

Patent Litigation: >>>

DON'T GET CAUGHT IN THE STORM

June **2017**

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PATENT LITIGATION: DON'T GET CAUGHT IN THE STORM

Patent risk—the possibility of being sued for patent infringement—is a complex and potentially devastating impending storm for businesses of all sizes.

Litigation related to alleged patent infringement has resulted in settlements ranging from tens of thousands of dollars to more than \$1 billion. And while the most expensive, high-stakes cases often involve powerhouse litigants, any company that makes, sells, or even just uses a product or service containing patented technology can find itself wrapped up in a patent suit. With the proliferation of technology and a record number of patents issued each year, the likelihood that a company will have to defend itself against a patent infringement allegation is heightened.

Thousands of companies all over the world are accused of patent infringement each year, said Kimberly Klein Cauthorn, intellectual property leader at Willis Towers Watson. According to recent estimates, nearly 5,000 companies were sued in the US for patent infringement last year. And while the majority of patent infringement suits are and will continue to be filed in the US, sources said the number of filings in countries such as Germany and China are increasing.

“Whether you’re a start-up or a multibillion-dollar company, this risk exists for you,” Cauthorn said.

Without insurance, companies can be caught off guard with little information, facing the prospect of spending millions of unbudgeted dollars on a lengthy trial.

“This may be the most expensive type of litigation to get involved in. Lawyers are expensive,” said Donald Glazier, vice president - claims counsel at Lockton Companies. Attorney fees alone in these suits can approach hundreds of thousands of dollars. Data from RPX Corp., a patent insurance provider and patent risk management services company, indicates that in an average case, legal fees are typically at least half of total case costs.

In addition to the direct expenditures of time and money, experts said patent suits often force small- and medium-sized companies to delay innovation and can cause them to lose out on additional funding rounds—sending business plans into a tailspin. At larger businesses, valuable executive time and company resources are diverted to handle lawsuits, putting pressure on earnings.

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AN ATTACK FROM MANY ANGLES

A patent is “an intellectual property right” granted by the US Patent and Trademark Office that “gives a patent owner the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States.” Litigation has traditionally been the primary way for patent owners to enforce this right and establish a value for their patent.

Since anyone can own a patent, litigation can surface from several angles. Broadly, the risk is associated with the accusation or allegation of infringing upon a patent owned by someone else, but the accusations fly for different motives.

One motive relates to a conflict involving one company alleging patent infringement on another. For instance, big box retailers are often the target of suits alleging patent infringement related to ecommerce or point-of-sale

technology. These types of suits can also be applied to smaller companies in these industries.

Some companies use patent litigation as part of a competitive strategy, i.e. a large, well-entrenched company looking to knock down a newcomer by challenging its patents or by alleging infringement.

“Rather than compete in the marketplace, they are competing in court,” writes Rick Betterley, president of Betterley Risk Consultants, in his annual “Intellectual Property and Media Liability Insurance Market Survey.” Betterley said the protection of a smaller company’s intellectual property “may be their most important responsibility and the difference between success and failure.”

Other patent owners seek to extract value from their patents to generate revenue. Many companies have valuable patented technology from the products they’ve developed, and look to license or sell those patents as an additional source of revenue. Other companies may own patents, but do not do any business related to the patent. These entities file waves of cases against many companies at the same time, alleging infringement and seeking to extract quick settlements. Their targets are often smaller companies who are the least prepared to handle litigation. In comparison to higher-profile cases, settlements may look somewhat trivial in these types of cases, but to smaller companies, months-long litigation and the associated price tag may be more than they can bear.

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With the various ways in which a company can face patent litigation, it’s no surprise Cauthorn said companies “are more like to face a patent infringement claim than a D&O claim.”

While some US legislation has recognized the patent litigation logjam and some court decisions could imply the risk is not what it once was, there remains a simple fact: there is almost an unlimited supply of patents. Total patent grants by the US Patent and Trademark Office eclipsed 300,000 the last three years, and “there’s a lot of money to be made monetizing these assets,” said Cauthorn.

‘VIBRANT’ INSURANCE MARKET

Typical commercial insurance programs, sources said, do not cover intellectual property claims. But interestingly, the patent insurance market is, as Cauthorn described, “the most vibrant it’s been” in the 15-plus years she has been involved. It’s no secret the insurance industry as a whole has abundant capacity and there are several insurers researching whether patent risk is a place where they can diversify their books of business.

A fair amount of carriers are currently involved—right now there are eight insurers of patent infringement coverage, according to Betterley. Each have varying degrees of experience and data to quantify the likelihood and severity of claims, though some providers are able to model a company’s risk.

Buyers should seek some assistance in getting appropriate coverage since applications, policy forms, perils, underwriting and costs differ insurer to insurer, brokers said. Nevertheless, meaningful limits and some other interesting tools are available. From RPX Insurance Services, a subsidiary of RPX Corp., clients can benefit from the company’s actuarial model built upon its proprietary data, its ability to purchase patents preemptively, and its risk

mitigation services. These features combined can prevent or mitigate litigation and reduce a company's per case costs.

However, carriers are "fighting against inertia," said Gauthorn. Companies that should be buying insurance just aren't—even though a start-up company could pay between \$5,000 and \$7,000, if not less, for \$1 million in coverage. One attorney involved in large-company litigation said nearly all do not possess insurance.

"Most companies that have intellectual property recognize the value of those assets and the risk, but many think insurance is not robust enough to address the risk," Glazier said. "The sense is it may not be palatable financially but I can't imagine there isn't regret when a company gets sued and doesn't have coverage."

Brokers said more carriers entering the patent insurance marketplace could increase competition, broadening the market. More carriers may also increase awareness of patent insurance and risk mitigation solutions as well as encourage a better understanding among clients of frequency and severity trends.

"When a company is facing down a lawsuit that can cost it upwards of \$2 million, insurance can offer more than just a cap on litigation costs. With the right provider, a company can make smarter decisions about its litigation strategy, as well as access experts, tools, and resources that may reduce the time it spends in litigation and similarly its overall costs," said Paul Scola, head of RPX Insurance Services.

Insurance and some interesting pre- and post-litigation risk management products available would benefit companies looking to protect patent assets just as companies would protect their property from fire. Brokers know that insurance should be part of a solid business continuity plan, and patent litigation insurance should be a part of their conversations with every company—especially those with a limited ability to sustain seven-figure losses.

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