

PATENT LITIGATION SURVEY

The Boom Goes Bust

The number of patent cases filed in the U.S. declined in 2005, but the firms in our survey aren't feeling the pain—yet.

By Lisa Shuchman

Less Is More?

Filings were down amongst the firms that filed the most cases in 2005.

Rank 2006	Rank 2005	Firm	Total Cases
1	1	Fish & Richardson	75
2	3	Jones Day	53
3	4	Foley & Lardner	40
4	22	Morrison & Foerster	39
5	5	Howrey	37
5	15	Kirkland & Ellis	37
5	7	Morris, Nichols	37
5	N/A	Niro, Scavone	37
9	10	McDermott Will	34
10	9	Finnegan, Henderson	33
10	N/A	Kilpatrick Stockton	33
12	12	Greenberg Traurig	30
12	5	Kenyon & Kenyon	30
12	25	Sidley Austin	30
15	2	Knobbe, Martens	28
15	15	Potter Anderson	28
17	N/A	Baker Botts	27
17	19	Michael Best	27
17	8	Winston & Strawn	27
20	N/A	DLA Piper*	25
20	N/A	Wilson Sonsini	25
22	23	Alston & Bird	24
22	25	Fitzpatrick, Cella	24
22	N/A	Goodwin Procter	24
22	N/A	Perkins Coie	24
22	N/A	Weil, Gotshal	24
27	10	Connolly Bove	23
27	18	Dorsey & Whitney	23
29	13	Morgan, Lewis	22
29	N/A	Ropes & Gray	22
29	N/A	Townsend and Townsend	22
32	N/A	Duane Morris	21
32	N/A	Fulbright & Jaworski	21
32	N/A	Richards, Layton	21

Is the patent litigation boom over? Our annual patent litigation survey shows an overall decline in the number of patent cases filed in 2005—the first drop we've seen since we began publishing this list in 2000.

The survey is fairly straightforward. We count the number of new patent cases a firm initiated or defended in 2005. Firms with the most cases come out on top. It's a survey that reflects quantity. We tackled the quality question in our Litigation Department of the Year contest [January 2006]. The survey also reflects national statistics. Since 2000, the number of patent cases filed in U.S. district courts has risen steadily, with filings jumping 9.3 percent between 2003 and 2004, according to the Administrative Office of the U.S. Courts. In 2005, filings totaled 2,720, a sizable drop from the 3,075 cases filed in 2004, but still higher than a decade ago. In 1995, 1,723 patent cases were filed [see "A Decade of Growth"].

The dozen or so patent litigators and in-house IP lawyers we spoke with haven't yet felt the downturn. Joseph FitzGerald, vice president of IP at Symantec Corp. in Cupertino, California, believes patent litigation has at the very least remained steady. "The traditional

THE BOOM GOES BUST

litigation shops seem as busy as ever," he says. In May, FitzGerald's company, represented by Latham & Watkins, filed a patent suit against Microsoft Corporation, claiming the software

"Plaintiffs used to sue one infringer after another, or just one or two at a time," says one IP lawyer. "But now patent holders often go after all the infringers they can think of at once."

giant is misusing data management technology that Symantec acquired last year.

"We have not seen a trend toward any decline," says Douglas Luftman, associate general counsel for IP at Sunnyvale, California-based Palm Inc., noting that patent-holding companies have been more active and aggressive in pursuing licenses for patents.

Palm is one of 31 defendants named in a patent case involving JPEG technology brought last year by Compression Labs, which is owned by patent-holding company Forgent. The Austin-based video technology developer sued a who's who of tech giants, including Adobe Systems Inc., Apple Computer, Canon USA, Creative Labs Inc., Dell Inc., Eastman Kodak Co., Gateway Inc., Hewlett-Packard, IBM Corp., Panasonic Communications Corp. of America, and Toshiba America Inc. The case has swept up at least 27 law firms in its wake, including DLA Piper Rudnick Gray Cary (for Adobe), Fitzpatrick Cella, Harper & Scinto (Canon), Fulbright & Jaworski (Acer), Howrey (Toshiba), Irell & Manella (TiVo Inc.), Milbank, Tweed, Hadley & McCoy (Fujitsu Computer Products of America), and Wilson Sonsini

Goodrich & Rosati (Palm).

David Barkan, who heads Fish & Richardson's litigation group, says these kinds of cases may explain why there are fewer filings, but no drop-off in work. "Plaintiffs used to sue one infringer after another, or just one or two at a time," he says. "But now patent holders often go after all the infringers they can think of at once."

"Cases are getting larger, and the size of cases is not reflected in the statistics," says Barkan. Fish & Richardson saw a drop of two cases between 2004 and 2005, but remained at the top of the survey—a position it has held in four out of the past five years. The firm's 75 cases far outpaced second-ranked Jones Day's 53 cases.

Gross revenue at Fish & Richardson totaled \$246.5 million in 2005—up 9.8 percent from 2004, according to *The American Lawyer's* recent survey of the nation's highest-grossing law firms. And the firm's revenue from patent litigation rose 24 percent in 2005 over the previous year, says Barkan.

Revenue was also up at last

A few firms saw an increase in filings last year. Kirkland & Ellis jumped from fifteenth to fifth place, with an increase of 11. Morrison & Foerster also moved up—from twenty-second to fourth place.

year's second-place winner, Knobbe, Martens, Olson & Bear, which saw an 11.2 percent increase, to \$99 million. But new filings dropped dramatically, from 60 cases to 28, landing the firm in fifteenth place. Vito Canuso, chair of the firm's business development committee, says that 29 of the new cases Knobbe handled in 2005 were resolved within the year, making it

Taking the Lead

Firms that brought the most cases.

Rank 2006	Rank 2005	Firm	Plaintiffs Cases
1	N/A	Niro, Scavone	37
2	5	Morris, Nichols	23
3	3	Fish & Richardson	21
4	1	Jones Day	20
5	9	Fitzpatrick, Cella	19
6	N/A	Kilpatrick Stockton	18
7	6	Foley & Lardner	17
8	11	Finnegan, Henderson	16
9	4	Howrey	15
9	11	McDermott Will	15
11	11	Greenberg Traurig	14
11	N/A	Sidley Austin	14
13	15	Connolly Bove	13

On Defense

Firms that defended the most cases

Rank 2006	Rank 2005	Firm	Defense Cases
1	1	Fish & Richardson	54
2	5	Jones Day	33
3	16	Kirkland & Ellis	28
4	14	Morrison & Foerster	27
5	2	Kenyon & Kenyon	24
6	3	Foley & Lardner	23
7	7	Howrey	22
7	N/A	Wilson Sonsini	22
9	16	Michael Best	21
9	N/A	Weil, Gotshal	21
11	6	Winston & Strawn	20
12	N/A	DLA Piper	19
12	N/A	Goodwin Procter	19
12	16	McDermott Will	19
15	16	Alston & Bird	17
15	11	Finnegan, Henderson	17
15	10	Potter Anderson	17
18	N/A	Baker Botts	16
18	22	Greenberg Traurig	16
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22	N/A	Kilpatrick Stockton	15
22	N/A	Morgan, Lewis	15
22	N/A	Perkins Coie	15
22	N/A	Townsend and Townsend	15
27	8	Morris, Nichols	14
27	N/A	Orrick	14
29	14	Dorsey & Whitney	13
29	N/A	Richards, Layton	13
29	N/A	Ropes & Gray	13

ineligible for the survey's count [see Methodology]. Also, he notes that many of the cases the firm handled were larger. "Our revenues for patent litigation went up \$2.5 million in 2005," he says.

Robert Kahrle and Kenneth Adamo, coauthors of Jones Day's IP group, offer another explanation for the drop in filings: U.S. courts are seeing fewer patent suits because foreign jurisdictions are seeing more. Sometimes a case litigated successfully overseas can influence infringers in the United States, Adamo says. Jones Day has filed cases in Germany, for example, rather than in the U.S., for just that reason, and is currently handling three cases in overseas jurisdictions rather than in the U.S. courts. The firm, which has had patent litigators in Frankfurt, Munich, London, Brussels, and Paris for a while, has also opened offices in Beijing, Shanghai, Taiwan, and Hong Kong in the past few years, with an eye toward increased IP work in those offices.

A few firms actually saw an increase in cases last year. Kirkland & Ellis jumped from fifteenth to fifth place, with an increase of 11 cases. Twenty-five of Kirkland's 250 IP lawyers were tied up for two-and-a-half years representing

Newcomers to this year's most mentions list include Baker Botts, Wilson Sonsini Goodrich & Rosati, Duane Morris, and Goodwin Procter. Since 2002 Goodwin has bulked up from 30 to 110 IP lawyers.

surgeon-inventor Gary Michelson in a patent suit against Medtronic, Inc., explains Robert Krupka, who coauthors the firm's IP group. The litigation settled in 2005 with Medtronic paying \$1.35 billion. "Once that suit was over, more attorneys were free to take on new cases," says Krupka.

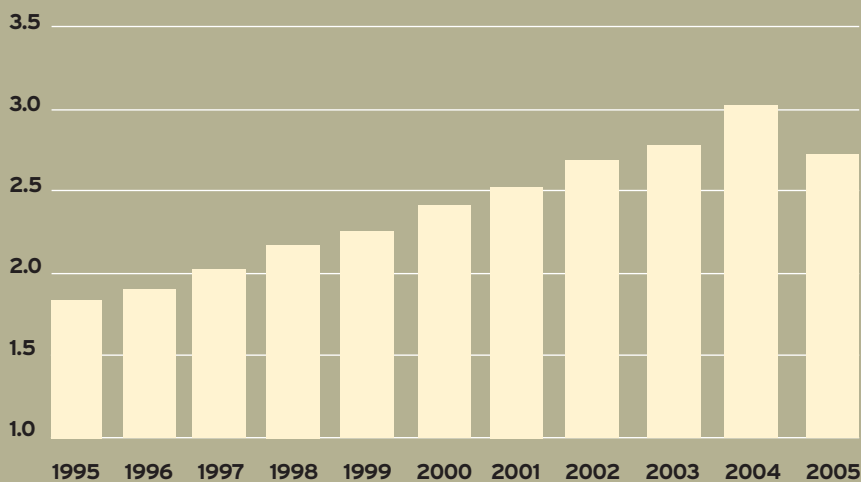
Morrison & Foerster filed 16 more cases in 2005 than in 2004, moving from twenty-second to fourth place. Harold McElhinny, cochair of MoFo's IP Group, says the firm gets more work because it has so many partners capable of

first-chairing a patent suit. The San Francisco office, for example, is home not only to McElhinny, but also to Michael Jacobs, who won a summary judgment ruling for noninfringement on behalf of client Think Outside Inc., a designer of foldable keyboards. In 2004 Rachel Krevans, also in San Francisco, won a settlement valued at about \$100 million for client Chiron Corp. against Roche Molecular Systems, Inc. In New York, Karen Hagberg successfully defended Fujitsu Ltd. against the University of Illinois, in a patent case involving flat panel

plasma displays. In San Diego, David Doyle is representing Bridge Medical Inc., General Atomics, and DexCom Inc. In Los Angeles, Vincent Belusko obtained a judgment for an inventor who sued Microsoft Corp. for patent infringement—a ruling that has forced the software giant to put more than \$60 million into escrow pending appeal. Finally, the Palo Alto office is home to Gerald Dodson, who this year obtained a \$200 million settlement from Monsanto Co. for the University of California ["Cash Cow," May 2006].

A Decade of Growth

The number of patent suits filed in federal courts (in thousands).



Source: Judicial Business of the U.S. Courts – Annual Reports

Back in the Day

When we first published this survey in 2001, Fish & Neave led the pack, and Brobeck and Lyon & Lyon were still around. These were the firms with the most filings five years ago:

Fish & Neave	41 cases
Fish & Richardson	40 cases
Morrison & Foerster	39 cases
Morris, Nichols	38 cases
Brobeck, Phleger	37 cases
Howrey Simon	32 cases
Lyon & Lyon	31 cases

There were also some newcomers to this year's most-mentions list, including Baker Botts, Wilson Sonsini Goodrich & Rosati, Duane Morris, and Goodwin Procter. Since 2002, Goodwin has gone from 30 to 110 IP lawyers, says Ethan Horwitz, chair of the firm's IP group.

And Ropes & Gray, which acquired Fish & Neave in 2004, makes a debut of sorts this year: Fish & Neave hadn't made the list since 2001. ■

THE BOOM GOES BUST

METHODOLOGY

In March, *IP Law & Business* contacted more than 200 law firms, asking for a list of patent suits that they filed in federal courts in 2005 that were still active as of February 1, 2006. (We didn't want to count cases that disappeared quickly.) From there we whittled down the submissions, eliminating international cases, International Trade Commission cases, and appellate cases. We did not make a distinction between firms acting only as local counsel or trial counsel, simply because it turns out to be a difficult line to draw. (What's more, in selecting local counsel, do you want a firm without trial experience?) We did not measure the complexity of cases or a firm's success.

Straightforward enough, but the next part gets a bit more subjective. On the plaintiffs side, we didn't count

all cases. Here's why: We didn't want to penalize firms that filed a single suit against multiple defendants when another firm may choose to file individual cases. So when a firm listed multiple cases with the same plaintiff, we asked the firm to explain why we should count them separately. If the cases involved different sets of patents, different technology, or different discovery tracks, we counted the cases separately. But if the cases involved the same patent, highly similar technology, or consolidated discovery, we counted them as one. We made those decisions case-by-case.

At the end of the exercise, we prepared a list of the firms that handled at least 13 plaintiffs cases or 13 defense cases in 2005. Our main chart lists the firms that filed more than 20 total cases.

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