

## **Pursuing An Intellectual Property Lawsuit Without Bankrupting Your Company**

The American Intellectual Property Law Association reports that it can cost in excess of \$1M to pursue an IP infringement lawsuit, such as one for patent infringement. Whether for a start-up company or a Fortune 500 company, the costs of litigating an infringement lawsuit is substantial. However, for a start-up or mid-sized company, the litigation cost can effectively bankrupt the company.

Contingency fee arrangements, however, can enable a company to cost-effectively pursue an infringer. In a contingency arrangement, the attorney bringing the lawsuit recovers all or a portion of attorney's fees based on a percentage of what the plaintiff recovers through settlement or trial.

But what circumstances will make an infringement action a good candidate for a contingency fee arrangement – that is, one in which a plaintiff's attorney is motivated to work on a contingency basis?

### **Validity Opinion**

Only a valid IP right, such as a patent or trademark, can be infringed. It therefore becomes imperative that the attorney bringing the lawsuit has a high degree of confidence in the validity of the IP right. If the IP right is not valid, there can be no infringement, and thus no recovery of money by the plaintiff. Without a recovery by the plaintiff, the attorney receives nothing.

A high (or low) confidence level in the validity of the IP right can come from a validity search. This is a search to determine if the infringed IP right is valid in view of previously established IP rights, such as prior patents.

Regardless of who conducts the search, a validity opinion that interprets the results of the search should be obtained. It can be beneficial for the plaintiff's attorney to provide the validity opinion since it is that attorney who will need to be familiar with the background of the IP right. Having analyzed the search results and having formed an opinion on validity will enable the plaintiff's attorney to better defend the validity throughout the litigation and trial.

### **Infringement Opinion**

Even if armed with a strong validity opinion, the plaintiff's attorney also needs to be armed with an opinion that there is a strong case for infringement. Better yet, the opinion may conclude that the infringement was willful. Willful infringement might exist, for example, when the infringer has effectively ignored the plaintiff's rights. In such instance, the damages recoverable by the plaintiff may be enhanced and, likewise, the recovery by the plaintiff's attorney. With the potential for a greater recovery by the attorney, a lower percentage of plaintiff's recovery might be acceptable to the plaintiff's attorney.

**Potential Recovery**

If the plaintiff is primarily interested in enjoining the infringing activity, an injunction without monetary damages can result in no compensation to the plaintiff's attorney. Thus, the absence of a potential monetary recovery will not motivate the plaintiff's attorney to work on a contingency. Likewise, and it goes without saying that, the potential for a greater damages suffered by the plaintiff (and thus greater compensation to the plaintiff's attorney) will motivate the attorney to work on a contingency basis.

**Defendant's Ability to Pay**

Having a strong case and the potential for large damages is meaningless if the defendant cannot pay a large settlement or judgment. Investigation into the defendant's financial wherewithal is accordingly important. The investigation can be as simple as running a credit report or checking a Dun & Bradstreet report.

Importantly, the investigation should occur before the lawsuit is initiated rather than after the plaintiff has a judgment. By investigating the defendant before filing suit, the plaintiff and the attorney can better assess if the time and expense of the lawsuit are outweighed by the potential recovery.

**Conclusion**

A contingency fee arrangement provides an avenue for a plaintiff who might otherwise be unable to pay the attorney's fees on an hourly basis to pursue an infringer. The terms of the contingency can vary - from all or just a portion of the attorney's fees coming from the plaintiff's recovery. Similarly, the arrangement can include the plaintiff advancing all or a portion of the out-of-pocket costs by the attorney (as distinguished from attorney fees). Whatever the terms of the arrangement, it is one worth exploring for IP infringement lawsuits.