

Patent litigation as an asset class

As the litigation finance industry grows in prominence, funders and their investors are increasingly turning their attention to patents

By Jack Ellis

In 2011, the US Supreme Court handed down its historic decision in *Microsoft Corp v i4i Ltd*. The justices ruled in favour of the Canadian software company and in so doing ended Microsoft's hopes of lowering the standard needed to invalidate a US patent. David had defeated Goliath. The cost of the lawsuit was borne by investors, which saw the potential for success in i4i's infringement suit – and the opportunity of handsome returns if the outcome was favourable. Ultimately, this investment enabled the tiny single-patent business from Toronto to survive a protracted four-year battle and win US\$300 million in damages.

“No matter how serious the company and its technology, we simply didn't have the resources, firepower and bandwidth to protect ourselves against large market-leading companies,” says Loudon Owen, chair at i4i. “We began to notice just how tremendously difficult it is to address those asymmetries in the market.” Confident that Microsoft was infringing its patent, i4i set out to find partners that could provide the capital needed to assemble a litigation team and launch an enforcement campaign. But it soon realised that this would not be easy. “There was this recurring theme, which was understandable but suboptimal from our point of view, because our ultimate aim was to continue as an operating business,” explains Owen. “What entrepreneur wants to see their company passed into the

hands of people they have never worked with where the core IP asset is not in service of their business, but in that party's interests?”

Many of the potential partners that i4i approached sought total control over the case. Others proposed acquiring the patent in question from i4i in full, leaving the Canadian outfit with a negligible ongoing revenue stream. “That's a very different proposition from being able to partner with investors and experts and continuing to be able to do business,” says Owen. “It is forcing small companies into giving up control of their destiny.”

Eventually, i4i discovered Michael Cannata and his team at NW Patent Funding Corporation, a specialised patent litigation and monetisation funder backed by investment group Northwater Capital. NW agreed to provide the finance that i4i needed to take its case all the way. The result was that funder and patent owner alike shared the considerable damages awarded – and i4i continued life as an operating company unimpeded and without having to sell off its most valuable asset.

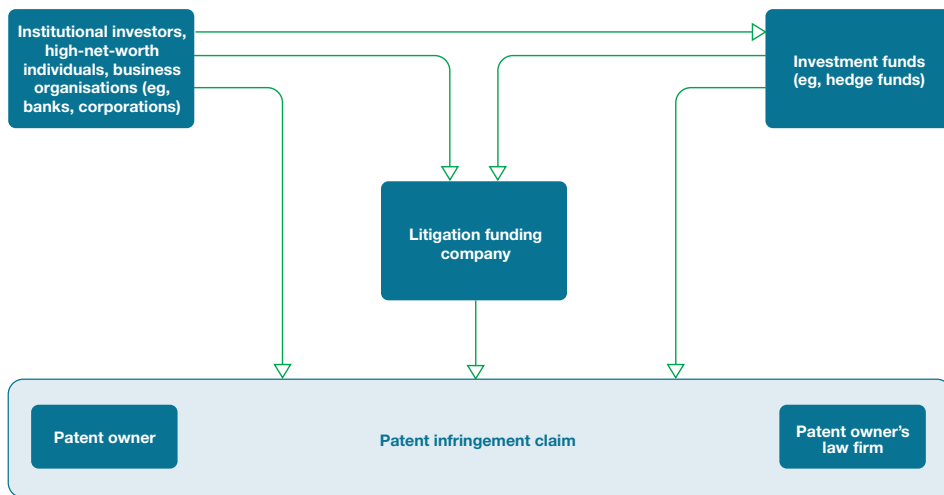
Levelling the playing field

Like i4i, many small and medium-sized enterprises (SMEs) find themselves between the devil and the deep blue sea when they believe that their patents are being infringed. Lacking the resources to enforce their rights, SMEs are often forced into a situation where competitors – often much larger companies with greater experience of litigation and the capital to fund it – can continue to infringe unchecked.

Alternatively, SMEs can partner with other entities in a bid to challenge the infringer – but the price is frequently the patents that are central to their business. “All too often, SMEs are in a position where

Figure 1. Third-party funding models for patent litigation

Investors can provide capital directly to claimants and their external counsel. However, investing via a dedicated litigation funding company can prove to be a safer option. In addition to having specialist expertise in litigation finance, such companies can de-risk each individual investment by building a diverse portfolio of cases differentiated by subject matter, jurisdiction, applicable law and other factors



Loudon Owen
Chair, i4i
“We simply didn’t have the resources, firepower and bandwidth to protect ourselves against large market-leading companies”

the rest of the market is telling them that the only way they can monetise and enforce their patents is by selling them to someone else who has the resources to do so,” says Cannata, who is now a principal alongside Owen at Patent Monetization Inc, a patent brokerage firm that assists SMEs in securing outside funding for litigation. “But small companies need those patents to grow their business. Funders can loan that capital to them, allowing them to continue while at the same time protecting and asserting their IP.”

Big business

The commercial financing of lawsuits is a relatively recent phenomenon. Emerging in Australia during the 1990s, third-party litigation funding (TPLF) – also often referred to as alternative litigation funding – was originally used in the insolvency context. Recognising that bankrupt entities lacked the funds to pursue actions, investors stepped in to provide the necessary capital in exchange for a proportion of the proceeds. As the industry developed, investment-backed financing companies increasingly turned their attention to a much wider range of disputes – including those involving patents. Litigation funders have since emerged on the scene throughout Europe and a robust TPLF market has developed, with many of the world’s leading providers based in the United Kingdom and Germany.

In the United States, however, TPLF has

only recently begun to take off in the arena of high-stakes commercial litigation. Despite being late to the game, largely due to the longstanding availability of contingency fee arrangements, US funding companies are among the most highly capitalised and are rapidly assuming a dominant position in the global TPLF market. With US\$300 million in equity – mainly from institutional investors including Invesco, Baillie Gifford and Eton Park International – New York’s Burford Finance is probably the largest dedicated commercial litigation funder in the world. Focused on providing finance in the United States and the United Kingdom, the company’s shares are traded on London’s AIM. “People come to us for capital for two main reasons,” explains Jonathan Molot, chief investment officer at Burford. “It may be because they don’t have the cash to finance a claim they wish to pursue. On the other hand, they may have the money, but they would rather spend it on something else. And although they can probably find a lawyer to run the case on a contingency fee basis, the right lawyer for this complex commercial case is the sort that bills by the hour.”

Consequently, lawyers will often request litigation finance where their client has a case with a high chance of success, but is unable to pay the requisite fees. “Generally, cases are referred to us either by the claimant or by the lawyer running the case,” explains Susan Dunn, head of



Jonathan Molot
Chief investment officer, Burford Finance
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Book value

External litigation financing can afford multiple business planning and accounting benefits to those who choose to use it. While advantageous to all types of businesses, this can be particularly beneficial to patent owners that are looking to go on the offensive. “When you pursue your claim, every dollar you spend on lawyers is an expense that reduces your earnings,” explains Jonathan Molot, chief investment officer at Burford Finance. “And if you ultimately win, that’s traditionally a below-the-line one-time adjustment that doesn’t affect your earnings. All in all, pursuing affirmative litigation is bad for earnings. So even for general counsel in the

largest companies who are spending nearly their entire litigation budget on defence, it may well be wise to use litigation financing to pursue any affirmative litigation.”

Legal budgets are finite – and today’s uncertain economic environment makes the job of in-house IP departments ever more difficult. “Litigation funding offers anybody, from finance director to corporate counsel, the ability to reduce their outlay and effectively have a net income,” says Nick Rowles-Davies, principal at Vannin Capital. “They’re paying nothing for it unless they win, so it’s only money coming in through the door – albeit some has gone to the funder on the way.”

litigation funding at London-based Harbour Litigation Funding. “Typically, the best patent cases come to us from lawyers who are highly experienced in this area, who believe they have a great claim on their hands and think it may be a candidate for funding.”

This option also allows law firms to extend their practice in a challenging legal market. For example, while a client may be able to afford to pay external counsel on an hourly-fee basis for a patent transaction, it would face a bill running into several millions should those patents subsequently become the subject of a dispute. Funding can help the client to retain the same firm for both contentious and non-contentious matters. “With funding, the client can get the billing arrangement it wants with the legal team it wants, while the lawyer earns fees in the way it wants to while pursuing the best claims,” says Molot.

Winning more than once

Clearly, the main attraction of litigation investment is the possibility for big returns. Typically, TPLF providers will take a significant percentage of damages awarded: for the funders featured in this article, that share typically falls anywhere between 20% and 50%, depending on the case. Patent litigation also offers the possible bonus of a continuing revenue stream in the form of royalty payments. “With patent cases, you can share in the whole monetisation, rather than just a straight piece of one-off litigation, as with other commercial disputes,” says Nick Rowles-Davies, principal at TPLF provider Vannin Capital, which has offices on the Isle of Man and in the British Virgin Islands, and up to £120

million to invest put up largely by private equity backers. “There’s also the opportunity to fund enforcement of that patent against other defendants too,” he continues. “It all adds up to be a very lucrative business – so if you pick the right patent case to invest in, you can effectively win it more than once.”

Buy or lend

Given this potential for high returns, it is understandable why many investors might prefer to acquire patents outright, rather than merely participating in the risky business of litigating them. But buying a patent portfolio or a patent-owning business in its entirety could involve parting with tens of millions of dollars in a single transaction, without any guarantee of a return. Litigation funding can offer both the patent owner and the investor greater flexibility. “With litigation, the capital can be doled out as and when the case progresses,” says Cannata. “For example, an investor may make a commitment for US\$10 million of funding over a five-year period. If the defendant comes up with some killer prior art one year in, the plaintiff may be forced to settle or could lose the case on a summary judgment – but by that point, the investor has spent only US\$1 million. If the same scenario played out, but the investor had instead bought the asset and litigated it as plaintiff, it would likely have paid more than US\$10 million upfront and would now find itself US\$12 million in and without a case.”

Another appealing factor is that financing litigation, rather than acquiring a patent outright, affords the chance to invest in the ‘story’ of a business and collaborate

A risky business: gambling with justice

Those in favour of third-party litigation funding (TPLF) argue that it provides access to justice and levels the playing field when smaller entities want to sue larger and better-resourced opponents. But critics maintain that contingency fee-type schemes and variations on them already give plaintiffs in difficult financial predicaments the opportunity to enforce their rights. They further warn that allowing investors to gamble on the outcome of litigation compromises the efficacy of the justice system – leading to frivolous lawsuits as funders try to exploit any opportunity to get a return.

“Litigation funding companies’ incentives for pursuing litigation are different from the incentives for attorneys and claimants,” says Gary Rubin, counsel in the litigation and government enforcement litigation group at Skadden, Arps, Slate, Meagher & Flom LLP. He and his colleagues have conducted research into alternative litigation finance on behalf of the Institute for Legal Reform, a department of the US Chamber of Commerce that is the leading voice against TPLF in the United States. “Funding companies – like all sophisticated investors – will base their funding decisions on the present value of their expected return,” Rubin continues. “The legal merit of a lawsuit, however, is only one component of this calculus – the other being the potential amount of recovery. If that potential recovery is sufficiently large, the lawsuit will be attractive as an investment vehicle even if the likelihood of achieving that recovery is small. When the potential recovery is large enough, there will always be willing investors.”

But Jonathan Molot, chief investment officer at Burford Finance, argues that this premise flies in the face of investors’ real intentions. “The surest way to lose money if you invest in litigation is to invest in cases that are going to lose,” he says. Susan Dunn

of Harbour Litigation Funding agrees that such criticisms are misplaced, since it would be irrational and dangerous to invest in litigation where there was no clear chance of success. She also believes that many of the arguments against TPLF have a US bias. “They overlook one really important point – in the United States, if you bring a case against somebody and lose, you don’t have to pay their costs,” she explains. “But in most of the rest of the world, you do. When those costs can run into the millions, that proves to be an extremely powerful deterrent to anybody thinking of embarking on a speculative litigation.”

Nonetheless, funders can offset their risk by making sure that they invest in a diverse range of litigation. Rubin thinks that the possibility to hedge in this way means that TPLF providers tend to have a higher tolerance for risk than lawyers – making them more likely to fund speculative, but potentially high-yield cases. “Unlike attorneys and claimants, third-party funding companies have two ways in which they can mitigate their downside risk,” he explains. “First, by spreading the risk of any particular case over their entire portfolio of cases; and second, by spreading the risk among their investors.”

Rubin also points out that there is the potential for the relationship between claimant and funder to break down since each party’s stake in the outcome of the financed litigation differs. In one such example, Texas-based software business DeepNines was sued by IP-focused investment firm Altitude Capital Partners. Altitude had provided DeepNines with an US\$8 million loan to pursue a patent infringement action, which eventually settled for US\$25 million. But while Altitude reportedly made US\$10.8 million from the award, the software company netted less than US\$800,000 after legal fees and costs. Altitude had expected nearly twice as much in damages based on its pre-trial damaging,

and slapped the beleaguered Texan outfit with its own lawsuit after it refused to pay an extra US\$5 million to make up the apparent shortfall.

Despite DeepNines’ negative experience, Michael Cannata, principal at Patent Monetization Inc, thinks that the benefits of TPLF for small and medium-sized enterprises ultimately outweigh the risks. “Small companies have the same rights as large companies,” he says. “Apple, for example, goes out and sues to protect its IP – so why shouldn’t small businesses be able to do the same thing? And why should it be wrong for someone else to finance them so that they can do that?”

Rubin concedes that TPLF can provide patent owners with the capital they need to enforce their rights. But he disagrees with the notion that TPLF levels the playing field in scenarios where a small-time patentee seeks to sue a company with greater experience and financial clout. “If a defendant has the monetary resources to defend itself and its own claims to its IP in court, then that is neither a social nor an economic ill,” he says. “Defending patent cases is expensive, and defendants must pay the dollar-for-dollar cost of doing so or risk a default judgment. The plaintiff makes the choice to file suit – the defendant has no choice but to defend.” For Rubin, contingency fees and other alternative billing arrangements already offer an adequate – and a much less risky – route for patent owners to pursue their claims, meaning that external financing is unnecessary. “The biggest problem with third-party funding is that it increases the amount of money available to pay attorneys to litigate,” he concludes. “That increases the volume of claims that are litigated – and therefore it will increase the volume of frivolous or unmeritorious litigation as funders supplant attorneys as the gatekeepers to litigation.”

with the people who have invented, developed and commercialised the technology at its core. “A major benefit to the funder is that it gets to work with the most motivated teams and entrepreneurs out there,” says Owen. “Funders can help those entrepreneurs to achieve their real objectives – not simply enforcing patents, but doing so to grow their business.” As a result, TPLF can inspire confidence in SMEs that would normally avoid IP monetisation

activities due to the costs and risks associated with litigation. “I think that this opens up to investment a class, a quality and a calibre of IP that is unprecedented – some of the most valuable patents there are,” Owen adds.

Mitigating risk

However, ‘betting the farm’ can represent a far greater risk than a patent acquisition, regardless of the initial outlay. Litigation is



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Head of litigation funding,
Harbour Litigation Funding
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Defence funding

Third-party litigation funding (TPLF) works on the premise that an outside investor puts up the costs of litigation while taking a proportion of the proceeds as payment should the claimant win. On the other side of the coin, companies can purchase insurance against being sued. But any TPLF-type model for funding a defendant’s legal costs will necessarily be far more complex, since a defendant typically receives no pay-out if it prevails in litigation. “Claimant funding works by dividing up the proceeds,” says Nick Rowles-Davies, principal at Vannin Capital.

He suggests that one way in which TPLF might be made to work in a defensive capacity is for the defendant to pledge part of what it saves as payment for the funder. “It would be difficult, because the investor would be putting up capital up with no clear way of getting a return,” says Michael Cannata, principal at Patent Monetization Inc. “But this industry is so new and there are a lot of creative people involved in it, so I’m sure that somebody is going to figure out a way to put out defendant-type financing and get their return some other way.”

winner takes all – so from the investor’s point of view, hedging that risk is key. “For example, a single decision at the Federal Circuit could affect a large number of patent matters,” says Molot. “Our total portfolio of cases is diversified across jurisdiction, applicable law, size of case, subject matter – a high number of metrics. That’s the best way to take a high-risk investment and make it smoother and less risky.”

The legal, technological and scientific peculiarities make patent litigation one of the most challenging fields for investors. By investing across a broad spectrum of cases requiring less specialist expertise, TPLF providers can diversify their risk profile. “We are much more careful before we choose to invest in patent claims, because they are much more susceptible to losing on technicalities,” says Molot. Dunn agrees that while the rewards can be exceptional, funders need to be mindful of the specific risks that patent cases bring: “I don’t think that patent litigation is something investors should dabble in. Even though we may win lots of cases, there is always the very real chance we will lose them too – and if that happens, we write off our investment.”

Harbour Litigation Funding has a total of £180 million to invest in commercial lawsuits. The money comes from a range of institutional investors and high-net-worth individuals, which commit to a long-term, closed-end fund. While cases in the United Kingdom tend to be its focus, the company also regularly funds litigation in the United States, as well as in other common law and offshore jurisdictions. Dunn outlines the criteria that the company will weigh up when considering whether to foot the bill for a case: “Whether it involves patents or any other type of commercial dispute, we are always looking for the same four key

things. First, the defendant must be able to pay the amount claimed, because clearly there is no point in proceeding if it can’t. Second, it should be a case you think you should win, and win with substantial rewards. Third, you need to know how much it is going to cost. And finally, you need to know and trust the team that is going to run the case.”

In the context of patent litigation in particular, the need for top-notch technical expertise is absolutely crucial. In addition to external patent counsel, the team should include specialists who can assess likely damages and calculate potential royalty income. “We have to understand the patent itself and the potentially infringing technologies,” Molot continues. “To do that, we need experts in the technology to understand how it works, and experts in patent law to know how the claims are likely to be interpreted.”

The NPE continuum

By carefully structuring deals with patent owners, funders can further mitigate the risks that patent litigation presents. One of the supposed attractions of TPLF for patentees is that it allows them to retain ownership of their intellectual property and avoid assigning assets to an assertion entity. However, TPLF and the NPE model are by no means mutually exclusive. “It’s a continuum, and we are not only willing to participate at one end of that continuum,” says Molot. “Burford wouldn’t rule out purchasing a patent or being involved in a group that would do that.”

Juridica Investments – another New York-based, AIM-listed litigation funder – has invested around US\$150 million in commercial lawsuits to date, with about US\$40 million of that in patent litigation, according to CEO Richard Fields. For the

Figure 2. **Commercial litigation funding companies**

A selection of litigation funding companies known to offer finance for IP cases

Funding company	Location and web address	Notes
Allianz ProzessFinanz*	Munich, Germany profi.allianz.de	Part of insurance conglomerate Allianz SE. Focused on providing finance in Germany, Austria, Switzerland and the United Kingdom.* To date, it has assessed around 5,000 legal claims worth about €500 million in total.†
Burford Finance	New York, United States (Burford Capital domiciled in Guernsey) www.burfordfinance.com	cUS\$300 million to invest. Publicly listed on London Stock Exchange's AIM.
Calunius Capital	London, United Kingdom www.calunius.com	Capital range £10 million to £40 million. † Focus on the United Kingdom and Germany. Financed the Elvis Presley estate's copyright litigation against the successor to RCA Records at the Munich District Court.
FORIS AG	Bonn, Germany portal.foris.de	Capital for investment unknown. Finances litigation in Germany, Austria and Switzerland. Publicly listed on the Frankfurt Stock Exchange's XETRA.
Fulbrook Capital Management	New York, United States www.fulbrookmanagement.com	Capital for investment unknown.
Harbour Litigation Funding	London, United Kingdom www.harbourlitigationfunding.com	c£180 million in capital for investment.
IMF (Australia) Ltd	Sydney, Australia www.imf.com.au	Capital for investment unknown. Finances Uniloc's patent litigation against Microsoft at the US Federal Circuit. Publicly listed on the Australian Securities Exchange.
Juridica Investments	New York, United States (Juridica Capital domiciled in Guernsey) www.juridicainvestments.com	cUS\$150 million invested in litigation so far. Publicly listed on the London Stock Exchange's AIM.
Legial AG	Munich, Germany www.legial.de	Capital for investment unknown. Formerly known as DAS Prozessfinanzierung.
NW Patent Funding Corporation	Toronto, Canada www.nwpatentfunding.com	Provides specialist funding and expertise to patent owners for litigation and licensing. Capital for investment unknown.
Therium Capital Management	London, United Kingdom www.therium.com	Capital range £40 million to £70 million.†
Vannin Capital	Douglas, Isle of Man www.litigationfunding.com	c£120 million in capital for investment.
1624 Capital	New York, United States www.1624capital.com	Capital for investment unknown. Focused on funding contract, antitrust and patent disputes, among others.

*Allianz began its exit from the litigation funding market in October 2011, citing conflicts of interest with its core insurance businesses. Reportedly, it still works with existing clients, but has stopped seeking new business.

†These figures are taken from Litigation Funding: Status and Issues by Christopher Hodges, John Peysner and Angus Nurse (University of Oxford Centre for Socio-Legal Studies and the University of Lincoln School of Law, 2012)



Nick Rowles-Davies
Principal, Vannin Capital
“We can effectively recreate the US litigation landscape here in Europe for NPEs”



Richard Fields
CEO, Juridica Investments
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majority of patent cases it funds, Juridica prefers to acquire the assets in question and assign them to a freshly created NPE. “That gives us more control and lessens the risk,” explains Fields. “When we started up, we financed cases which were single patent, single inventor, single claim – they turned out well for us, but were very high risk. Our model has evolved now so that we are mainly interested in whole portfolios where there are multiple patents around a given technology.” The evolution of the IP marketplace has seen Juridica’s client base shift from mainly sole inventors and start-ups to larger, more established organisations. “Five years ago, major companies were complaining about patent trolls,” says Fields. “But now many of them – including some of the largest technology companies in the world – have quietly become patent trolls themselves. That is presenting a growing number of high-quality opportunities for us in this field.”

Juridica’s institutional clients are less concerned than smaller businesses about retaining ownership of patents. “A lot of major companies would prefer to be distanced from litigation to reduce the threat of countersuits and remove themselves from a situation where they may end up suing their business partners,” says Fields. “So this gives them a way of monetising their assets without getting into patent wars with the rest of their market.”

In addition to ‘privateering’ for operating companies, litigation funders often work with standalone NPEs. Vannin Capital counts a number of patent aggregators among its clients and Rowles-Davies reports increasing interest in TPLF services from that sector. “In the United States, those entities normally run with contingency fee lawyers – something that they haven’t really been able to do in the United Kingdom and the rest of Europe,” he explains. “They use funders because it de-risks the adverse costs problem you get in Europe.” The traditional patent aggregation and assertion model of many NPEs has been predicated largely on the peculiarities of the US litigation system. Across the Atlantic, however, they hit snags – not least because of the ‘loser pays’ rule found in European jurisdictions. “If the claimant uses a funder, it doesn’t have to pay its own lawyers and the funder will cover the potential downside of the other side’s costs by either insurance or indemnity,” continues Rowles-Davies. “We can effectively recreate the US litigation landscape here in Europe for NPEs.”

The birth of an industry

For the time being at least, the United States looks to remain the TPLF industry’s most lucrative market in terms of patent litigation. However, the America Invents Act (AIA) has introduced a raft of changes, including measures intended to make enforcement less expensive for patent owners. If these succeed in their aims, demand for TPLF could wane.

That said, Molot for one welcomes any revision that improves access to the patent system. “Any reform that can streamline the patent system and make it faster, more efficient and more predictable will be welcome to everybody,” he says. “If this means that a claimant with a good case can afford to pursue it by itself, so be it. But I think there will still be ample opportunities for funding patent litigation – and in the cases that are still financed, a more efficient system will clearly work to the funders’ benefit.”

Cannata agrees that the AIA is unlikely to dampen investor enthusiasm. “As long as the US market continues to be one of the world’s largest, as well as the venue where the most patent litigation is taking place and the biggest pay-outs are available, this is going to be attractive for investment. The experts who work in this field will be able to adapt to changes – that’s part of what makes them experts.”

Fields emphasises that regardless of the reforms, the most important thing for investors to remember is that patent litigation financing should form one part of a broader portfolio. One strategy to achieve this which is gradually gaining traction is to invest in lawsuits involving other classes of IP asset. “We are financing several trade secret cases,” says Fields. “They often come hand in hand with patent cases, but may have some advantages over them depending on the investor’s point of view. There tend to be a lot fewer technical issues – there just aren’t the same technological and legal hurdles you get in patent cases.” Molot likewise confirms that Burford receives plenty of enquiries relating to copyright, trademark and trade secret claims. “We are certainly getting more and more calls for all sorts of IP cases,” he says. “I just don’t think there’s such broad market awareness of it – there seems to be more interest in patents at the moment.”

Cannata thinks that the hype surrounding patents is understandable after recent big-money transactions. And he believes that owners of patents and other IP rights not quite on the scale of the heavyweight technology players will enjoy a

trickle-down benefit. "In terms of investing in IP, most of the attention at the moment is on potential sales of big patent portfolios," he says. "But in reality, most of the new inventions that have some sort of monetisation value come from sole inventors, universities and small companies. I think that the more that gets written about Nortel and AOL and those big guys, the more those smaller entities are going to want to get their fair share from their IP too. But they won't have the capital to do that or the expertise to do that." That's where the funders can step in. *iam*

Action plan



Patent owners:

- Should have their claim thoroughly examined for its merits by lawyers before approaching funders.
- Have a clear idea of how much of any potential upside they would be willing to part with from a successful infringement claim. This will form the basis of negotiations with funders.
- Find a funder that can demonstrate a good track record in patent litigation.
- Find a funder that can best complement their business objectives. For example, different funders will offer different structuring arrangements; some funders may specialise in patent claims.

Investors/funders:

- To reduce risk, patent litigation funding should be one part of a diversified portfolio of investments.
- Patent litigation is generally uncorrelated to the stock market, giving the opportunity to hedge stock interests in an investment portfolio.
- The complex technical aspects of patent litigation mean that it is paramount to assemble an expert team to assess the infringement claim and run the case.
- Institutional investors, high-net-worth individuals and investment funds should work with litigation funding companies with a proven management team and good past performance in financing patent cases.

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