

Considerations in Filing and Defending Against a Patent Infringement Suit

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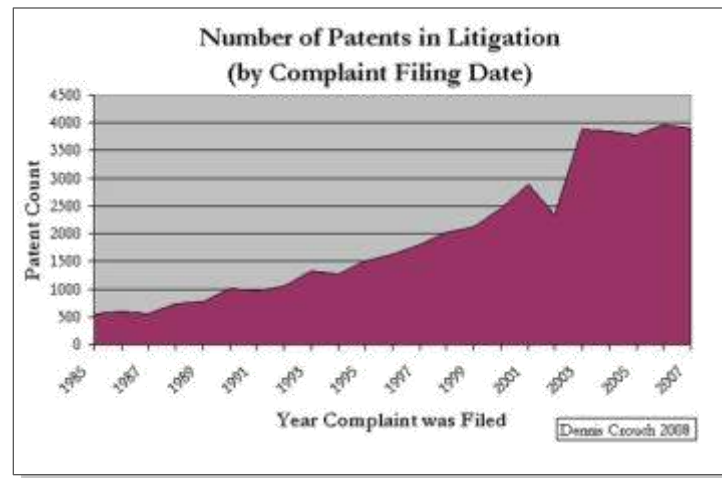
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Agenda

- Patent litigation overview
- Economic considerations
- Strategic considerations
- Evaluating merits

Patent Litigation Overview

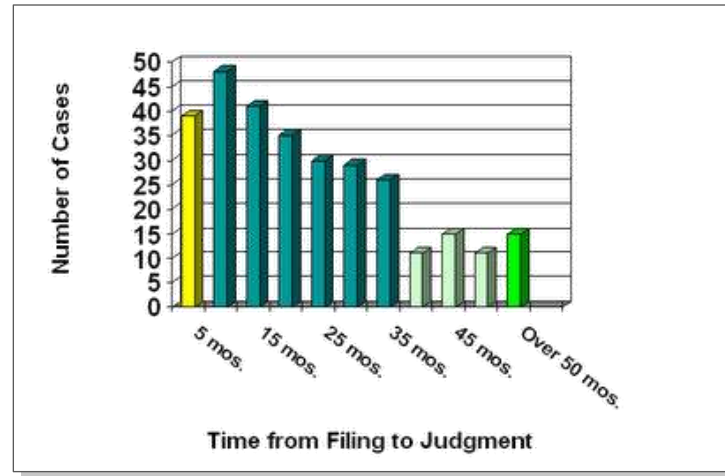
- More than 200,000 patents issued annually
- Over 2700 patent suits filed annually; nearly 4000 cases pending



- Potentially large damages awards
 - NTP v RIM – \$600 million
 - i4i v Microsoft – \$400 million

Economic Considerations

- Time: Average case duration is about 2 years; many cases last more than 4 years



- Money
 - Average cost between \$4.5 and \$5 million
 - Average jury award \$6.5 million
- Uncertainty
 - 3.3% of cases reach jury trial
 - 15% of cases at least partially overturned on appeal

Patent Damages

- Reasonable royalty rates:
 - Royalty base: revenue pool implicated by infringement
 - Royalty rate: percentage of royalty base
 - The trend in courts makes it harder for plaintiffs to capture high royalties
 - Double-digit royalty rates no longer common
- Lost profits
 - Reasonable certainty that would have profited \$X but for sale of infringing product

Strategic Considerations

- Temporary or permanent injunction
- Cross-licensing agreements
- Other competitive considerations
- Counterclaims

Evaluating Merits - Plaintiff

- Know your patent claims
- Identify infringing products and processes
 - Each claim element must be present in the infringing product
- Claim construction issues
 - Surprise, plaintiff and defendant do not agree on what claims mean
 - Patent specification and prosecution history dictate meaning
- Prior art / Invalidity and Unenforceability Issues
 - Must fully review prosecution history
- Damages / Laches
- Witnesses – interview the inventors

Evaluating Merits - Defendant

- Learn the claims of the asserted patents
- Learn the accused product or process
 - Systems are complex
 - Often, no single individual possesses complete knowledge of elements of an accused product or service
 - Identify key witnesses, consulting and testifying experts
- Non-infringement arguments
- Invalidity / Unenforceability arguments
- Financial exposure