Software Patent Litigation: What have we learned?

Deb Nicholson
Open Invention Network
LISA, November 11th, 2015

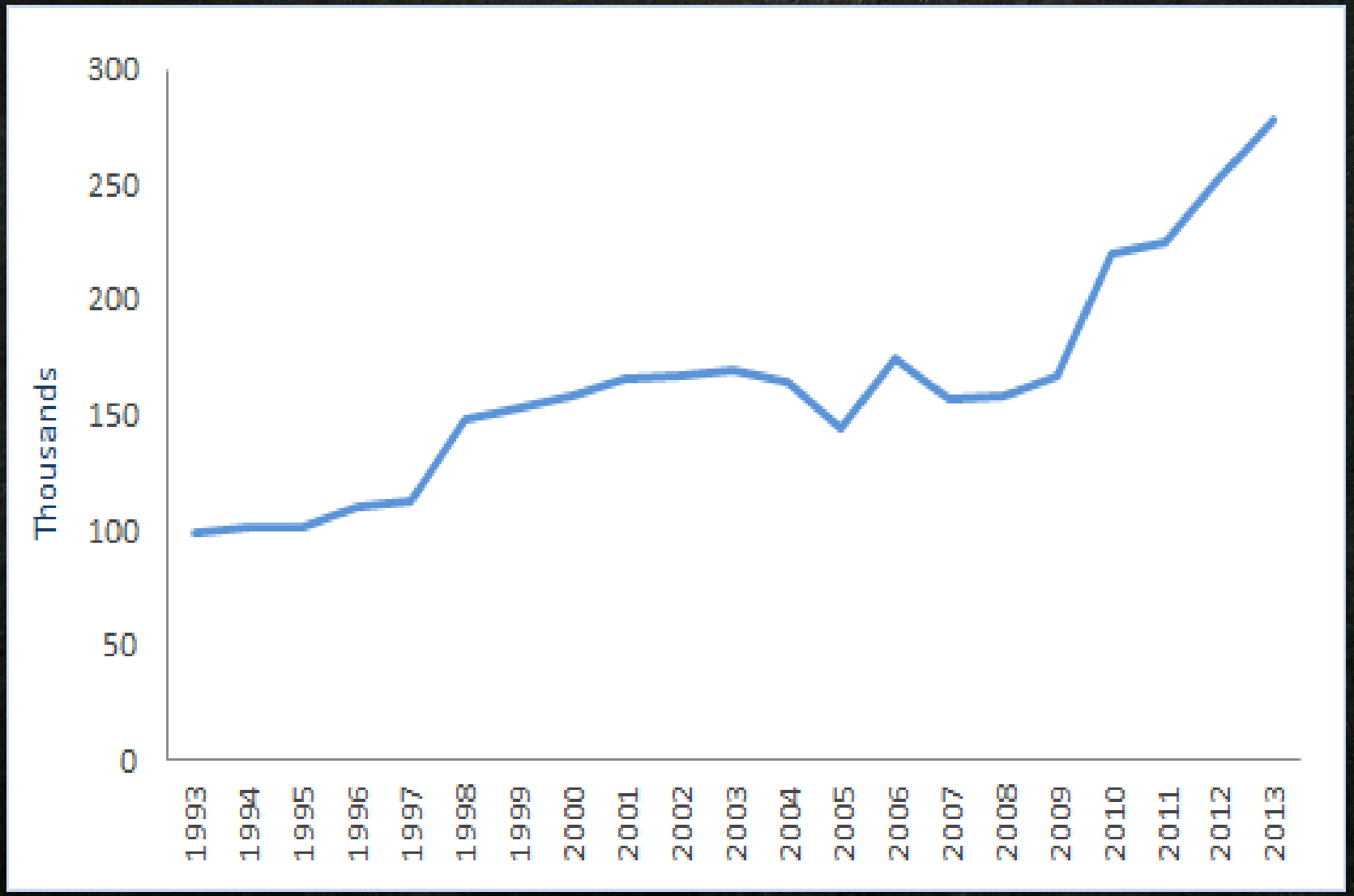
I am not a lawyer.

This is not legal advice.

Big Picture

300,000 patents were
granted in the US
in the last year

99 problems,
but an invention ain't one



U.S. Utility Patents Issued Over Time,
courtesy of www.patentfreedom.com

About 50% percent of those were given to inventors outside the US

Global Trends

Software Patents Issued To Date

US: 799,050

Australia: 53,278

European Patent Office: 108,977

China: 9,860

Korea: 2,362

Canada: 2,109

Japan: 1,993

Great Britain: 672

Germany: 606

From lens.org, on Jan. 30th, 2015

Trolls are bringing 11% of UK suits

Source: Stefania Fusco, Markets and Patent Enforcement: A Comparative Investigation of Non-Practicing Entities in the United States and Europe, 20 M ICH . T ELECOMM . & T ECH . L. R EV . 439 (2014)



Foreign inventors are very successful in the US courts



Barristers & Bottomfeeders



65% of litigated
NPE suits have
software-related claims

"An Empirical Study of Patent Litigation Timing: Could A Patent Term Reduction Decimate Trolls Without Harming Innovators?" Brian J. Love, 2012

Contingent fee representation is on the rise



The economy even affects lawyers

"Even with a 40% contingent share, we need at least $5 million in damages to break even."

The Rise of Contingent Fee Legislation, David L. Schwarz (2012)

Many firms go after weaker defendants first

Smaller firms go with quantity over quality



Even if you win,
getting sued sucks

Judges & Juries

In the 90's defendants needed to find prior art or prove that their work was out of scope

"Understanding the realities of Modern Patent Litigation" (2014 : Allison, Lemley & Schwartz)

Nautilus v. Biosig ruling:
vague patents aren't enforceable

Alice v. CLS Bank ruling:

generic computer implementation isn't patentable

”The Supreme Court recently reaffirmed that fundamental concepts, by themselves, are ineligible abstract ideas.”

Federal Circuit, Digitech Image v. Electronics for Imaging, Inc.

McRO v. Activision:

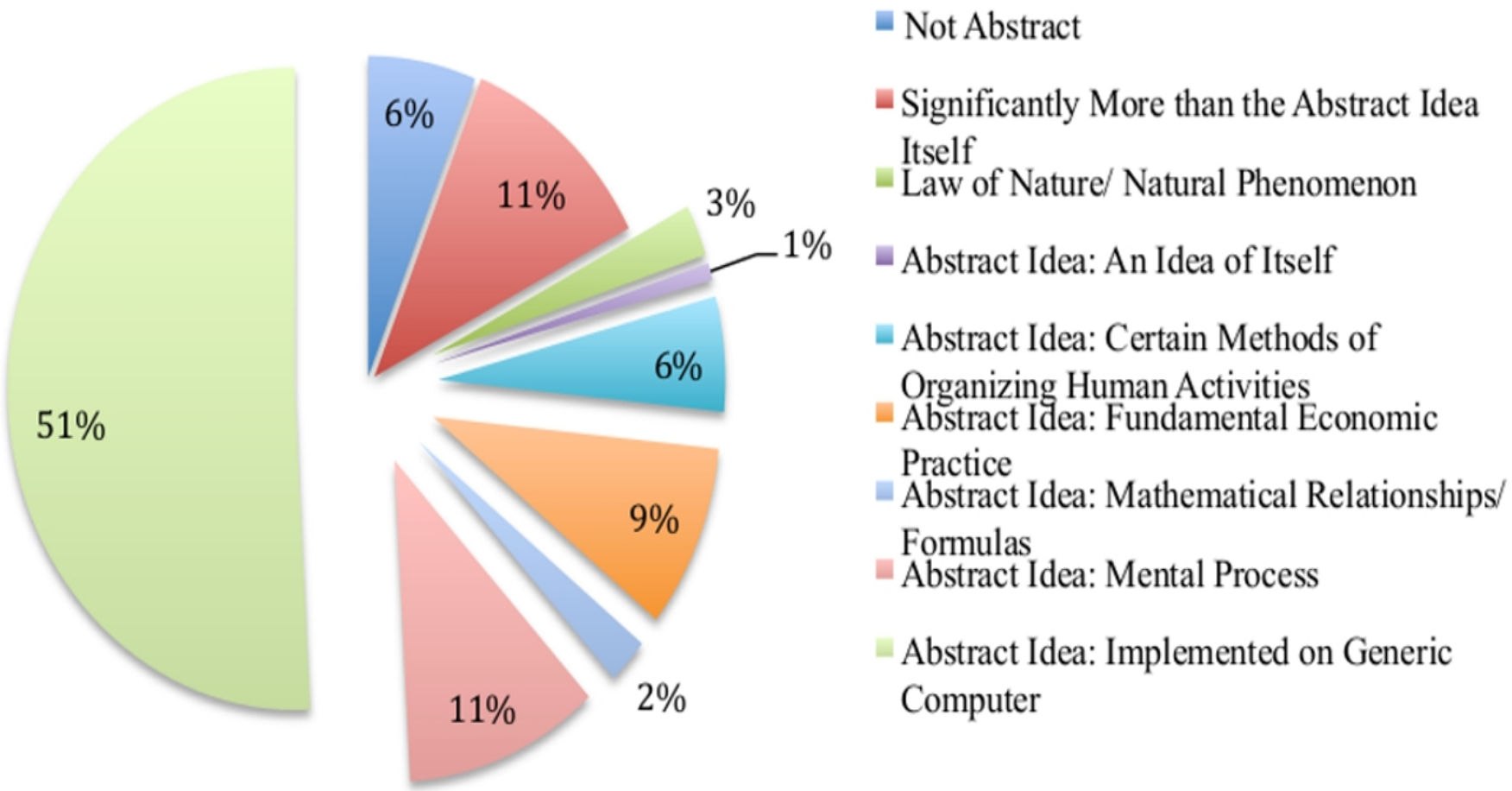
"This case illustrates the danger that exists when the novel portions of an invention are claimed too broadly."

Judge Wu

More experience with patent suits makes judges **less** likely to rule for patent-holders

Does Familiarity Breed Contempt Among Judges Deciding Patent Cases?,
Mark A. Lemley, Su Li, and Jennifer M. Urban, 2013

Figure 1. The courts' implementation of *Alice*



Jasper L. Tran, Software Patents: A One-Year Review of Alice v. CLS Bank, 97 Journal of the Patent and Trademark Office Society 532, 540 (2015)

Four out of five software patents could be bogus?


START
FINISH

Juries are another story...


GRANT
WOOD

Judges tend to rule for the patentee only half the time

Juries rule for the patentee over two-thirds of the time

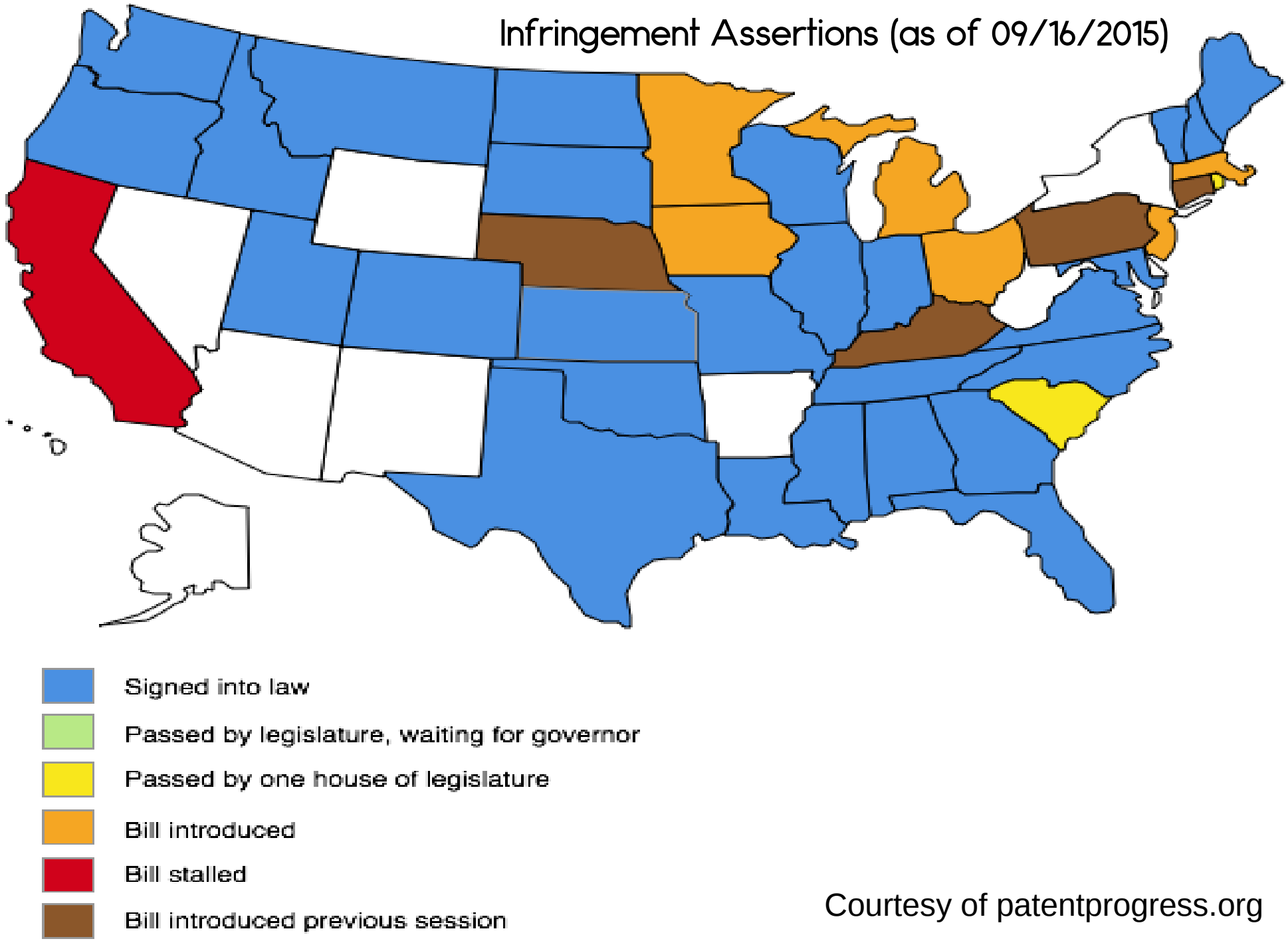
Today over 70% of patent cases are heard by juries

It used to be closer to 5%

What's working and what isn't

Germany, New Zealand and India have put strict limits on patentability

States Acting Against Bad Faith Patent Infringement Assertions (as of 09/16/2015)



Courtesy of patentprogress.org


Sometimes democracy
works!

And sometimes it's a little trickier...



” ...each Party shall make patents available for any invention, whether a product or process, in all fields of technology, provided that the invention is new, involves an inventive step and is capable of industrial application.”

From the Trans-Pacific Partnership Agreement

The Open Invention Network:
1800+ FLOSS companies
and projects that
don't sue each other

We also coordinate defensive publishing

Homework

Patent-busting sites

http://linuxdefenders.org/

https://trollingeffects.org/

http://patents.stackexchange.com/

Join OIN



Pass local laws



Further reading

The Trans-Pacific Partnership Agreement, http://ur1.ca/o9dwh

The Rise of Contingent Fee Representation in Patent Litigation by David L. Schwartz (2012)

Does Familiarity Breed Contempt Among Judges Deciding Patent Cases?, Mark A. Lemley, Su Li, and Jennifer M. Urban, 2013

Software Patents: A One-Year Review of Alice v. CLS Bank, Jasper L. Tran, 2015

Inter Partes Review: An Early Look at the Numbers
Brian J. Love & Shawn Ambwani, 2015

Picture and Font Credits

US Transparency Legislation, courtesy of www.patentprogress.org

U.S. Utility Patents Issued Over Time & Operating Company Parties in NPE Lawsuits Over Time, courtesy of www.patentfreedom.com

The courts' implementation of Alice: Jasper L. Tran, Software Patents: A One-Year Review of Alice v. CLS Bank, 97 Journal of the Patent and Trademark Office Society 532, 540 (2015)

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