

LITIGATION SUPPORT CENTER:

LOOK *at the year ahead*

By,
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As we approach year-end, our litigation support practice has seen an increasing docket of intellectual property ("IP") infringement matters. This is not a surprise to us since companies are becoming more sophisticated in understanding the value of their IP, as well as protecting and monetizing it. We have also noticed that we are being retained on litigation assignments earlier on in the case and being asked to perform pre-litigation consulting services for counsel with more frequency. We anticipate both of these trends to continue in the upcoming New Year.

IP infringement matters continue to increase. David Cupar, Chair of the Intellectual Property Department, at McDonald Hopkins, LLC states, "In 2015, we expect to see an uptick in IP litigation, especially as it relates to patents, trademarks, and trade secrets." Sound economic analysis is needed in IP litigation since the assets themselves (i.e., patents, trademarks, trade secrets, copyrights, etc.) are, by their very nature, complex. For example, economic damage quantification on patent infringement matters requires an understanding of the demand for the infringed product, acceptable non-infringing substitutes, and the ability of the patent holder to produce and market the product. In a trademark infringement matter with a diminution in value claim, the economic expert needs to conduct economic analysis to determine the strength of the mark and the impact of the diminution in value; perhaps corrective advertising is needed to remedy the situation. As such, sound and logical economic analysis is required along with well-thought out economic damage quantification that can be clearly and concisely conveyed to the trier of fact.

We also notice that we are getting brought in on litigation support assignments earlier in the litigation process. This is advantageous because we can assist counsel with litigation strategy, discovery, and damage theory which often leads to a well-thought out litigation strategy that works in tandem with economic damage quantification. Cupar noted, "It is important that litigation costs are commensurate with the economic damage outcome. Retaining an expert early on in the process gives the litigator options on potential damages theories, as well as measuring opposing counsel's damages theory." Of course, there is a balancing act of case management and anticipated economic damages. Nevertheless, it is not

helpful when needed documents or information cannot be requested because discovery has ended, which can "hand-cuff" the economic damages expert and litigator unnecessarily. It goes without saying that winning liability with an award of zero economic damages is generally not a good outcome for your client. Consequently, it only makes sense to understand the magnitude of anticipated economic damages before the case is filed.

Wrapping up, as we look forward to another year, we anticipate an increase in IP engagements, as well as continuing to be retained early in the litigation process so as to assist counsel with litigation strategy and the resulting commensurate economic damages.

Andrew M. Malec, Ph.D., is a Partner and Managing Director at O'Keefe. Dr. Malec is a recognized expert in providing economic analysis and litigation advisory services to litigators in complex, commercial litigation matters, including but not limited to, intellectual property infringement, securities litigation, and shareholder disputes. Dr. Malec also has significant experience in providing valuation opinions including, but not limited to, derivative securities, enterprise value, equity, intangible asset/intellectual property valuation, and debt opinions for corporate planning, financial reporting, taxation, transaction, litigation, and strategic planning purposes. Dr. Malec can be reached at amalec@okeefellc.com.

