



IP Watch™

Intellectual Property Law Alerts from Ober|Kaler's IP Group

In this Issue

Reduce Your IP Budget...
Not Your IP

Patent Litigation Preparedness

Advertise Your Strengths
Without Disparaging Your
Competitors

Intellectual Property Group

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Patent Litigation Preparedness

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Times are tough. There is no doubt about it. Revenues are down because no one is spending and the future is uncertain. Conversely, no one is spending because revenues are down and the future is uncertain. What *is* certain is that pressures on cash flow are intense, causing many to look for new revenue streams to stabilize their balance sheet until the current economic storm passes and growth resumes. If history is any guide, companies often do one of two things during a recession to create new sources of income: innovate or appropriate. Both can lead to litigation (another tool that some companies rely on to generate revenues in tough times).

A sure way to increase revenues is to develop and market new and innovative products and services that businesses and consumers will purchase. This strategy can capture market share from a competitor or increase the market overall by attracting new buyers, while increasing profits because the new products are often sold at premium margins. Companies that cannot, or do not want to invest in the research and development necessary to innovate may take the alternative approach. They appropriate the innovations of their competitors to grab any available market share.

Companies that appropriate often find themselves the target of a lawsuit by innovators seeking to protect their investments. By the same token, companies that innovate often find themselves as the target of lawsuits by competitors seeking to nullify the advantage innovators enjoy. These tactics are reflected in court dockets which show that during and following the two most recent U.S. recessions, the eight month recessions of July 1990 through March 1991 and March through November 2001, patent litigation increased as a percentage of all litigation in U.S. Federal Courts by 5-15 percent. During that same period, intellectual property litigation (patent, trademark and copyright) increased by 12-17 percent of Federal litigation as a whole.

What does this mean for your business? Be aware of the increased and very real risk that you may be drawn into litigation and take steps to avoid it when possible and to prepare for it when unavoidable. There are a few relatively inexpensive things that can help you avoid litigation or improve the chances of a positive outcome if a day in court cannot be avoided.

- Avoiding litigation can be as simple as searching patent and trademark filings by your competitors and obtaining infringement opinions to ensure that you don't invite suit by infringing their work;

- Consider acquiring intellectual property where appropriate to advance your own innovation. IP rights can often be purchased or licensed on more favorable terms in a down economy;
- Diligently police the market to protect your own work. A well-timed notice letter can turn back a would-be infringer before he invests too much in his efforts and is willing to litigate;
- Don't forget to file for necessary protection. Legal and IP budgets are often reduced during tough times leaving crucial innovations vulnerable to appropriation. Patent filings during and immediately after the 1990-91 and 2001 recessionary periods increased at a markedly slower rate than in the healthy economic periods that preceded or followed. Failing to file for protection deprives innovators of the rights and tools needed to protect their investment at a time when they are most likely to be needed and short changes the future of your business. If an IP budget is reduced, ensure that it is done in a manner that follows the guidelines set forth in the previous article.
- Carefully monitor marketing by your company and your competitors to avoid claims of false advertising and unfair competition. Aggressive marketing in tough times does not excuse careless and misleading claims. If new marketing campaigns are begun, ensure they follow the guidelines set forth in the following article.

A tough economy has been compared to the last two minutes of a hockey game with the score tied. The checking becomes a little rougher on both sides as each team looks for a way to pull ahead before the buzzer. Some may not like the violence but it is part of game nonetheless. The same can be said for litigation in business. Some may not like it but it is a tool available to everyone and so everyone must be prepared for it. These few simple and relatively inexpensive steps taken now can prevent your business from getting knocked off its feet before the buzzer.

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