

Inbound Patent Assertion: how to respond to the challenge

Patent assertion is set to increase due to the economic downturn. Here's how to devise strategies to build an effective, efficient response.

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Patent assertion on the rise

Operating companies are facing a perfect storm this year. Patent assertion is set to soar, thanks to economic crises throughout the world, just as technology convergence is making many more industries vulnerable to attack. To make matters even worse, the litigation landscape is more complicated than it ever has been, with litigation increasingly being filed in other jurisdictions, such as Germany and China, as well as the United States.

The evidence is clear that economic downturns tend to result in an immediate rise in patent assertion, which is followed by increased litigation over the next few years. As chart 1 shows, the recession in 2001 led to litigation increasing in 2003 and 2004, while the Great Recession of 2007-09 resulted in litigation rising each year from 2009 and peaking in 2013, after which it steadily declined.

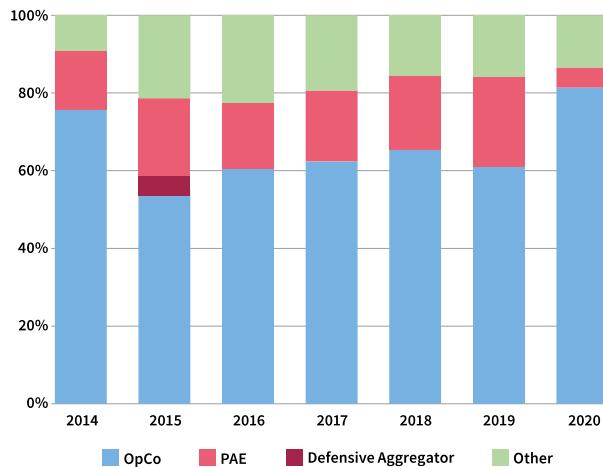
Chart 1: Number of US patent litigations started by year, where an operating company is both plaintiff and defendant



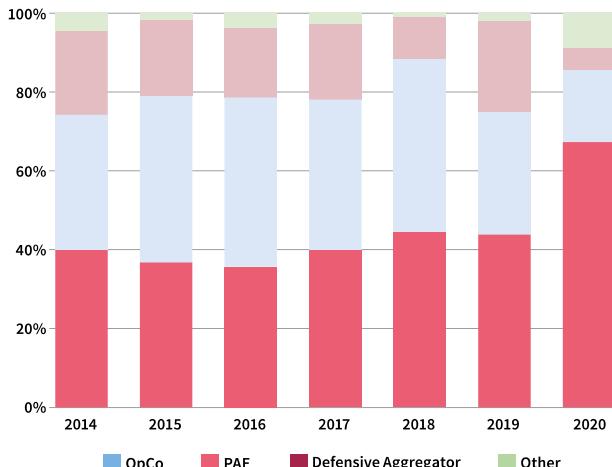
Source: MaxVal Litigation Databank/Cipher

There are several factors that explain this trend. Recessions provide an incentive for companies to seek to monetise dormant portfolios, while corporate insolvencies put more assets on the market – which are snapped up by patent assertion entities (PAEs). Some PAEs may also see an opportunity to target operating companies at a time when businesses are distracted, under-resourced or lacking budget.

Data compiled by Richardson Oliver Law Group indicates that PAEs are by far the biggest buyers of patents, accounting for nearly two-thirds of purchases so far this year (chart 3). The data also shows that over 80% of PAE purchases have been from operating companies (chart 2).

Chart 2: Who supplies PAEs with patents


Source: Richardson Oliver Law Group

Chart 3: Percentage of patents bought by PAEs


Source: Richardson Oliver Law Group

According to a recent report by LOT Network and Cipher, in 2019 PAEs asserted over 1,400 patents in more than 2,000 litigations worldwide – and that number is expected to increase this year. Increasingly, operating companies feel compelled to protect themselves from the risk: LOT Network's members agree to grant each other a non-exclusive, conditional license if any of their patent assets were ever transferred to a PAE – and membership has soared from 11 companies in 2014 to over 1,000 today.

The threat from patent assertion entities means that all operating companies need to put in place a strategy to be able to respond effectively and efficiently when patents are asserted against them.

How to respond

Ignoring patent assertion is not an option: every threat has to be taken seriously. Not doing so risks ending up with a significant damages award (potentially increased for willful infringement) and even, in some jurisdictions, an injunction.

Filing an invalidity action might be a valid response if you are facing one or two patents being asserted and have the luxury to do thorough prior art searches. But it is simply not viable if you receive assertions of portfolios comprising hundreds or thousands of patents and demands to respond rapidly.

However, there are strategies you can adopt when patent portfolios are asserted, whether that happens to you frequently or rarely. These are built on taking the threat seriously, evaluating your position and building an effective response.

A multi-step process helps to formulate an effective approach (chart 4). This involves identifying what is relevant; assessing the impact based on specific patented technologies and revenue data; exploring the possibility of counter-assertion; and working out how to use the analysis most effectively.



Cipher's Solution to Inbound Patent Assertion

Relevant patent intelligence and analysis is at the heart of any response to inbound assertion. Cipher's unique AI-driven technology can help you assess the patents being asserted and compare them with your portfolio according to various metrics. This can form the basis of a robust response.

Cipher can also provide customers with customised charts and analysis which can be used to reinforce your negotiations with PAEs, and help to tip discussions in your favour.

We will be exploring how this strategic approach can help in practice and offering tips on using data to respond to patent assertion, during our webinar in December on '***Inbound Patent Assertion – economic downturn triggering an increased risk?***'.

[Register for the webinar](#) on 8th December at 18:00 GMT or catch the rerun on 10th December at 09:00 GMT.

For more information about how Cipher can help with Inbound Patent Assertion challenges, get in touch directly or visit our website www.cipher.ai/solutions/patent-assertion.