IPRs: Balancing Effectiveness vs. Cost

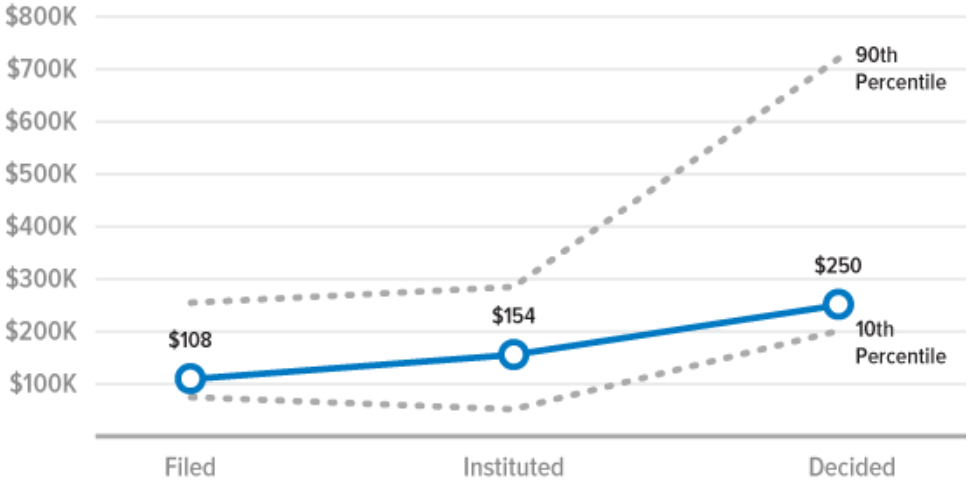
June 17, 2016

Our continued study of *inter partes* review (IPR) as a potentially cost-effective alternative or adjunct to district court litigation shows that IPRs are relatively cheap *per petition*—but single-petition IPR strategies are not always sufficient. Multi-petition strategies, on the other hand, can cost millions. Whether IPR is a cost-effective strategy to deal with a patent assertion or an expensive detour depends on the chosen strategy and the circumstances of the campaign.

The cost baseline

Data confirm that an IPR generally costs in the six figures. Most range from about $100,000 to $700,000, depending on the litigation stage reached. As illustrated by the percentiles, costs vary widely even at the same stage; indeed, some petitions cost more just to file than others cost to reach final decision. This variation likely reflects case-specific circumstances that drive costs. For example, some petitioners use a "copycat" strategy, filing a petition that lifts the arguments from an existing IPR that the new petitioner then seeks to join. Such a petition requires far less counsel time, which is the most significant component of cost.

Figure 1: Median and Range of Costs per IPR Petition (Cumulative, by Stage)



Hisense Ex. 1024, p. 1
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To be sure, a six-figure price tag is much cheaper than the total cost of defense for most district court litigations, which can reach into the seven figures by the time validity is usually determined—that is, at summary judgment or trial. This math makes IPR an attractive

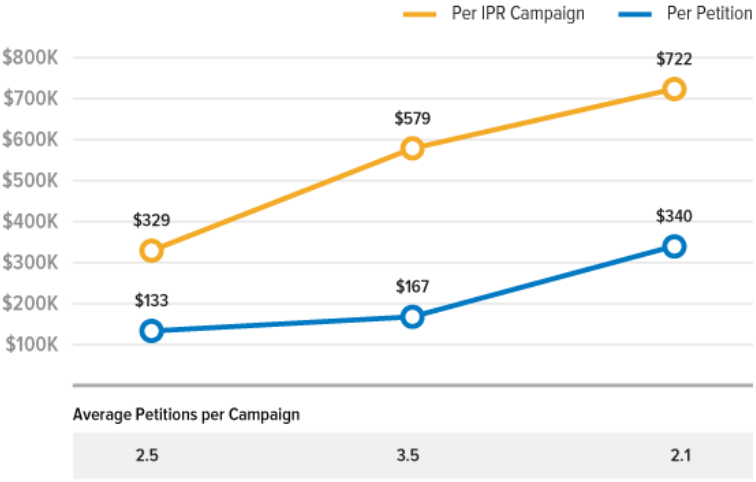
alternate strategy to litigation alone, especially considering the much faster, far more certain 18-month timeline to resolution. Still, the particular circumstances matter.

Stays and multiple petitions

A one-patent NPE litigation campaign could easily be neutralized by one six-figure IPR petition. With a stay in the district court, that particular IPR becomes a cheap, fast alternative to litigating through a seven-figure summary judgment or jury verdict. But consider an NPE campaign in which multiple patents are asserted. To be effective here, an IPR strategy could require a petition against several of the asserted patents, if not all. Too few petitions, and the IPR strategy could end up adding significant costs while addressing only a portion of the issues in the case. Worse, if the IPR strategy will not streamline the issues, the court might decline to stay the litigation—also depending, of course, on the court's view of other circumstances, such as the timing of the request—which eliminates the savings advantage of the stay.

Our study suggests that many petitioners file at least two or three IPR petitions per litigation campaign—in a sense an IPR "campaign" of its own. This doubles or triples the typical cost of the IPR strategy. Such a strategy, if taken to final decision, appears to cost over $700,000 and could reach the millions.

Figure 2: Average Cost of an IPR Campaign



Deeper pockets required

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All that said, it is no surprise that most of the top IPR petitioners by volume are high-revenue tech companies (page 22, Table 1: **RPX 2015 Report: NPE Litigation, Patent Marketplace, and NPE Cost**). These companies can handle the variable costs of the strategy and can afford to spread the risk of the occasional loss across multiple cases. Then again, that risk is increasing: IPR institution rates have dropped to about 60%, and final decision outcomes now hover around 50-60% fully in favor of the petitioner (pages 17-18, Charts 23-24: **RPX 2015 Report**). About another 25-35% come out partly in their favor, but such partial victories can be

problematic: if even one challenged claim survives and that claim supports a strong allegation of infringement, the patent may actually emerge from the filing stronger than before, with the Patent Trial and Appeal Board's stamp of approval.

Still, a well-resourced and experienced petitioner might view even a million-dollar IPR strategy with a 60% likelihood of success as a good settlement lever in a tough case, since IPR provides other tactical advantages. Smaller companies, on the other hand, will find it more difficult to absorb that high cost alone.

We will continue our study of IPRs to bring insight into what makes this strategy effective. High-level findings—including all of the above—from our ongoing IPR cost study are collected in our **2015 Report: NPE Litigation, Patent Marketplace, and NPE Cost** (with data on success rates and other metrics related to IPR activity available in the Litigation section, pages 16-24). Our complete IPR cost findings are available only to participants in the study. Comments or questions about the data and inquiries about participation in the study are welcome at **reports@rpxcorp.com**.

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