



Litigation Funding for Patent Disputes

Woodsford Litigation Funding Insight

The use of litigation funding is expanding rapidly across the legal world.

This trend has accelerated as the key actors in dispute resolution proceedings become familiar with litigation funding and its many advantages.

Sophisticated claimants appreciate how funding can help them manage costs and offset legal risk; savvy lawyers recognise how third-party funding can help them expand their practice and offer clients flexibility on fees; and forward-thinking judges and arbitrators acknowledge the positive role that litigation funding plays in promoting meritorious claims and fostering access to justice.

Due to the substantial costs and risk inherent in patent litigation, it is a natural fit for litigation funding - in particular for smaller, entrepreneurial inventors and patent owners who find themselves pitted against larger, more well-resourced defendants. Partnering with a litigation funder allows a patent owner to achieve equal footing and to offset some of their risk to the funder.

The Basics of Litigation Funding

Litigation funding, also known as “litigation finance” or “third party funding,” is simply an alternative means for a claimant to fund the costs of a legal dispute.

Rather than an individual patent owner or corporation paying the costs out-of-pocket (which can cause significant strain on a company’s operations and ongoing research efforts) or a lawyer proceeding on contingency (which many patent litigation firms increasingly will not accommodate), a commercial litigation funder finances the cost of the patent litigation in return for a share of any award or licensing revenue.

This kind of funding is typically non-recourse - if the claim is lost, the claimant is not liable to repay the investment of the funder. Thus, in a typical funding arrangement, the outside litigation funder shoulders the majority of the risk.

Finally, patent related funding is not only limited to litigation for patent infringement. In some instances, for companies with valuable IP and clear path to monetization, funding may be obtained to help prosecute ongoing patent applications or to fund a company’s ongoing research and development.

The Fit Between Patent Matters and Litigation Funding

Patent litigation can be hugely expensive, straining the budget of even the most well-resourced claimants. Not only are sophisticated patent litigation firms often able to charge at the top of the market, but patent litigation generally requires substantial capital outlay for expert fees and other disbursements—often \$1 million or more even for a relatively small patent dispute. Typical budgets can be in the \$3-5 million range, and campaigns against multiple infringing defendants can require double that budget.

Moreover, a disproportionate share of claimants are precisely the category of patent owner that is least able to bear such expenses - individual inventors, academics and small, entrepreneurial businesses. Pitted against larger defendants with nearly unlimited legal resources, such owners may

have slim chances of protecting their invention and being fairly compensated for their hard work and innovation. But by partnering with a litigation funder, these kinds of claimants are able to level the playing field and have their day in court.

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And patent litigation is a risky endeavour. The typical patent litigation has several critical milestones where a claimant’s case can be defeated or substantially limited, and thus risk remains relatively constant

throughout the life of the litigation.

In the United States for example, that risk has been substantially heightened in recent years, with the advent of inter partes review and other post-grant forms of review, which effectively require a patent owner to simultaneously defend their patents in two forums (and similar proceedings are likely in Germany and other key jurisdictions for patent enforcement). While the rate at which the Patent Trial and Appeal Board (PTAB) finds patents to be invalid has lessened somewhat recently, the difficult reality is that a significant number of granted patents have a substantial risk of invalidation. Further, decisions from the U.S. Supreme Court have narrowed the scope of patent eligibility and established a potentially significant hurdle at the outset,

especially for certain fields of invention. And even in the US, where adverse costs are not the norm, the number of fee shifting applications in patent disputes has increased substantially, adding another layer of risk for patent owners considering enforcement.

Nevertheless the pace of infringement has not lessened. Indeed, perhaps emboldened by the more difficult climate for patent enforcement, as well notions of efficient-infringement, both large and small companies continue to infringe otherwise valid patents.

Partnering with a litigation funder such as Woodsford allows inventors and businesses to hedge a significant portion of their risk while giving them access to capital to seek fair compensation for their inventions.

The Benefits of Litigation Funding for Patent Disputes

The advantages of litigation funding for both patent owners and patent litigators are substantial.

Most fundamentally, litigation funding facilitates access to justice. A capital-constrained patent owner who might not otherwise have the resources to protect its invention is given the opportunity to have its day in court. This is particularly true in “David v Goliath” cases, an all too frequent scenario in patent infringement, where a smaller claimant, such as an inventor, takes on a bigger, more well-resourced defendant, who may use a strategy of attrition to exhaust the claimant’s appetite and ability to prosecute its claim. Partnering with a well-capitalized funder such as Woodsford substantially levels the playing field and allows a claim to survive on its merits.

Even where a patent owner has the resources to fund a dispute, litigation

funding offers many other advantages. Funding allows a claimant to unlock the value of a potential claim and preserve capital for other uses, while transferring the ongoing costs and contingent liabilities of the claim to a third party. For start-ups or entrepreneurial companies focused on research and development, funding can allow them to protect their critical IP rights, while also getting on with their core businesses.

Ultimately, funding permits a patent owner to hedge some of its risk, ensuring that it will be in a better position if the claim is successful, but in no worse position if the claim is not successful. Thus, funding transforms patent litigation from a traditional “win-lose” proposition to a “win-don’t lose” proposition.

Litigation funding can also have substantial strategic benefits and lead to better

settlement outcomes. A patent owner, knowing that they have the resources to fully prosecute a dispute, will be in a more advantageous position for settlement and will not be forced to accept a low offer merely on account of their capital constraints. Furthermore, the fact that a sophisticated litigation funder like Woodsford has backed a patent owner's position sends a powerful signal to the infringing defendant and court that a third party with substantial expertise believes strongly in the novelty of the invention and merits of the underlying claim to put their own capital at risk.

From the perspective of law firms with substantial patent litigation practices, a litigation finance agreement with a funder can boost their financial position. Law firm finance, where a funder provides capital directly to a firm, cross-collateralized against a portfolio of cases that the firm has taken on a contingent basis, can mitigate cash flow challenges, providing a certainty that legal invoices will be paid in a timely manner and provide lawyers a more stable financial position, allowing them to focus on better advocating their client's positions.

Equally, an agreement with a funder may allow a law firm to offer more flexible arrangements to existing clients and to take on new contingency matters which may have strong merits and a very attractive upside, but which might otherwise be an unbearable strain on the firm's resources.

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It should be emphasised that litigation funders do not control the litigation. Although a litigation funder like Woodsford, staffed with expert IP litigators with decades of international law firm experience, can provide valuable resource to patent owners and their lawyers, all decisions regarding the litigation, licensing and potential settlement remain firmly in the hands of the lawyer and patent owner.



How to Obtain Funding for Patent Litigation

Getting funding for a patent litigation is no different than any other type of case - litigation funders want to fund meritorious claims with a realistic path to a return on their investment. Nevertheless, there are some unique aspects to patent litigation that are worth exploring. Successful patent litigation requires substantial pre-action preparation. Moreover, unlike many types of disputes, there is often less reliance on discovery from the other side to prove some of the key elements of a case. Rather, key issues such as infringement, validity and damages must be given significant analysis at the outset. At a minimum, a litigation funder will expect to see:

- A developed claims chart that demonstrates the alleged infringement in detail.
- Analysis of any key prior art and the scope of any prior art search.
- Analyses of any particular issues such as patent eligibility.

- A realistic budget that distinguishes between costs and fees, provides for both trial litigation and the likely IPR or invalidity proceedings.
- A realistic damages analysis where funding still makes economic sense at the conservative end of assumptions (low royalty rate, smaller royalty base, no enhanced damages, etc.)
- A well thought out strategy of how enforcement will commence against multiple defendants.
- Consideration of a potential advantages of a global strategy for enforcement.

As noted earlier, funding for patent litigation is generally non-recourse. If the claim is lost, the funder is typically owed nothing. Given this risk, litigation funders will subject claims to substantial diligence and will invest in only the most meritorious of claims.



A Look Ahead

While the climate for patent litigation remains challenging for some patent owners, the pendulum has perhaps started to swing back towards the center. Last year, the U.S. Supreme Court heard oral arguments in *Oil States*, and a decision is expected to be issued in the near term which will effectively decide whether the IPR framework established by the America Invents Act (AIA) is constitutional. While it seems unlikely that the Supreme Court will do away with IPRs wholesale, it may well limit the scope of such proceedings. Putting aside the ultimate decision itself, it is notable that the Federal Circuit and the PTAB have since issued a number of

seemingly patent-owner friendly decisions, which may well have been decided in the long shadow of that certiorari grant.

Patent litigation also increasingly requires a global strategy, with the potential for coordinated proceedings in the UK, US, EU and, increasingly, China. While the ultimate promise of the Unified Patent Court (and EU-wide injunctions) remains somewhat uncertain due to twin question marks of Brexit and German ratification, there is little doubt enforcement and protection of IP will require an international strategy. Such campaigns are likely to increase the costs of enforcement and underscore the continued need for litigation funding.

Patent litigation will continue to be one of the most complex, expensive, and risky categories of litigation a claimant may undertake. Given these characteristics, we expect that we will continue to see substantial use of litigation funding for patent litigation in the coming years.

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Woodsford looks forward to working with inventors and owners of novel patents to help them protect their valuable inventions and to seek to be fairly compensated for their innovations when faced by the specter of infringement.



About the author

Zachary Krug is a Senior Investment Officer at Woodsford. He is a United States-qualified lawyer who previously practiced international litigation at Quinn Emanuel Urquhart & Sullivan LLP and Shearman & Sterling LLP.

About Woodsford Litigation Funding

Woodsford is one of the world's leading providers of finance to law firms and their clients. Founded in 2010, with offices in London, Philadelphia and Singapore, Woodsford provides financing solutions for law firms, businesses and individuals around the world.

Woodsford's highly-experienced, international team deliver a unique combination of extensive business and legal expertise, which allows for quick understanding of the financial implications and legal merits of a case or portfolio of cases. By using its own internal legal capability and its funds from its own balance sheet rather than relying on external advice or capital, the entire financing process is accelerated.

Woodsford is a founder member of the Association of Litigation Funders of England and Wales, a body dedicated to promoting best practice in the litigation finance industry. Woodsford was instrumental in drafting the original Code of Conduct, published by the Civil Justice Council of England and Wales in 2011.

By working with Woodsford, law firms and their clients are assured that they are working with an organisation meeting the high-quality standards that should define this industry.

For further information, visit www.woodsfordlitigationfunding.com or email **Steven Savage** at ssavage@woodsfordlf.com