

## Use Litigation Funding to Enforce Patents

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There used to be a time when an individual inventor might come up with the most brilliant invention and patent it, only to have some unscrupulous company employ that invention without a license. Without a war chest to enforce the patent in litigation, the individual inventor's patent was, for all practical purposes, worthless.

Some intellectual property (IP) attorneys are willing to take on cases on a contingency fee basis. In a contingency fee case, the attorneys' fee is satisfied from any award recovered. But even in such cases, the patent owner was still typically required to foot the bill for expenses such as discovery vendors, court reporters for depositions, and expert witnesses. These expenses can be hundreds of thousands or even millions of dollars. And, not all attorneys are willing to take on contingency fee cases. Patent owners who could not afford to pay attorneys' fees or other litigation expenses had little recourse but to sit on the sidelines while others practiced their patented inventions without a license.

Although the cost of patent litigation has not decreased, a growing industry of litigation financing companies is now willing to cover some, or even all, of the costs of patent litigation, including attorneys' fees, for a percentage of any amounts recovered over those expenses. Not only does this solve the issue of paying for expenses, but it also provides access to a broader variety of IP attorneys, including ones that would not otherwise be interested in taking on a contingency fee case. All patent owners, both big and small, now potentially have access to the funds necessary to police their patents, even against giant corporations with deep pockets. This has become such a shift in the litigation landscape — and not just for patent litigation — that the show "60 Minutes" aired a piece on litigation funding in December 2022.

Here is how it works: The patent owner can retain IP counsel with a working relationship with a litigation funder

or can work with a funder directly before retaining counsel. Both counsel and the funder will perform their own due diligence and, if each is satisfied, the case will be funded and proceed. Even though the funder foots the bills, it most often has no say in the litigation strategy. Now armed with the necessary funding, the patent owner and its counsel litigate the case through trial, appeal if necessary, or settle. If the patent owner successfully recovers damages or a settlement payment, then the funder is first repaid for advanced funds and then takes a predetermined percentage of the balance, though the specifics vary. The patent owner keeps the rest. If the patent owner is unsuccessful, then the funder makes nothing.

Importantly to patent owners, litigation funding is different from a bank loan because it is non-recourse funding. Even if a patent owner could convince a bank to provide a loan to pursue litigation, the bank will always demand its money back. If the litigation is unsuccessful, the loaned funds will have been expended for naught and the patent owner will have nothing left to repay the bank. Litigation funding is different. Not only is a funder ready, willing, and able to provide funds in the first place, but if the case is unsuccessful, the funder has no recourse to ask the patent owner to return any of the advances. The funder thus bears the lion's share of the financial risk for the case. While losing on any one case is unfortunate, the funder still expects to turn a profit off its portfolio of multiple litigations. And importantly to the funder, those profits are not correlated with the economy or the stock market.

Litigation funding is not without its critics. The "60 Minutes" piece suggested that, because the litigation funding industry is not regulated like lawyers are — *i.e.*, through ethics rules — the lack of regulation invites unethical behavior by allowing the funder to put its interests ahead of the patent owner's interests. And at least one U.S. district court judge even has a standing order that any party that receives litigation funding must disclose the identity of that funder.

However, the benefit to smaller or nonprofit patent owners cannot be overstated. Funding provides the ability to pursue cases that would have been cost-prohibitive otherwise. Now, these entities can tap into this previously unavailable pool of financial resources to police their patent portfolio, turning what had once been worthless into further funding for further innovation that can benefit us all.

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