Controlling The Costs Of Intellectual Property Litigation

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In 2009, the cost of the average patent lawsuit, which was $5,000,000 in 2007, rose to $5,500,000.[1] The increased cost of patent litigation was indicative of the overall trend in intellectual property (IP) litigation. Across the board, the cost of IP litigation has risen substantially in recent years. Since 2001, the cost of patent, trademark and copyright lawsuits has risen 48 percent, 38 percent and 73 percent respectively. And with estimates showing the cost of IP litigation rising at almost 20 percent a year, there is no indication that the trend of rising costs will end anytime soon.

Cost is not the only aspect of IP litigation that has steadily grown in recent years; the number of IP litigation lawsuits filed has also seen steady growth over the past 30 years. Even with the recent economic downturn, the number of new patent cases has remained fairly steady. With both the cost of IP litigation and the number of IP suits filed rapidly growing, the chances of your company being involved in an expensive IP lawsuit is becoming less of a possibility and more of an inevitability. But by taking the right preventative measures now, your company can seek to control the cost of its IP litigation and to reduce the likelihood of being in a lawsuit altogether.

Steps To Avoid Litigation

The best way to control the cost of litigation is to avoid litigation altogether. Whether your company is the plaintiff or defendant, the cost of IP litigation can be staggering. But your company does not have to accept the high cost of litigation as a cost of doing business. While avoiding litigation is not always possible, your company can make litigation less likely simply by knowing your business, knowing your industry, protecting your business and being open to alternative resolutions to disputes.

In order to know your business, your company should conduct regular IP audits of your patents, copyrights, trademarks and trade secrets. Knowledge of your business alone is not sufficient to avoid litigation; your company should also be aware of your competitors' products and what they might be working on for the future. Consider using search filters like Google Alerts[2] or LexisNexis[3] to monitor your industry, allowing you to better understand your competitors' IP. There are also commercially available watch services that will monitor for patents and trademarks that your competitors are obtaining. In addition, pay special attention to your competition's press releases, shareholder announcements, or website updates for indications of what products or services might potentially conflict with yours.

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While knowing both your business and your industry is critical in an attempt to avoid costly litigation, your company can also make IP litigation less likely by protecting its own business IP. By taking steps to protect its IP, your company makes litigation not only less likely but perhaps less expensive when it does occur, as any potential plaintiff may be subject to counterclaims for violating your IP. Your company should also brand its products and services and make sure that its advertising and marketing departments are using the brands appropriately. Improper protection generally offers your company no protection at all. Your company should also have signed written agreements with any employee who contributes to the creation of IP that grant exclusive ownership of the IP to the company. Additionally, your company should take steps to protect its trade secrets by controlling the dissemination of confidential information. Once your company has sought and obtained IP protection, frequently monitor your IP portfolio and immediately address any potential threats to your IP rights. While the practices of knowing your business, knowing your industry and protecting your IP can be tedious, they may benefit your company by reducing the likelihood of litigation or at least its costs.

Your company should also understand that the courthouse is not the only option to settle IP disputes. Often companies can save a great deal of money by making the courthouse the last option for dispute resolution. In addition to traditional ADR methods of dispute resolutions, IP disputes can often be resolved through licensing agreements or joint ventures. In fact, such solutions might not only save your company money in litigation expenses but might provide it with an opportunity to profit.

Finally, working out an agreement prior to litigation is generally much cheaper than a settlement negotiation during litigation. Settlement negotiations are done on the assumptions that your company infringed and your opponent's IP is valid. Conversely, pre-lawsuit negotiations allow your company to appropriately value the probability that your company actually infringes on your opponent's IP and the validity of its IP. Additionally, a pre-lawsuit licensing agreement typically includes considerations such as cross-licenses and covenants not to sue, which can be valuable to a company.

Develop A Litigation Strategy That Achieves Your Goals

While avoiding litigation is the best way to control the cost, it is not always a practical solution, as some disputes simply require litigation. In such situations, the tactics and strategies your company uses will vary based on the specific situation, but the ultimate goal of your company should be to obtain the best results in a cost-effective manner. Efficient handling of a case requires your company to have a well-developed strategy, whether acting as the plaintiff or the defendant.

As a plaintiff your company should know what the ultimate goal of the litigation is and gear the strategy toward accomplishing that goal. Your strategy may change based on whether the lawsuit's objective is money, an injunction or increased market share. Additionally, any effective strategy must be premised on the strength of the underlying IP. Prior to initiating a lawsuit, your company should take a critical look at its IP portfolio. It doesn't make sense to pursue costly litigation if the underlying patent is likely invalid. Each lawsuit should be viewed as a proposed investment, with the company only participating if there is the possibility of a positive return. A positive return is not always simply monetary; it might be an injunction or to achieve a higher market share. But you do not want to spend an inordinate amount of time and money preparing for trial only to realize that you can never recover that amount in damages or realize your business objectives.

When your company is the defendant, a critical element of an effective strategy is to understand your opponent's goals. In the patent litigation field the motivation behind a lawsuit may be different if your opponent is a competitor rather than a non-practicing entity or NPE (i.e., patent troll). Your strategy should adapt based on your opponent's goals. The ultimate goal as a defendant should be to win the case as cost-efficiently as possible. One way to handle cases in a cost-effective manner is to create a budget with your counsel and stick to it.

Strategies for handling an NPE lawsuit are different than in a competitor lawsuit and require an understanding of the NPE's motivation for the lawsuit. NPEs are not in the industry and do not want an injunction or increased market share; they simply want money. From the NPE's perspective, a lawsuit is strictly a financial investment. Accordingly, one of the most effective strategies for handling an NPE lawsuit is to make the lawsuit a costly proposition for the NPE. It is critical to make the NPE plaintiff prepare proper infringement contentions early on, as these are costly to prepare and require a great amount of detailed information. Your company should also consider seeking a reexamination of the NPE's patent(s). Reexaminations can be costly for patent owners and even eliminate the lawsuit altogether. But reexaminations are not without risks: depending on the type of reexamination, your trial strategy may be affected by the outcome. Moreover, prior to requesting a reexamination, you should know your court and whether or not a reexamination will stay the lawsuit.

Often NPEs do not sue just one defendant, but rather target entire industries. In these situations, it may be in your company's best interest to form a coalition with co-defendants. Forming a coalition can reduce the cost of litigation by sharing the overhead among your co-defendants.

Understand Your Insurance Policies

Will your insurance policies cover the cost of the litigation? Typically, a company that has a commercial general liability (CGL) policy may attempt to obtain coverage under the "advertising injury" provisions of the policy after an IP suit has been filed, but how the coverage is applied by the courts can vary greatly.

For example, the court in *Capitol Indem. Corp. v. Elston Self Serv. Wholesale Groceries*, 559 F.3d 616 (7th Cir. 2009) (applying Illinois law), held that the insurer was required to defend the policyholder in a trademark infringement case under the advertising injury provisions of the policy. The insurer attempted to invoke an exclusion to bar coverage, but the court found the argument unconvincing, holding that a plain reading of the exclusion did not abrogate the insurer from its duty to defend.

The policy language itself is the most important factor in determining coverage. Courts will not go outside the plain meaning of the language in the policy to provide relief for the insured. For example, in *Discover Fin. Servs. v. Nat'l Union*, 527 F. Supp. 2d 806 (N.D. Ill. 2007) (applying Illinois law), the court granted summary judgment for an insurer, finding that it did not have a duty to defend the insured in its patent infringement action. Despite the insured's attempt to redefine the claims through interrogatories, the court held that the insured's claims did not qualify for coverage.

Traditionally, companies have relied solely on the CGL policy to cover their business risks, but as the insurance industry has adjusted to avoid providing protection for newly evolved risks, like IP litigation, companies should consider purchasing specialized insurance policies to ensure coverage, where and if available.

Conclusion

Knowing your business and being familiar with your competitors' activities, protecting your business from IP ownership challenges, and being open to alternative methods of resolving disputes are just a few suggested practices for avoiding or at least mitigating the costs of IP litigation. While there are varieties of methods to lessen your chances of being involved in litigation, litigation is sometimes unavoidable. Therefore, your company should also develop strategies to appropriately deal with litigation when it arises. As a plaintiff, your company should only pursue litigation that presents the possibility of a positive return. As a defendant, your strategy will vary based on the specifics of the case, but it should also keep in mind the goals of your opponents. Your company should also consider whether it might benefit from a traditional CGL insurance policy. Additionally, your company might want to examine the insurance marketplace for specific IP insurance coverage.

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[1] *See the 2009 AIPLA Economic Survey at pp. 138 to 141.*

[2] *http://www.google.com/alerts.*

[3] *http://www.lexisnexis.com.*

Please email the author at swarren@akingump.com with questions about this article.