

## ICC Scene-Setter Paper

### **Third-Party Litigation Finance Fuelling Abusive Intellectual Property Litigation**

#### Description

Intellectual Property (IP)-protected intangible assets are at risk, as criminal and other, often unknown, entities abuse the current legal framework in innovation-driven economies by exploiting gaps in the IP governance and enforcement frameworks. This includes the traditional direct assault on IP value committed through copyright piracy, trademark counterfeiting, or trade secret theft. It also includes value destruction and wealth transfer through unfair exploitation of gaps that result from the IP frameworks' complexities. In recent years, abusive third-party litigation finance has become a particularly damaging practice that exploits those gaps in IP frameworks.

The transnational litigation finance industry reached \$39 billion global industry as of 2019. The numbers are growing rapidly. While litigation financiers fund cases in a number of areas of law, IP is particularly vulnerable, with patent litigation increasingly central to their business model. No form of IP is immune, no industry sector is immune, and litigation increasingly targets all phases in the supply chain. The United States is the primary market now, but the financiers are already active against European and Asian companies, and have advertised the opportunities they expect the Unitary Patent System to offer them. This type of IP litigation, funded by often non-transparent third-party sources, threatens the legitimate innovators, economies, jobs, and consumers that the IP system should serve.

#### Who is concerned by this issue?

On one side of this litigation are the makers – businesses that develop new products, create jobs, and help drive our economies forward – such as semiconductor manufacturers, telecommunications equipment manufacturers, and biopharma. On the other side are shell companies – often supported by transnational litigation finance entities – that do not innovate, do not hire, do not build, and do not create anything other than lawsuits. Hedge funds, private equity companies (including one that some credit with worsening the 2008 Global Financial Crisis), state-owned or sovereign wealth funds, and other, untraceable transnational financiers are increasingly engaging in this type of litigation. This practice diverts resources from traditional investment in R&D, creates added risks for complementary industries such as insurance, and drains resources from legitimate, innovative businesses worldwide.

This is not traditional litigation. This is not a proxy for SEPs litigation or a patent creator seeking to monetize its patents until their expiration. This is a lottery-style business venture, in which the players launch hundreds of cases and wait for a few to pay off. It is, for example, a hedge fund acquiring a patent portfolio in a specific industrial sector and gaming the judicial and administrative enforcement systems to extort from as many parties as possible financial settlements or court awards. In many cases, the risk factors compel settlement even though it is not at all clear whether the underlying patents are even valid. The involvement of litigation financiers vastly improves shell companies' chances of success in asserting low-quality patents against makers.

Patents are not the only vulnerable IP right. This business model is also applicable to trademark squatting and copyright portfolio litigation. It can be used against any type of business. It disrupts the ordinary course of litigation. It traps its victims in a time and resource-wasting hall of mirrors. It distorts capital flows and manipulates enforcement frameworks.

Often, third parties use shell organizations to obscure their identities and the sources of their funding, and attack innovative and creative companies from the shadows. Instead of using the IP system to

foster innovation and generate economic growth that fuels economies, these parties are engaged in what has become a highly profitable misuse of IP frameworks to transfer wealth from inventors to shadow investors. Thus far, there have been few controls and no mechanisms for deterrence.

### Misuse of Intellectual Property Frameworks

Trends of misuse of legal IP frameworks are greatly concerning, as they result in damage to the economy and hamper innovation and growth potential. Moreover, these trends seem to have expanded in recent years, fuelled by globalisation, international trade, and governance gaps across countries.

Two primary policy concerns have emerged. The first is the impact of this clandestine and increasingly destructive activity on good governance, public integrity, and the rule of law. The second is the negative effect that misuse of IP frameworks has on legitimate competitive advantage of rights holders, and consequently on innovation, employment, and long-term economic growth.

Governments and businesses have undertaken initiatives to enhance efforts to combat traditional misuse of IP frameworks. However, this particular challenge to the IP system is only now being studied. Little of any academic value has been written about these practices and even less is known about the players. A lack of general awareness of the problem combined with little information on the magnitude and scope of the abusive litigation problem worldwide and on the identities and practices of the participating entities have hampered efforts to understand and address this challenge. The unethical, and in many cases clandestine, nature of abusive activities and consequent difficulties in developing reliable statistical and other information have been key factors in this regard.

### How can ICC contribute act on this issue?

The objective is to employ the ICC and its institutional reach at WIPO, OECD, et al. to identify means for gathering and analyzing information to improve overall awareness and understanding of the situation, identify the governance gaps that fuel it, motivate governments to address those gaps, and mitigate the impact of this activity on the competitiveness of ICC members and other innovative companies.

This item will become a workstream within the ICC Global Intellectual Property, and we will work with ICC members, National Committees, and partner organizations at different stages.

Specifically, some of the actions to be taken in this workstream include:

1. Intelligence gathering. Holding conversations with stakeholders, including ICC member companies affected by this issue.
2. Preparing a set of key messages. These messages can contain an identification of the points of concern for businesses and how, concretely, they affect innovation ecosystems. This may include data-gathering efforts to support the ICC key messages on this matter.
3. Identifying the governance gaps that enable abusive third-party litigation practices. These identified governance gaps can be consolidated into an ICC policy document.
4. Conducting policy advocacy efforts based on the content developed on points 2 and 3, advocating for solutions that address business concerns on this issue.