

Litigation Funding for Copyright Disputes

Woodsford Litigation Funding Insight

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The advent of digital media distribution has made copyrights more valuable than ever. The internet, and the widespread consumption of rich media in particular, has fueled a massive market for content. The ability to cheaply reproduce and broadly disseminate content has increased access and profit margins. But the same ease of publishing and distribution has made it easier for copyright infringers to reproduce and distribute protected works without paying for the rights. The accessibility of copyrighted works, the ubiquity of digital tools for reproduction and manipulation—and sometimes, increasingly, the blurred lines between parody, homage, pastiche and outright infringement—creates a difficult environment for copyright holders to protect their rights. Music, images, software, literature, can effortlessly be reproduced and sold, cutting out the author/artist. Newer digital tools have made detection of those infringing works easier, but the process of establishing infringement and damages in court remains an expensive and arduous task. Partnering with Woodsford can allow artists and authors to maintain control over their work and recover just compensation for its misuse by infringers.

Copyrights are valuable property and the underlying work may be the product of years of hard work. A copyright allows the creator to prevent others from making reproductions or derivative works—or to choose to allow reproduction for an agreed compensation. When an unauthorized user infringes, copyright law allows the copyright holder to elect from one of two types of damages, actual or statutory, both of which can be substantial. And if an accused infringer has willfully violated the copyright, the damages can be enhanced significantly. Reaching a verdict, however, or getting just compensation can potentially cost millions of dollars in legal fees and take years in court. Faced with that prospect, many copyright holders simply have no choice but to ignore infringement or to settle for substantially less than they deserve. That is where litigation finance can play a critical role, allowing copyright holders to enforce their rights at trial and demand higher compensation for any eventual settlement—at no risk, and with no impact on cash flow and no additional debt.

What is Litigation Finance?

Litigation financing is, broadly, how the sometimes-expensive process of pursuing a case through the judiciary system is paid for. The concept may sound foreign, but all litigations are financed. Most of the time the attorney's fees associated with resolving a dispute through a court system are carried by the plaintiff by paying counsel to represent them on an hourly basis. These cases are self-financed. Law firms also occasionally will finance the plaintiff by exchanging part or all of their fees for a portion of the recovery in a successful representation. These cases are firm-financed or contingency financed. Third party financing is when an unrelated third

party pays part or all of the legal fees and costs of litigation. Similar to a contingency financing by a law firm, a third-party financier, like Woodsford, provides capital to plaintiffs with good claims to offset litigation costs, and in return receives a portion of the recovery in a successful case. The funder does not have the right or ability to influence the strategy of a litigation or dictate settlement decisions. A funder does not interfere with the attorney client relationship. Funding is typically provided on a non-recourse basis, i.e., the funder's return depends on a successful outcome in the litigation. If the claim is not successful, nothing needs to be paid to the funder.

The Benefits of Litigation Finance to Copyright Owners

Litigation finance can provide access to capital and minimize risk from an economic standpoint. But there are more specific benefits for copyright owners large and small, and for the law firms that specialize in copyright litigation. For copyright owners, whether they are individual artists or large businesses with broad copyright holdings, litigation finance provides a significant number of potential advantages.

- **Access to counsel:** For individual artists or authors, oftentimes the cost of attorney's fees to represent them in the enforcement of their copyright against infringers is prohibitive. Litigation financing means that copyright holders can afford not just counsel to vindicate their rights, but the counsel of their choice.
- **Best use of capital:** Litigation finance is not only for individual copyright holders.

Aggregators of works such as music labels, image distributors, or publishing houses might have sufficient resources to pursue infringers, but oftentimes their capital can be better allocated to ongoing operations or growing the business. Working with a funder means they can preserve capital and hedge financial and legal risk.



- **Enforcement breadth:** It is a particular feature of copyright infringement in this digital age that unauthorized reproductions or derivatives are often widespread. A lack of access to capital often limits enforcement to a single defendant at a time. Litigation finance provides resources to pursue infringement broadly, against multiple parties and in multiple jurisdictions simultaneously, thereby allowing an artist or author to stamp out infringement rather than make the difficult choice to allow some infringement to go unchallenged because of economic constraints.

- **Signaling strength:** When the infringer is itself a well-capitalized entity, the disclosure of a litigation financier in a case gives a solid signal that the plaintiff cannot be spent off its claim. Further, it indicates that an independent, objective, legally sophisticated entity reviewed the claim and found it meritorious and worth committing significant capital to on a non-recourse basis.

- **Discourage future infringement:** The unfortunate reality is that sometimes copyright holders need to enforce their rights to protect them—not only to prevent ongoing infringement and obtain damages, but also to dissuade other future infringers from unfair use.

Law firms can also benefit significantly from the use of litigation funding, whether on behalf of a claimant or directly through law firm finance.

- **Client retention:** Law firms reduce the risk of losing a potential client to a firm willing and capable of covering the entire case, fees and costs, on a contingency. Relationships with litigation funders give the firm flexibility and resources to represent even clients who struggle with legal bills.



- **Risk mitigation:** Copyright claims, like most IP claims, carry a measure of unpredictability along with the promise of significant damages. A law firm can de-risk its exposure in a single case by introducing the client to financing that will go to pay a portion of its fees on an hourly basis.

- **Increase profitability:** Law firms struggle to find ways to increase firm profits without charging more for their services. Taking partial contingency positions in strong cases, if successful, will provide a multiple over what could have been realized for hourly billable work—increasing profitability without scaling internal costs or raising rates.

- **Strategic partner:** Partnering with a sophisticated litigation funder gives an objective and dispassionate review of the case—its merits, damages, obstacles and risks. Funders like Woodsford are usually staffed by former litigators themselves with deep experience, who can provide a helpful preview of the defendant's positions and a valuable resource during litigation.

Litigation Finance – Process

The process of obtaining funding is relatively simple. A third-party investor like Woodford pays part or all of the costs of enforcing a copyright against an infringer in exchange for a participation in a successful result. But certain questions come up about the process for those going through it for the first few times.

Litigation funders maintain relationships with leading law firms, but ultimately the agreement to fund a case is made with the claimholder itself. The funder is passive; its role is largely limited to providing capital. Litigation funders do not dictate case strategy or settlement. They do not interfere with the relationship between counsel and its client. Plaintiffs draw down what they need from a funding commitment and are generally not required to use all the capital committed by the investor. Funders rarely work with defendants, but instead provide financing to plaintiffs with valuable claims.

There are three main steps in the process from initial conversation to financing a case: 1) intake, 2) diligence and 3) approval. Case intake includes initial case discussion, getting an appropriate non disclosure agreement into place so that confidential communications are protected, and the negotiations of a term sheet. This phase can take as little as a week or ten days in the event that the case is totally prepared, and

the parties quickly reach terms.

The diligence process of a case looks a lot like the consideration law firms give a case when deciding whether to represent a client, especially if they are considering contingency financing part of the case. The goal is to understand the risks and potential

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upsides of a case and select cases that are likely to succeed and where a successful outcome would result in a meaningful return for the plaintiff, firm and funder.

The first step in diligence is reviewing the claim itself – the parties, the dispute, the facts and the applicable case or regulatory law. Funders will also consider the likely defenses that will be raised and the obstacles and pressure points present in a given jurisdiction or fact pattern. Finally, a funder like Woodford will look at the facts that a plaintiff possesses and consider what facts might be unknown and how they might affect a case. In a copyright case, a funder will typically explore a work’s



creation and ownership, undertake a close analysis of the similarity of the copyright work and allegedly infringing work, and consider potential defenses like statute of limitations or fair use.

The second step in diligence is considering the likely damages. This includes a review of the damage theories and their application to the known facts. Damage theories should be realistic and have a firm basis in industry norms or prior cases. Funders do not, typically, consider punitive or willfulness damages as they are discretionary. Investors are looking for a sizeable difference between case damages and the budget being requested—too narrow and the copyright holder will not receive a sufficient return for its claim, creating a misalignment of interest. Finally, an investor will look at the timing of a potential award or settlement. The longer it takes to resolve a case, the less present value that result has.

The third step in diligence is reviewing the firm itself. A funder considers the trial team—experience, expertise, track record and resources. Funders greatly value teams that have shown they can win similar claims at trial. This does not always mean large or national practices—boutiques often have similar or superior litigators who are strongly incentivized to win. Funders also consider the firm’s pricing and whether it is seeking to participate in the outcomes by discounting their fees and accepting a contingent percentage in the recovery. That

financial participation by the firm informs how the financial terms interplay, but also signals to the funder how strongly the firm believes in the case.

The fourth step is the budget—funders need a break out of the amounts of financing being sought for fees and those for costs. In certain circumstance its important knowing how the budget breaks down quarterly or monthly. Funders want to make sure that the budget is realistic for bringing the case to completion, which can mean adjusting the budget down or up. It is more common that a funder will recommend increasing the budget to make sure that the case has the resources to get through trial.

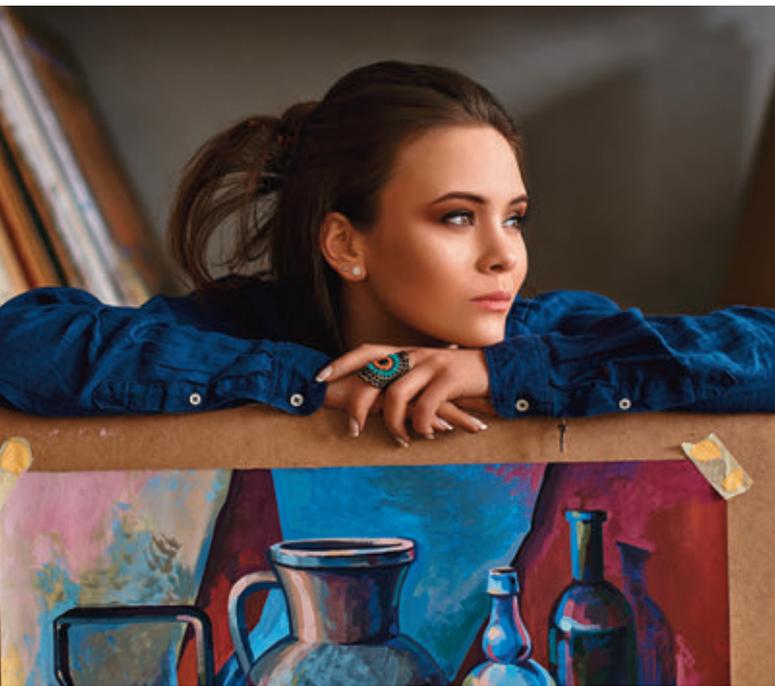
The fifth step is understanding any collection risk – foreign or insolvent defendants can result in uncollectible judgments. And the final step of the review is the narrative itself. Funders understand that general principals of equity and a sympathetic claim are usually better investments.

After the diligence is completed satisfactorily, and the litigation finance agreement concluded, the investment will be taken to an approval committee for review. Approval is another set of eyeballs, another perspective and another set of questions. If the case is well prepared, the risks identified and explained, and the budget appropriate, the investment is usually quickly approved, closed and funded.

Financing Fits in Copyright Matters

A copyright protects an artistic work - such as a song, work of literature, or image—from being reproduced without the permission of the copyright owner. Copyright vests in the artist on the creation of the work. It is not necessary to do more to create a valid copyright, but registration with the Library of Congress is required to obtain damages; however, registration can be obtained once a litigation is contemplated.

Certain types and features of copyright cases can be very attractive to litigation funders. Copyrights are an intellectual property asset class similar to patents in that they give the owner the right to exclude others from use or copying valuable intellectual property. Monetization includes the ability to sell the asset and right itself, or to license the rights to otherwise infringers. This means that a successful licensing or



trial will sometimes result in a valuable monetary award. Sharing in that monetary award makes it attractive for an investor to consider taking some of the financial risk of the case.

Copyright infringement can be a good fit for litigation financing because of the complex nature of the claim. Oftentimes, the copyright holder is a solo artist or author. A case budget that might exceed seven figures is often entirely out of reach of an artist, meaning that without litigation finance infringement would go on unabated. Partnering with a funder like Woodsford can mean that an artist can protect and receive compensation for their contribution and work with counsel of their choice. Funders also often partner with larger work owners such as music labels, image aggregators or publishing houses to allow them to preserve capital to grow the business or focus on development.

Copyright claims provide actual or statutory damages for infringement, making them appealing for funders who need a cash remedy to justify investment, but certain types of cases are better fits than others for litigation finance.

Images: Reproductions and derivatives of visual works have become the backbone of the internet. Images, videos and pictures are

used to market and sell goods and services. Sometimes they are the goods in question themselves. But for a funder to consider financing the case, the infringement of the images needs to be widespread and valuable. A handful of reproductions, while still a clear violation of the artists rights, rarely generate the complexity of case needed to require financing, or the economic upside to justify investment.

Occasionally, a single artist will own a portfolio of works that are infringed or a license to use them has been exceeded. Copyright aggregators like publishers, music sites, and image sellers are often good partners with litigation funders when they need to recover losses from infringement and maintain trust from artists.

Software: Occasionally, and usually as the result of a failed acquisition discussion, an author's code ends up in another company's software. Sometimes intentional, sometimes an accident, any substantial copying is a violation of copyright law and damages can mount up quickly if many copies are sold or the code in question is integral. Detection, however, is an issue.

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There are various programs that can identify a digital fingerprint, but once compiled infringement is impossible to confirm until discovery. For this reason, an author needs to be able to tell a compelling story about why the code is more likely than not to be in the infringer's software or the case might contain too much factual risk to underwrite.

Music: There are two underlying copyrights in recorded music - in the composition (the song or arrangement itself) and in the performance. Both arise on creation and allow the authors or performers to protect their work from unauthorized performance

or derivatives. Authors and performers of music have historically struggled to control their creations and derive value from it, and while the digital era has created new markets for music and disrupted the traditional distribution channels it has also provided further challenges for controlling the music in the face of file sharing, music aggregators and other social websites.



Adding to the problem is that many musicians no longer rely on well financed publishers to distribute their works, so when they become aware of valuable infringement it can be in the hands of a solo artist or other small entity to finance and coordinate enforcement.

Conclusion

Authors and artists are a group that has historically struggled to get fair compensation for their works. The advent of the digital era has made it even more difficult to capture that value from infringers who make free use of their work. For litigation funders, copyright actions can provide a compelling investment opportunity—working with an underserved population of litigants, a sympathetic complex civil claim, statutory and/or actual damages, and high quality attorneys who try the cases. For copyright holders, working with litigation funders like Woodsford can be a boon and allows an artist or author to access to their counsel of choice regardless of their financial position, relieve the

Events and performances: Some of the largest verdicts ever come from unauthorized recordings and reproductions of sporting events, but the same principal can apply to theater productions, live performances, speeches and other public events. With the advent of smart phone ownership, anyone with a phone can quickly and easily film and distribute performance content in violation of the artists copyrights. Those performances can quickly find themselves fueling marketing and other advertising campaigns, but without compensation.

Infringement bottle necks: When there is a single or handful of distributors, illegally providing infringing content to outlets, the cases are more appealing to investors than cases where there are a huge number of independent infringers. Infringing distributors have incentive to defend their actions through expensive litigations, and funding is often beneficial to offset costs and signal case strength. Since a small number of actors are responsible for large scale unauthorized works, the damages are concentrated in the hands of a few.

financial burden of trying to self-finance a complex litigation or redirect funds to other priorities, add expertise to their legal team, and prevent wealthy infringers from spending them out of the courtroom. Woodsford has particular expertise and experience working with copyright claims and holders, something that speeds the underwriting process and allows us to be a value add partner in a case. Protecting an author's or artist's work through litigation can be an expensive and arduous task, often times pitting individuals with limited resources against infringers with deeper resources. Partnering with Woodsford can help level the field—and even tip it in favor of the artist.

About the authors

Michael Kallus - Senior Investment Manager

Michael has a background in complex IP litigation and finance. He joined Woodsford from international alternative investment manager Fortress Investment Group. As Vice President, beginning in 2015, Michael worked in every aspect of the IP finance group—sourcing IP backed litigation finance, debt and private equity investment opportunities, maintaining relationships with domestic and foreign law firms and claims owners, aiding in asset valuations, directing drafting of transactional documents and managing investments post financing. Michael’s investment focus was patents, copyrights, trade secrets and ANDAs.

Prior to Fortress, Michael spent five years at patent risk mitigation company, RPX Corporation. As a director, Michael maintained close relationships with in-house legal teams, tracking and analyzing patent risk facing their companies and negotiated litigation buy outs with plaintiff’s counsel of claims on behalf of RPX clients.

Michael has a significant legal background. After clerking for the Honorable Chief Judge Roger Vinson in the Northern District of Florida, Michael worked in the Boston office of Fish & Richardson representing clients in the semiconductor, pharmaceutical, consumer electronics, networking, software and financial sectors. Michael also worked for the Palo Alto office of Morgan Lewis and later helped found fixed fee litigation boutique, Confluence Law Partners. In addition to IP litigation, Michael has handled trade secret and antitrust claims, drafted technology transfer licenses, and provided M&A support to multi-billion dollar acquisitions. Michael has practiced before a variety of federal and state courts as well as the International Trade Commission and the US Court of Claims.

Michael earned a BA in political science from the University of California Berkeley in 1997 and a juris doctorate from the University of Virginia School of Law in 2003. He is a member of the California and Massachusetts bar associations.

Michael is based in San Francisco, California.

Zachary D Krug - Senior Investment Officer

A trial litigator by training, with deep experience in both finance and law, Zachary helps lead Woodsford’s US and international investments. Zachary believes strongly that access to justice should not be dictated by financial resources and that litigation finance can play a pivotal role in vindicating legal rights. At Woodsford, Zachary works closely with plaintiffs and lawyers to not only provide much needed capital, but to craft winning strategies from day one through to enforcement.

Zachary has extensive trial litigation experience, having represented both plaintiffs and defendants in a wide variety of commercial disputes in state and federal courts in the United States, as well as in international proceedings. He has particular expertise in intellectual property disputes and technology related matters, complex business litigation and competitor disputes, government contracts and whistleblower actions, art related matters, and international human rights litigation.

Prior to joining Woodsford, Zachary was a trial litigator for nearly a decade and half. He most recently was a litigator in the Los Angeles office of the global litigation firm Quinn Emanuel Urquhart & Sullivan. Prior to that, he was an associate in the New York office of Shearman & Sterling, where he focused on international disputes and project finance.

Zachary clerked for Judge Shira A. Scheindlin in the Southern District of New York. He received his J.D. from Cornell Law School, where he was an Articles Editor on the Cornell Law Review, and his B.A. from Yale University, where he was a Sulger Scholar. Zachary is fluent in Spanish.

Zachary splits his time between London and Los Angeles.

About Woodsford Litigation Funding

Founded in 2010 and with offices in London, the USA, Singapore and Tel Aviv, Woodsford Litigation Funding provides tailored litigation financing solutions for businesses, individuals, and law firms. This includes both single case and portfolio litigation funding and arbitration funding. Woodsford's Executive team blends extensive business experience with world-class legal expertise. Woodsford is a

founder member of the Association of Litigation Funders of England and Wales.

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