focus on the

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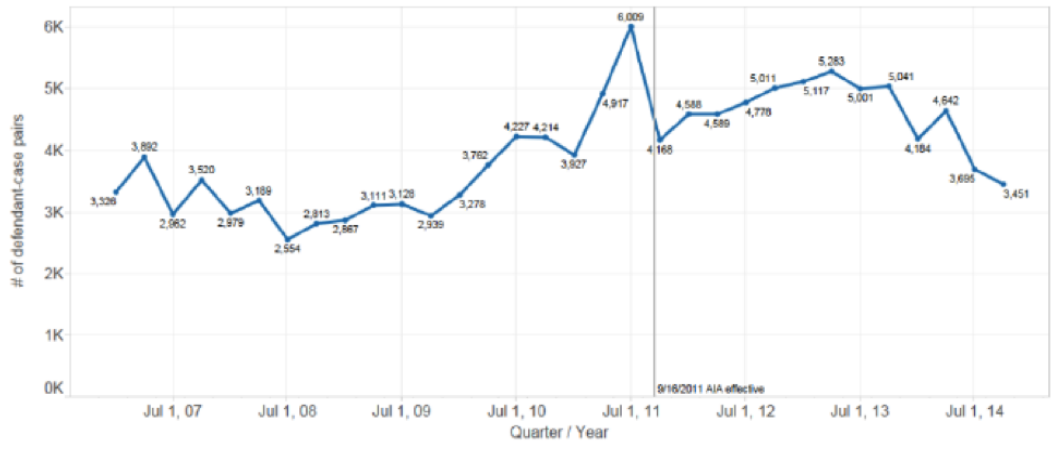
identity of the litigant … may be misplaced." Instead, the quality of issued patents was a more relevant concern, according to the GAO. As discussed below, Congress and the courts have taken significant steps to improve patent quality since the statistics John Oliver cites. These measures call into question the need for further legislation.

Any additional legislation, rather than punishing any patent owner that would license but not practice the patents it asserts, should target the behavior to which John Oliver actually objects. In fact, few would rush to the aid of "patent trolls" that send out non-meritorious demand letters to unsophisticated entities in hopes of extracting cost-of-litigation resolutions. But the Innovation Act would not affect these objectionable practices. It is worth noting that other legislation now pending in Congress, such as the Protecting American Talent and Entrepreneurship Act ("PATENT Act"), S.1137, and the Targeting Rogue and Opaque Letters Act ("TROL Act"), H.R. 2045, actually seeks to regulate these behaviors. The PATENT Act would penalize those who "engage in the widespread sending" of demand letters in bad faith, classifying demand letters of that kind as unfair or deceptive acts subject to redress by the Federal Trade Commission. The TROL Act includes similar measures. The Innovation Act, in contrast, would merely wag Congress's finger at this behavior in lieu of imposing a sanction. While it may be the case that none of the bills pending in Congress go far enough to deter misleading demand letters, the PATENT Act and TROL Act are – unlike the Innovation Act – a first step toward cracking down on the true "patent trolls."

2. Patent litigation is decreasing, and its costs are overstated.

Fueling John Oliver's critique of the patent system are statistics that are dated and, in some cases, thoroughly debunked.

For instance, John Oliver claimed that patent litigation was trending upwards, citing various statistics and reports from 2011 and 2012. As discussed throughout this piece, developments since then have materially changed the patent litigation landscape. As a result, the number of infringement lawsuits in 2014 declined 18% from the previous year, according to Lex Machina. This statistic actually understates the true decline in filings. The America Invents Act of 2011 ("AIA"), Public Law 112-29, restricted the circumstances under which a patent asserter could join multiple defendants in one lawsuit. Whereas a given lawsuit before the AIA could have numerous defendants but still account for just a single lawsuit in the statistics that John Oliver cites, in most instances post-AIA, each defendant must be named in its own complaint. As a result, a much more accurate measure of the real amount of patent litigation today is the number of defendants sued:



Source: Lex Machina.

By this measure, it is clear that, since a peak in 2012, the volume of patent litigation has decreased significantly. It also seems that the rate of decrease is accelerating.

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Moreover, the statistics John Oliver cites about the cost of patent litigation are misleading. He relies upon the 2011 study "Private & Social Costs of Patent Trolls," by Bessen, Ford, and Meurer, for the proposition that lawsuits by non-practicing entities ("NPEs") cost "investors half a trillion dollars" over twenty years. Serious questions have been raised in peer-reviewed journals and trade publications alike about the reliability of this study and these authors' successive articles on this subject. For instance, three-fourths of the cost the study attributes to litigation come from licensing fees. Many would argue that this simply reflects practicing entities paying appropriately to avail themselves of patented innovations.

3. With the America Invents Act of 2011, Congress has already taken steps to reduce the cost of patent litigation.

At the least, John Oliver's complaints about the cost of patent litigation are less pressing today given legislation implemented since the 2012 statistics he cites. For several reasons, including a concern for the cost of patent litigation, the America Invents Act of 2011 ("AIA"), Public Law 112-29, established inter partes review ("IPR"). Under this procedure, a petitioner (who may or may not be a defendant in an infringement action) can challenge the validity of a patent at the Patent Trial and Appeal Board of the U.S. Patent & Trademark Office ("PTAB"). IPRs proceed separately from any infringement action; in fact, lawsuits involving patents in pending IPRs are frequently stayed pending resolution of the IPR. The cost to litigate the validity of a patent in an IPR proceeding is far less than the cost of litigating in district court. By some estimates, attorney fees for a petitioner to take an IPR through completion can be as low as $200,000 , versus fees in district court estimated by AIPLA to run up to $3.6 million through discovery and $5.9 million in total.

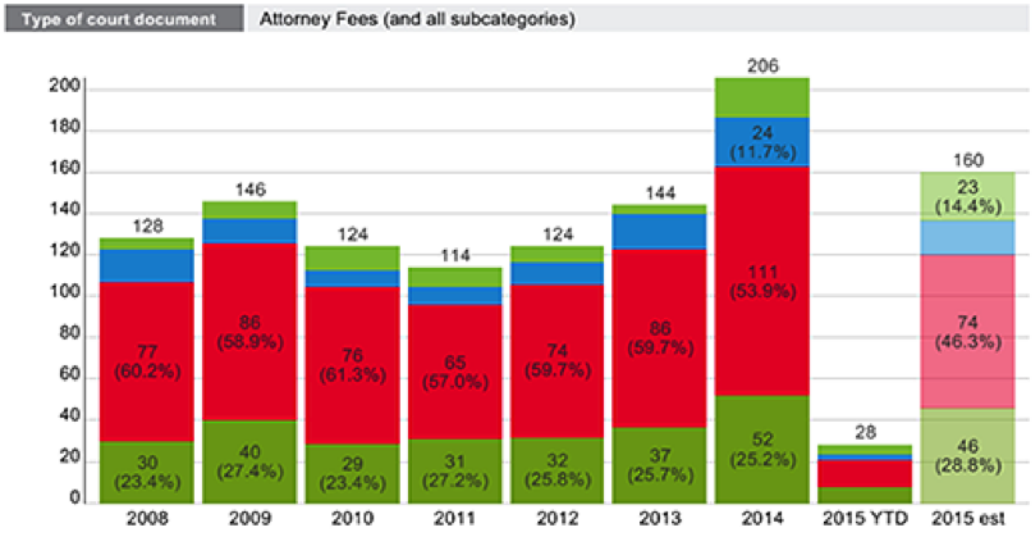
Petitioners have achieved great success challenging patents in IPR proceedings. In the first two years of the procedure's existence, the PTAB issued decisions on patentability in 66 IPR proceedings. Of these proceedings, there were six in which all claims — 148 claims in total — were deemed patentable, 10 cases in which only some claims were found patentable, and 50 cases in which all claims were found unpatentable. In other words, once an IPR was instituted, PTAB found all challenged claims unpatentable 73% of the time.

See McNamara and Driscoll, "Inter Partes Review Initial Filings of Paramount Importance: What Is Clear After Two Years of Inter Partes Review Under the AIA" (Oct. 21, 2014).

4. The Supreme Court has also recently addressed the costs of litigation.

Like Congress, the Supreme Court has recently taken measures that reduce the costs to defend against non-meritorious infringement allegations. Under 35 U.S.C. § 285, a district court may award attorney's fees in patent litigation upon a finding that a case is "exceptional." In *Octane Fitness, LLC v. Icon Health & Fitness*, the Court rejected the Federal Circuit test for "exceptional case," which required a finding either of litigation-related misconduct that rose to the level of sanctionable offense or that the litigation was both "brought in subjective bad faith" and "objectively baseless." Instead, the Court held, whether any given case is "exceptional" under the statute requires "case-by-case exercise of [the district courts'] discretion, considering the totality of the circumstances."

This new framework has resulted in a marked change in the number of fee awards in patent litigation. In 2012, parties in district court patent matters moved for attorneys' fees 124 times, prevailing at least in part 35% of the time. By 2014, the number of such motions had increased by 66%, to 206. These motions were granted at a similar rate — 37% — to the 2012 motions, resulting in an 85% increase in the number of granted motions for fees over this two-year span.



Count	2008	2009	2010	2011	2012	2013	2014	2015 YTD	2015 est
Granted	30	40	29	31	32	37	52	8	46
Denied	77	86	76	65	74	86	111	13	74
Partial	16	12	8	9	11	17	24	3	17
Other	5	8	11	9	7	4	19	4	23
Total	128	146	124	114	124	144	206	28	160

Percent	2008	2009	2010	2011	2012	2013	2014	2015 YTD	2015 est
Granted	23.4%	27.4%	23.4%	27.2%	25.8%	25.7%	25.2%	28.6%	28.8%
Denied	60.2%	58.9%	61.3%	57.0%	59.7%	59.7%	53.9%	46.4%	46.2%
Partial	12.5%	8.2%	6.5%	7.9%	8.9%	11.8%	11.7%	10.7%	10.6%
Other	3.9%	5.5%	8.9%	7.9%	5.6%	2.8%	9.2%	14.3%	14.4%

Source: DocketNavigator

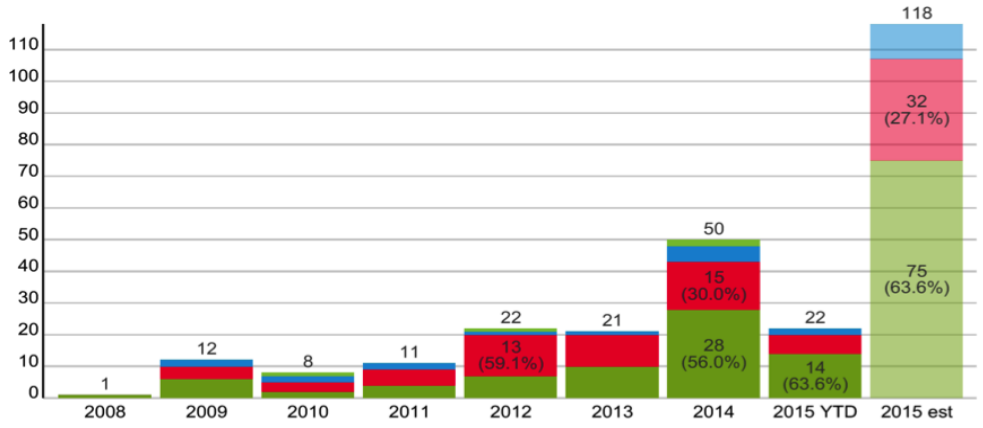
5. The Supreme Court addressed vague software patents as well.

The Supreme Court's 2014 opinion in *Alice Corp. v. CLS Bank International* struck a blow against what John Oliver decried as "vague software patents." There, the Court clarified the requirements for subject-matter

eligibility for patent protection under 35 U.S.C. § 101 and stressed that abstract ideas implemented using generic computers or components — the sort of vague claim language to which John Oliver objects — are not patentable.

Parties have used *Alice* potently and with increased frequency to challenge the validity of vague software patents. Nationwide, calendar year 2014 saw 50 challenges to the subject-matter eligibility of patents, more than double the number from the preceding year. 66% of these challenges were granted in whole or part.

Type of court document	Motion for Summary Judgment -- Other, OR Motion for Judgment as a Matter of Law, OR Motion to Dismiss -- Failure to State a Claim, OR Motion for Judgment on the Pleadings, OR Motion for Summary Judgment -- Patent Invalid, OR Findings of Fact and Conclusions of Law
Legal issue	Unpatentable Subject Matter



Count	2008	2009	2010	2011	2012	2013	2014	2015 YTD	2015 est
Granted	1	6	2	4	7	10	28	14	75
Denied		4	3	5	13	10	15	6	32
Partial		2	2	2	1	1	5	2	11
Other			1		1		2		
Total	1	12	8	11	22	21	50	22	118

Percent	2008	2009	2010	2011	2012	2013	2014	2015 YTD	2015 est
Granted	100.0%	50.0%	25.0%	36.4%	31.8%	47.6%	56.0%	63.6%	63.6%
Denied		33.3%	37.5%	45.5%	59.1%	47.6%	30.0%	27.3%	27.1%
Partial		16.7%	25.0%	18.2%	4.5%	4.8%	10.0%	9.1%	9.3%
Other			12.5%		4.5%		4.0%		

Source: DocketNavigator

Conclusion

Though entertaining, John Oliver's April 18, 2015 critique about patent system abuse rests on stale, discredited statistics. He ignored legislative and judicial measures implemented in the past several years geared at ameliorating the bulk of the problems he identified. Based on data from the past several years, these efforts appear to have reduced or even eliminated the need for further patent reform. Of course, given that John Oliver launched his HBO program *Last Week Tonight* with a series of very funny advertisements apologizing for not getting to the week's news immediately, perhaps it is understandable that he is only now getting to issues in the patent system from 2012.

If you have any questions about this topic, please contact the authors or your principal Mintz Levin attorney.

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