

## Five Important Things to Consider When Facing IP Litigation

Litigation can be necessary to prevent or remedy the misappropriation of a company's most prized assets — its intellectual property (IP) rights. A company's IP can include its products, technology, software, data and know-how, and can be protected in several ways, including by copyright, patent, trademark, trade dress and trade secret.

Prompt and credible assertion of IP rights is just as important as the investment in and development of these assets. Conversely, responding to others' assertion of IP rights efficiently and with appropriate defenses or business solutions can prevent ruinous loss.

Here are five things to consider when facing IP litigation that will help produce the best outcome and limit wasted resources.

### 1. Determine if Litigation Is Necessary

IP litigation can be expensive, time-consuming and unpredictable. It can also be difficult to terminate once it starts. As a result, litigation typically should be viewed as a last resort, unless it is determined that an aggressive approach will be most effective.

To make this decision, start by considering the business context, including a cost-benefit analysis that examines the claims, relief sought, resources required and risks, including counterclaims and market effects. Bear in mind that protecting this investigatory work product from discovery, in the event litigation becomes necessary, will be maximized by involving an attorney in the investigation.

### 2. Consult an Attorney With IP Litigation Experience

Some attorneys have experience in IP law while others are proficient in litigation. When considering initiating or defending an IP litigation you need an attorney who has depth of knowledge in both areas, as well as the ability to gain a quick understanding of your business and its

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objectives. The attorney you choose should know the relevant IP law, understand your technology and industry, and consider applicable litigation parameters and related trends.

### 3. Anticipate All Possible Outcomes

Once you have a qualified IP attorney, determine what the best and worst case scenarios are if you proceed with litigation. If you win, what will your company gain? If you lose, how will it impact your business? Will you risk losing your IP while attempting to enforce it? What are the risks of a countersuit? Is there other IP or business that can be used as part of a settlement? Will your customers be impacted?

You also need to weigh the potential repercussions of litigation on your shareholders, employees, distributors and other business associates. What budgetary limitations (including management and staff time) do you have? What alternative fee arrangements are available? These are only a few of the important questions you need to answer before making a decision for or against litigation.

### 4. Be Open to Alternative Dispute Resolution

An IP lawsuit does not necessarily mean you will go to court. In fact, most cases settle well before a trial occurs. While a negotiated settlement typically occurs because of the parties' assessment of their positions in the litigation, in light of court rulings and the respective costs of going forward, alternative options exist.

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One option is to utilize a mediator who can help find an outcome that is better for each side than a determination by a court. Another is to utilize a neutral arbitrator who can act more quickly, while possessing specific knowledge of the relevant law, technology and/or business. While mediation and arbitration can be utilized at any time during the litigation process, consider them early in the process to save time, money and goodwill. Determine with your attorney if it is in your best interest to reach a settlement through alternative dispute resolution before going to court.

## 5. Keep Accurate, Up-to-Date Business Records

During an IP litigation you will be required to produce a large amount of evidence in both tangible and electronic forms. In many cases, core documents must be produced early in the case by the party bringing suit, followed shortly by the defending party. Once litigation is expected, even inadvertent destruction of arguably relevant documentation can result in an adverse inference, i.e., that the destroyed documents contained damaging information.

Best practices for initiating litigation involve preparing for expected document production, including identification of likely repositories, searching for relevant records (electronically if appropriate), and conducting an assessment on the results before a suit is filed. In any case, if you know where and how your records are stored, you can save time and money retrieving them and cause less stress and disruption to your business in the process.

At Burns & Levinson, our IP Litigation attorneys represent clients worldwide in disputes involving patent, trademark, false advertising, unfair competition, copyright, licensing, trade secret, employment and antitrust laws. We assert IP rights and defend against assertions by others before state and federal courts, administrative agencies and neutrals. Whether representing large or small companies or individual inventors, our ability to handle the complicated technical and legal issues in a highly efficient and cost-effective manner separates us from our competitors and allows us to achieve the best business outcome for our client.