

# **BENCHMARKING IP LITIGATION 2019**

**A STUDY COMMISSIONED BY**

**MORRISON  

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FOERSTER**

# EXECUTIVE SUMMARY

To better understand the current state of IP litigation — and help companies better manage their costs and risks — Morrison & Foerster commissioned in-depth interviews with top IP legal decision-makers from 53 companies with at least \$750 million in revenue. Results of this study were combined with the BTI Consulting Group's Annual Survey of Top Legal Decision-Makers to illuminate IP litigation trends, including spend, types of matters, jurisdiction, and management.

The Morrison & Foerster Study of IP Legal Decision-Makers (“MoFo Study”) shows a significant shift in the nature of IP litigation matters that large companies face.

- Annual spend on IP litigation matters continues to increase, growing from \$1.7 billion in 2005 to \$3.3 billion in 2019; growth rates have recently slowed, but continue at double-digit rates
- While spending has increased, the number of matters that companies are managing is down 27%, from 15 matters on average in 2015 to 11 matters on average in 2019
- Matters are more complex and riskier, with nearly 1 out of 5 being classified as Bet-the-Company (4%) or High-Risk (15.1%); an additional 48% are reported as Complex or Significant
- 7 out of 10 new matters are being filed outside the U.S., and 17% of IP litigation decision-makers expect that to increase over the next three years

# I. CHANGES IN MANAGING IP LITIGATION

## INTRODUCTION

Managing IP litigation at a multinational company has never been more challenging. Yes, the volume of patent-infringement litigation has trended downward in recent years in the United States, where defendants have been afforded new tools and procedures to challenge the validity of patents and assert more control over jurisdiction. But the reality is that the risks, complexity, and costs of IP litigation continue to mount.

Part of this development can be attributed to the spread and development of new technologies that have blurred the lines between industries. Patents once relevant to just one industry may now apply to many more. As a result, companies can find themselves drawn into a wide range of disputes. And because of the wide application of these patents and the globalization of markets, the financial exposure in IP litigation can be extraordinary.

The internationalization of IP litigation is driving risk, complexity, and cost. The maturity and increasing popularity of patent courts in Europe and China have broadened the litigation landscape, making it essential for companies to effectively defend themselves or pursue infringers on a global playing field.

## WHY SPENDING IS INCREASING WHILE MATTERS ARE DECLINING

Although not growing as rapidly as a decade ago, spending on IP litigation by large companies (with \$750 million or more in revenue) continues to rise. Between 2005 and 2010, spending ballooned by 42%. The rate of growth has since slowed, but it nevertheless increased 14% between 2010 and 2015,

and 15% between 2016 and current expected levels in 2019.



Meanwhile, spending per matter is growing at an annual rate of 12%. Large companies now spend, on average, \$1.5 million per matter. In addition, median spending among large companies on IP litigation is growing rapidly and is now more than four times what it was in 2015.

As spending on IP litigation grows, the number of matters companies face is declining. IP legal decision-makers report managing an average of 11 IP litigation defense matters at the beginning of 2019. This is down from the 15 matters reported in the 2015 annual survey — a 27% drop.

This decline follows decisions by the U.S. Supreme Court, such as *TC Heartland v. Kraft* and *Alice Corp. v. CLS Bank International* that have generally made it tougher on plaintiffs in patent litigation. In the MoFo Study, 40% of IP litigation decision-makers said that *TC Heartland* had been helpful to their companies.

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## I. CHANGES IN MANAGING IP LITIGATION

The *inter partes* review procedure that allows defendants to challenge the validity of patents, introduced by the America Invents Act (AIA), also appears to have contributed to the decline. According to data from *Lex Machina*, patent litigation filed in U.S. federal district courts in 2018 were at their lowest level since the AIA's enactment. Perhaps unsurprisingly, more than half of the IP legal decision-makers surveyed described *inter partes* review as a helpful tool.

So, with these helpful tools for defendants — and the number of matters decreasing — why does spending continue to rise? Two major causes appear to be at play:

1. **Larger claims**
2. **Increased complexity of claims**

### LARGER CLAIMS

IP litigation decision-makers report that they are facing some of the largest claims they have ever seen. That could be in part because claims are being made later in a product or use life cycle, allowing claimants to assert higher damages because the infringement covers longer time frames and larger revenue streams.

These large claims are increasing the exposure that companies face, which appears to be causing them to spend more resources defending themselves. In bet-the-company cases, the average exposure for large companies is over \$1 billion, with the high end at \$2 billion.

As alleged damages have grown, so too have awards in litigated cases. A 2018 PwC study found that the median damages award for patent infringement in 2017 was \$10.2 million, an increase from \$6.1 million in 2016.

### INCREASED COMPLEXITY OF CLAIMS

Patent-infringement litigation is also becoming more complex, covering ever-evolving innovations and technologies. At the same time, plaintiffs are more aggressive, forcing companies to defend against claims involving numerous sources of alleged infringement.

It is common for plaintiffs today to assert multiple claims for multiple patents in one lawsuit. This strategy can reduce the risk that a lawsuit will be dismissed based on *inter partes* review. The more patents asserted, the less likely it is that a lawsuit will be dismissed in its entirety.

Another wrinkle is the multijurisdictional nature of matters. With the globalization of markets and supply chains, patent disputes are increasingly likely to play out in multiple jurisdictions around the world, as exemplified by the smartphone and standard-essential patent wars. These disputes require companies to locate and hire counsel around the world and to develop a cohesive strategy across markets.

**“...you need to really understand each jurisdiction because the results can be radically different in each one”**

**— Associate GC, IP & Litigation, Communications Company**

# I. CHANGES IN MANAGING IP LITIGATION

## MIX OF MATTERS CHANGING

Our survey of IP legal decision-makers reveals 19% of matters are getting most of management’s attention and money. These cases fall into two categories: High-Risk at 15% of matters and Bet-the-Company at 4% of matters.

Additionally, IP litigation decision-makers characterize 47.9% of all matters as Complex or Significant. These matters are unlikely to damage a brand, stop operations, or kill a product line, but they can inflict significant financial damage.

This spending pattern suggests these companies would benefit from:

- Early risk assessment
- Structured budgeting processes
- Formal, scheduled, systematic updates from outside counsel

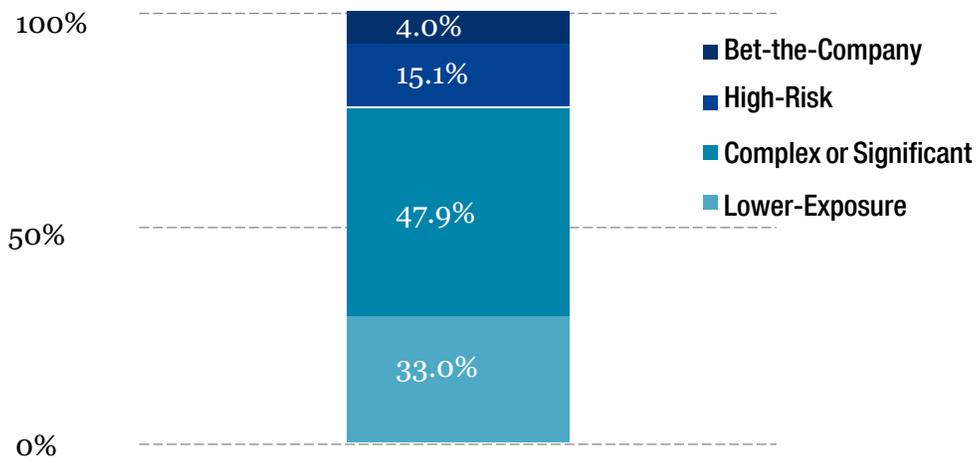
- Mid-course risk assessments
- Mid-course budget assessments
- Multiple trial-preparation (e.g., mock-trial) sessions

## QUESTIONS TO ASK

The decline in the overall number of matters, combined with increased spending per matter, suggests companies would benefit from asking a few key questions:

1. What changes in strategy and tactics can we use to manage and contain this trend?
2. How early can we assess risk?
3. What litigation strategies can we employ to resolve cases more efficiently?

**IP LITIGATION BY RISK LEVEL**  
PERCENT OF MATTERS



# II. WHAT THE FUTURE HOLDS

## LITIGATION MIGRATING OUTSIDE THE UNITED STATES

IP litigation decision-makers predict that the next litigation wave will be fueled by increased activity outside the United States. Indeed, respondents indicated that almost 70% of new matters against their companies over a recent 12-month period had been filed outside the United States.

The growing number of non-U.S. patents filed and the increasing familiarity with non-U.S. courts are helping to drive this trend. Increasingly, parties also see tactical advantages in these jurisdictions not available in the United States.

China in particular has become a popular destination for IP litigants in recent years. The country's market size and growing commercial importance, notably in global supply chains, makes it nearly impossible to avoid or ignore when it comes to patent disputes. But China's IP system has also gained popularity among parties for its speed in resolving disputes and its available injunctive remedies.

Elsewhere, in Europe, Germany has emerged as a leading jurisdiction, with its courts attracting nearly 1,000 infringement actions ever year. National courts in Europe, however, are expected to take a back seat to the forthcoming Unified Patent Court, which is designed to be a one-stop-shop venue for patent litigation on the continent.

Top U.S. IP litigation decision-makers believe defending claims filed outside the U.S. is more challenging than defending claims filed in the U.S., perhaps as a result of perceived unfairness to their companies, or finding and managing counsel on the ground. In any case, approximately 17% of top IP litigation decision-makers expect the number of IP litigation matters filed outside the U.S. to increase, leading to a surge in non-U.S.-based IP litigation.

Few are sanguine about this development, with only 8.1% viewing it as preferable to litigation inside the US.

## FUTURE LITIGATION TARGETS

In addition to more lawsuits filed outside the United States, participants in the MoFo Study identified industries and technologies likely to see more litigation in the near future. Among the most-cited areas were genetics and biosimilars. In 2017, addressing some of the legal issues presented by biosimilars, the U.S. Supreme Court ruled in a closely watched case over when companies can bring biosimilar compounds to market under the Biologics Price Competition and Innovation Act (BPCIA).

But more disputes around biosimilars are emerging. Last year saw a record number of new BPCIA suits filed in U.S. federal district courts.

Other areas expected to generate litigation, according to the MoFo Study, include autonomous technology, artificial intelligence, medical devices, and Internet streaming. Companies have also expressed concern about litigation relating to the Internet of Things.

## QUESTIONS TO ASK

With IP litigation activity outside the United States expected to continue rising, companies should be asking a few questions:

1. What is the impact of the globalization of IP litigation on our IP strategy?
2. What kind of planning tools will be most effective in preparing for unexpected decisions and impacts?
3. Which jurisdictions do we need to watch and gather defensive assets for?
4. How will we monitor decisions in jurisdictions outside the U.S. in real-time?

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## II. WHAT THE FUTURE HOLDS

### CONCLUSION

With nearly 20% of top IP litigation decision-makers expecting bigger, more complex, and riskier IP litigation over the next three years, it is crucial that companies make initial risk assessments to minimize costs and mitigate risks. Such assessments should ideally be done within 30 days of matters being filed. It should never be assumed that a matter is insignificant. Frequently developed with outside counsel, formal risk assessment tools can help quickly identify bet-the-company and high-risk

work, allowing companies to prepare efficiently and effectively.

The expected increase in litigation outside the United States, particularly in Europe and China, makes these assessments even more critical. The rules and precedents in these various jurisdictions differ widely, which can alter the risk calculus significantly.

Of course, preparation can and should start even sooner. Companies planning for the expected and the unexpected alike well before decisions become law and IP litigation is filed will have an advantage.

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*We expect to see more cases, especially in Europe and China. China will be starting up domestic production for our core products, so we don't know what the outcome of this will be.”*

— Director, Litigation & Technology,  
Global Technology Company

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*There will be a rise of foreign litigation in Germany and other jurisdictions as well. Our industry is more mature than most in the handling of IP litigation, and we see a shift away from the U.S. to various overseas jurisdictions, as well as a general increase in litigation cases outside of the U.S.”*

— Director & Managing IP Counsel,  
High-Growth Technology Company

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*For our industry, it's litigation against Chinese companies trying to compete with U.S. companies. The government is pumping billions of dollars into these companies.”*

— Associate Counsel IP  
Global High Tech Leader

For more information,  
please visit our website at [mofo.com](http://mofo.com)