



Why plaintiffs in US patent cases who understand the odds of victory are almost always best off settling

IAM

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The vast majority of patent disputes in the US settle before they end up in court. One reason for this, it is claimed, is because scared defendants are worried into making suits go away by aggressive plaintiffs (trolls) who give them a choice of settlement at one price or fighting a suit at a higher price. And, undoubtedly, there is an element of that involved.

However, there is a lot more on top. For example, looking from the plaintiff's perspective there are also significant disincentives to take a fight all the way - especially against deep pocket corporate opponents.

Below, IP Edge managing director Gautham Bodepudi explains why plaintiffs that properly understand the odds of prevailing in a US patent case are likely to favour settlement in all but the most open and shut cases of infringement.

The US - it's the land of opportunity, including for inventors who protect their dreams with patent protection. In 2016, the US government granted more than 325,000 patents to inventors.

Inventors enforce their patent rights through litigation, when they believe a corporation is practising their protected idea. In 2016 there were 5,100 patent litigation lawsuit filings. The vast majority of patent lawsuits settle before trial —95% to 97% of them.

Some policy makers and corporations strongly criticise patent enforcement practices that favour early settlement. They argue early settlements to avoid testing the merits on patent disputes are an abusive litigation practice.

In June 2013, I worked on a case that showed me early settlement isn't an abusive practice, but rather a prudent business decision.

The inventor, who I'll refer to as Michael to maintain confidentiality, believed corporations had taken his database-algorithm invention.

Michael is not your average inventor. He served as an officer in the military and, after retiring and returning to civilian life, became an entrepreneur.

He developed an algorithm to improve database operation, created a patented software product and founded a company. Michael invested more than \$100,000 to protect his idea with numerous patents.

Though his company failed, he believed he could license his patents to corporations that were using his technology.

When he approached us, we agreed. Our team filed a patent litigation lawsuit on his behalf.

Fast forward to the pertinent part of the story: we came to a critical point in his litigation - the claim construction hearing.

This is where a judge interprets the patent's protected property: the claims. A judge's determination in claim construction reveals what technology areas a patent does and does not cover.

Our position was strong. On each claim term, we could rely on a plain meaning of the words. The defendants, on the other hand, needed to weave convoluted interpretations to support their defence.

When strategising with Michael, we presented why we believed he would win at claim construction.

At that point he asked a question: "Is there risk?"

We informed him there was risk.

He followed: "What's the best- and worst-case scenario?"

We explained the best case would be the judge ruling in our favour on each of the four claim terms. That did mean, we said, that Michael would actually "win", but that he would live to fight to another stage in the litigation.

On the other hand, we said, the worst case would be the judge ruling against us on any one of the four claim terms. In that case we'd not only lose the current litigation, but all future litigations as well.

Michael didn't find the risk profile very appetising.

He directed us take an offer on the table, thereby settling the case and avoiding any risk associated with claim construction.

Though it was puzzling at the time, I learned years later why his decision to minimise risk was the right one.

First, patent litigation is structured like a video game. You must win every level to end up the winner. If you lose any one level, no matter how far you've come, then it's game over.

And like a video game, every level has its own gatekeeper.

The table below describes each level of litigation, the gatekeeper, and provides the 2017 statistics of winning at each level.

Litigation level

Gatekeeper

Plaintiff Win Rate

Pretrial motion

Judge

*6% - 15%**

Trial

Jury

*61% - 66%**

Appeals

Appeals panel

38% - 40%**

* PwC, 2017 Patent Litigation Study, page 15

** Gibson Dunn, Federal Circuit Year in Review 2015/2016, page 2

In level one, you must convince a judge why you have a winnable case. If you reach level 2, you present your case to a jury. If you win there then at level 3, you must convince an appeals panel to uphold a favourable jury verdict.

*What are your overall chances of winning at every level, to win at patent litigation? It's just **9% to 14%**.*

Second, at every level you must perform a flawless juggling routine.

In every patent litigation, as a baseline you must prove a corporation infringes your patent. This is one ball to juggle in every patent litigation.

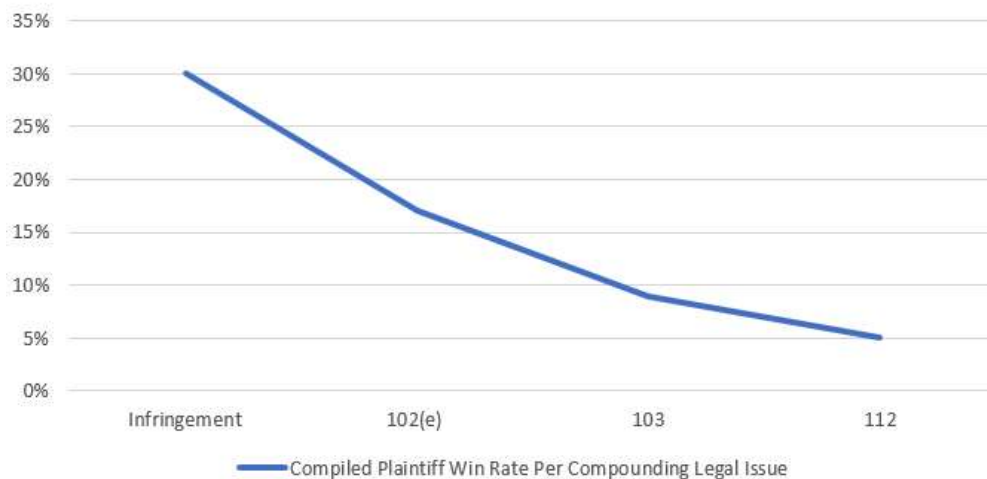
But a corporation can defend itself by raising up to 27 patent defences, each representing an additional ball to juggle.

A corporation has 17 validity defences to invalidate your patent, two enforceability defences to render it unenforceable, four damages defences to prevent you from recovering the money you want and four infringement defences to be excused for infringing.

If you drop the ball on any one of the 27 defences, then you lose and the defendant wins.

The chart below illustrates the chances of winning this juggling routine. It is pulled from a 2000-2013 composite study from the University of Houston on the win/loss rate per legal issue in patent litigation.

Overall Plaintiff Win Rate Per Compounding Legal Issue
from 2000-2013



Let's say you accuse a corporation of directly infringing your patent and the corporation raises a validity defence called 102(e) - this creates two legal issues you need to successfully juggle through the patent litigation. You have a 17.4% chance of winning both issues, through all levels.

But suppose the corporation raises two more defences, two validity defences called 103 obviousness and 112 indefiniteness. This now creates four legal issues to juggle. Your chances of winning drop to 5.5%.

Adding just two defences decreases your chances of success by 42.8%, because you must win on every legal issue at every level in front of a judge, jury and appeals panel.

If you're a patent owner, do you go for the home run on every legal issue, at every level in the litigation, for a 9% to 14% chance of winning?

Or do you do what Michael did? Take a settlement offer to reduce risk to the patent and live to fight another day?

Most people do what Michael did. That's why 90% of all patent cases settle before claim construction and, as noted above, 95% to 97% settle before trial.

This high settlement rate may seem alarming, but it demonstrates business judgement due to skewed risks against patent holders.

If you're a patent owner and are considering patent litigation, consider taking a page from Michael's book and minimising risk to your patent assets.

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