

Determination of lost profits as damages

- The Panduit test is usually the starting point for determining whether profits have been lost as a result of infringement. The test will help you to present affirmative proof of the following:
 - Demand for patent holder's patents in the marketplace
 - Absence of acceptable non-infringing substitutes in the marketplace
 - Patent holder's manufacturing and marketing capabilities to meet the demand for said patented technology in the market
- Factors we take into consideration for detailed computation of lost profits:
 - **Collateral sales:** You can recover profits on not only lost sales of the infringed upon patent but also lost sales of the accessories and component parts relating to the patented technologies.
 - **The entire market value rule:** As the patent holder's patents bear dominant and significant responsibility for the functioning of the products sold by the infringing party, the patent holder can also take into consideration the market value factor in determining the profits lost due to alleged patent infringement by the infringing party.
 - **Infringer's profits:** We can also help you in the computation of profits made by the infringing party by infringing the patent holder's technologies.

Determination of price erosion damages

- The patent holder can also recover additional damages if it can establish that it is more likely than not that, if there had been no infringement, the patent holder would have been able to charge higher prices for some of its products.
- If this fact is established, the patent holder can claim price erosion damages as the difference between:
 - the amount of profits the patent holder would have made by selling its product at the higher price, and
 - the amount of profits the patent holder actually made by selling its product at the lower price actually charged for its product.
- We assist in identifying, extracting, gathering and preserving evidence to prove price erosion, such as the pricing history of similar products, contemporaneous sales and marketing reports, correspondence (including emails), marketing documents and business plans, and proposals and quotes.



Expert appearance and assistance in counterclaims

- We appear as independent experts to challenge the infringing party's theories and assumptions.
- Factors to be considered in such cross-examination and counterclaims are as under:
 - Their expert's methodology
 - Presence of analytical gaps between the data and the expert's opinion
 - Comparable licences
 - Peer review of the expert's analytical models
 - Published analysis of the expert's theories
 - Lack of prior patent infringement damages experience
 - Sufficiency of the evidence

Contact us

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Intellectual Property Dispute Advisory Services

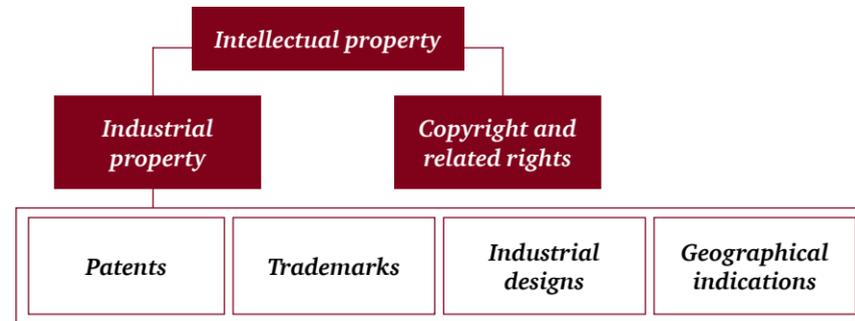
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clients
handle
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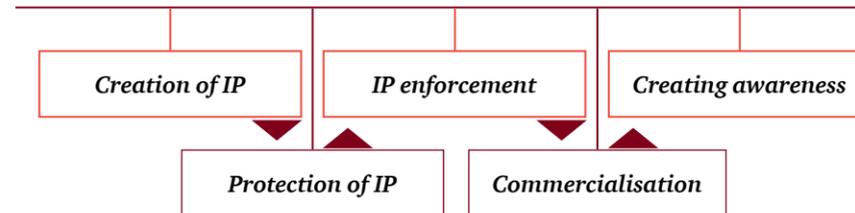
What is intellectual property?

The World Intellectual Property Organization defines intellectual property (IP) as creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce. IP rights are the rights that allow the owner of the IP asset to derive economic benefits from its use in future.



IP life cycle

The IP life cycle, encompassing the creation, protection, enforcement, commercialisation and awareness of IP, has become increasingly crucial to business success. Quantitative economic analysis of these IP rights during each phase of the life cycle plays an essential role, especially at a time when these rights have been subject to greater scrutiny and higher standards of proof in a dispute or litigation scenario.



IP now involves 'significant returns'

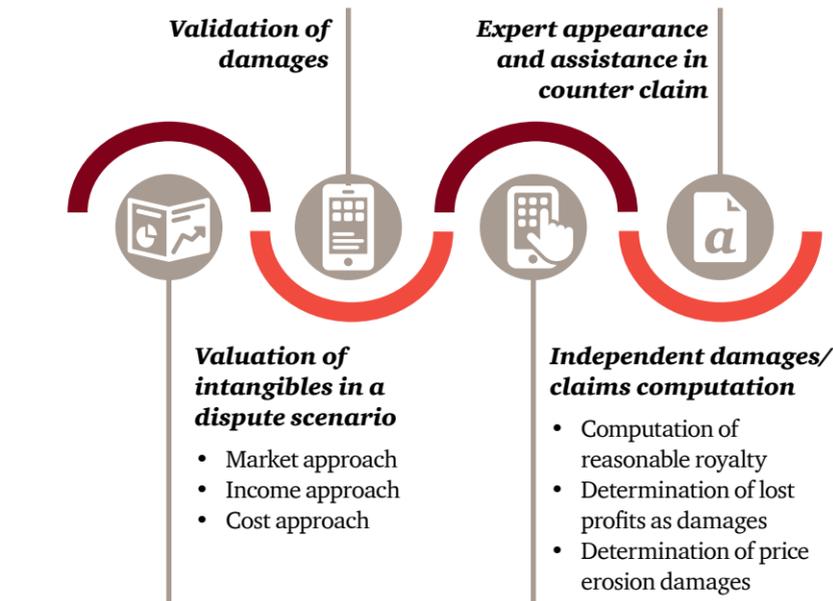
The present global economy is driven by the power of IP, which is the gateway to growth. The value of intangible IP assets can significantly enhance the market value of the company, as is evident from studies that the brand value of the top 10 global brands individually exceeds 25 billion USD! As IP begins to play an increasingly important role in making business unique, both business owners and courts are recognising the true value of IP and the loss caused to right holders due to IP infringement.

The recent announcements in cases involving several multinational companies have proved to be eye-openers on the complexity and massive scale of damages/claims involved in the areas of patent infringement, copyright and design disputes, royalty payment disagreements, and technology disputes.

What are the early signs of IP disputes?

- Are you involved in a disagreement involving valuation of an intangible asset?
- Does your claim involve computation of reasonable royalty under fair, reasonable, and non-discriminatory (FRAND) terms?
- Is there a conflict between the legal versus economic owner of the IP asset?
- Do you notice any material loss of your revenue due to patent misuse or infringement?
- Is your relationship with your technology partner turning hostile?
- How do you determine lost profits and price erosion as damages?
- Is the licensor of the technology attempting to abuse its monopoly power?
- Is the existing royalty rate for the use of the brand or technology fair and reasonable?

How we can assist you



a Valuation of intangibles in a dispute scenario

- There are three traditional approaches for valuing an IP: income, market and cost. Whether an approach is used and the extent to which it is relied upon depends on the nature of the asset, the context of the valuation, and the quality and quantity of information available.
- Where more than one approach to value is appropriate, we will reconcile and weigh the results in consideration of the type of IP being appraised and the quality of applicable research data available to form an opinion.

Approach	Market approach	Income approach	Cost approach
Methods	Market price on active markets	Relief from royalty method	Reproduction costs method
	Analogy method	Multi-period excess earnings method	Reproduction costs method
		Incremental cash flow/profit premium	
		Greenfield/discounted cash flow (DCF) method	
	Preferred approach, but not commonly used due to lack of comparable transactions of individual assets	Preferred approach	Ignores future financial benefits

b Validation of damages

- Carry out an independent validation of the damages to strengthen the legal position of the patent holder in this matter
- Make the court or arbitrator understand the methodology of computing IP damages
- Understand the negotiations of the parties at the time infringement began
- Consolidated look at the complete set of various events and facts that occurred thereafter and that could not have been known to or predicted by the hypothesised negotiators

c Independent computation of damages and claims

- **Computation of reasonable royalty under FRAND terms**
- A reasonable royalty is the floor below which any award of damages should not fall.
- Computation of reasonable royalty can be done from:
 - an established royalty or the prevailing royalty in the industry as evidenced by prior licences,
 - infringing party's profit projections for infringing sales, and
 - hypothetical negotiation between the patentee (willing licensor) and infringing party (willing licensee) based on the factors in Georgia-Pacific.
- The Georgia-Pacific factors serve as a starting point for determining reasonable royalty. Many of the Georgia-Pacific factors are influenced to a large degree by the presence or absence of substitutes on either the demand or supply side.