

Getting with the times

Cindy Ahn of Longford Capital explains how the general counsels of IP-centric companies can maximise value and innovation while staying within budget

Budget constraints often act as a barrier to aggressive litigation and patent protection. But it doesn't have to be that way. Companies can pursue justice and have their holiday bonuses, too.

As general counsel managing multiple litigations for a publicly traded biotech firm, no statement crystallised the pressure of balancing budgetary constraints and quality legal practice more than a warning my former boss gave early in my tenure, that if I didn't come in under my budget, the company wouldn't be able to give Christmas bonuses that year. That statement kept me intensely focused on controlling costs. I didn't have the luxury of taking big risks, unless I wanted my colleagues to potentially suffer the consequences. Luckily, our company was extremely intellectual property savvy, in part because the CEO was a former patent litigation attorney with the confidence to assess the importance of IP in protecting our technology and market position.

As a result, we did not hesitate to litigate when appropriate. This required me to hire legal teams I trusted to win, which accounted for the lion's share of my legal budget every year. I spent a lot of time pouring over invoices and attempting to cut costs in a manner that would not jeopardise the overall quality of work that I expected from my outside legal teams, and in turn was expected from me. I never cost my colleagues their Christmas bonuses, but it certainly wasn't easy. I was recently reminded of the immense pressure to balance costs with effective legal counsel when I read that pharma, biotech and life science had easily the highest legal spend of any industry in the US last year. Looking back on my own situation, however, I don't think I would be on such a knife's edge if I were an in-house counsel today, and here's why.

A new era of innovation

For an industry built around innovation, many legal departments at pharma and biotech firms can be relatively stuck in their ways, relying largely on time-tested methods of cost cutting just as I did: tamping down on billable hours, seeking alternative fee arrangements or potentially sacrificing quality for low cost options. While most in-house counsel would agree these options can be helpful in controlling costs, they would concede that they are merely band-aids, to be applied when the ideal strategy or solution simply seems too costly.

Now, however, a few innovative general counsels are challenging this paradigm. They aren't struggling to choose between aggressively pursuing IP claims and coming under budget, because they know they can do both. Rather than obsessing over saving money, they are focusing instead on identifying winning cases and generating

revenue. They are shifting the risk and costs that sometimes prevent companies from defending patents, and redefining the role of legal departments along the way.

From cost centre to value driver

The volume of legal spending in the pharma and biotech industries is staggering: firms spend, on average, 2.5 percent of revenue on internal and external legal services, according to a survey from the Corporate Legal Operations Consortium. That's a whole percentage point higher than the next highest industry, media and entertainment, and in an industry with an estimated \$370 billion in sales, that's some \$9 billion in legal spending. Controlling these soaring costs has to be a priority for every company in the industry, from big pharma to biotech startups. However, the spirit of innovation at the heart of the industry—labs filled with brilliant scientists, discoveries that save lives and global searches for the next wonder drug—often seems to be missing from legal departments, which are too often seen as cost centers, tasked with the near-impossible tasks of keeping expenses in check while also defending all-important IP.

When it comes to litigation, many of these companies are still asking themselves the questions: "do we have the budget for that?" or "what if we lose?", that can cause them to miss opportunities to extract value from meritorious IP claims. After all, even a successful case can eat up resources and act as a short-term drag on profits, potentially doing more damage than it is worth. But in order to remain competitive, general counsels and their bosses know a vigorous IP strategy is essential.

Many beleaguered general counsels have set out to spend less without scaling back on their caseload, pushing the risks and pricing pressure on to their outside law firms, and driving a race to the bottom for firms that specialise in IP cases. Patent attorneys at established firms are being undercut by new entrants offering to take on cases for a fraction of the cost—and with a fraction of the experience and expertise. Rather than rethinking their strategy, companies are simply trying to litigate as lean as possible.

It doesn't have to be this way. Innovative new tools like litigation financing allow companies to deploy the best available legal resources without causing major disruptions to cash flow or absorbing a multimillion-dollar hit to quarterly earnings. Forward-thinking general counsels are using these tools to once again pursue the ideal path forward, rather than the most affordable one.

A flexible new solution

Although the use of litigation finance in the US is rising at a rapid clip, about a third of corporate lawyers are now using it, up more than 400 percent since 2013, we remain far behind the UK and Australia in adoption. Yet the main concerns stifling broader adoption are evaporating. Just five years ago, 85 percent of US lawyers believed legal financing would lead to unnecessary litigation. Today, that figure has dropped to 10 percent.

While litigation finance has historically been used mainly for trials, the legal battlefield for pharma and biotech has expanded beyond the courtroom in recent years, with generic drug makers often seeking approval under the Hatch-Waxman act or requesting inter partes reviews (IPRs) to settle patent disputes. But as long as there is a resolution point and financial reward at the end of the process, litigation finance remains a valuable tool.

A standard litigation finance arrangement calls for the financier to take a percentage of the proceeds in the event of a successful outcome. In an IPR—or any other administrative proceeding—the value exchange would derive from a market analysis that determines the potential value of a win. A company seeking to bring a generic drug to market, for example, might agree to share a percentage of sales for a finite period.

Litigation finance is also a democratizing force. It is just as useful to a large-cap firm looking to alleviate short-term costs as it is to a growth-stage company whose success depends on its ability to defend ground-breaking patents. In the raging IP battle between innovators and generics, it offers both sides a fair chance to prevail, based on the merits of their claims, not on their resources.

Embracing disruption

For any company operating in the pharma/biotech space, legal costs are built into the business model. Generics know they will face costly lawsuits as they try to bring cheaper drugs to market, just like innovators can expect to spend millions fighting off attacks on their signature drugs, particularly in the age of IP rights. Any startup seeking to break into the industry should know that their innovations

will be gobbled up by bigger competitors if they don't come with a savvy IP strategy. It's safe to say that those costs aren't going down anytime soon. Which is why general counsels need to get creative, and be prepared to deploy a full array of tools. Because IP is so central to the pharma and biotech industries, business leaders generally appreciate the value of applying for patents and protecting them. But that doesn't mean they can always afford to wield them.

Even companies with vast resources are apt to pass on smaller cases that could spoil a quarter, possibly damaging shareholder value more in the short-term than they would boost it in the event of a favorable outcome. Yet general counsels are essentially throwing away assets if they ignore patent infringement. Again, the scenario cries out for innovation. And again, litigation finance offers an elegant solution. Because the cost is incurred only when, and if, a case reaches a successful conclusion, income and expenditures are synchronized.

For generics, the legal winds have lately been blowing in a positive direction, thanks to legislation that not only encourages them to attack patents, but also allows them to do it faster and cheaper than ever before. But it's still a costly endeavor, particularly for companies without the cash hoards of their large-cap competitors. For these firms, the ability to litigate at the same level—hiring lawyers of equal ability and expertise—is essential to carving out a market share.

The same goes for growth-stage companies, which may have the next great breakthrough, but will quickly see its value destroyed if they can't afford to protect and monetize it. For companies whose future depends on one big innovation, there is no greater risk than having their resources sucked up by legal battles, rather than marketing or production. It's all but impossible to avoid these disputes, however, which is why partnering with a litigation finance firm makes so much sense.

In each case, it no longer has to be a question of whether the legal department will blow the holiday bonus pool, but whether it will deliver a holiday surprise.

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