Five Ways to Win Patent Litigation

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Though the smart phone fight between Apple and Samsung may garner the headlines, U.S. patent litigation over oil and gas technology remains vibrant. On August 16, 2012, for example, a Houston jury awarded a $106 million verdict to WesternGeco in its patent suit against ION Geophysical, involving marine seismic streamer technology. Current oil and gas patent litigation includes several patents covering casing running tools *(Tesco v. Weatherford in Houston),* rig automation control systems *(National Oilwell Varco v. Omron Oilfield & Marine in Austin),* and vibrating screens for reclaiming drilling mud *(Continental Wire Cloth v. Derrick in Oklahoma),* to name only a few. And patent suits over pipe pickup and handling apparatuses *(Better Half Industries v. Oilfield Innovators)* and wellhead isolation tools used in hydrofracturing operations *(Oil States Energy Services v. Trojan Wellhead Protection)* were filed this year alone.

While every patent case is different, and a winning strategy depends heavily on the facts of the case, here are five tips to strengthen your ability to defend a patent infringement suit:

1. A Good Offense Can be the Best Defense.
Building your own strong patent portfolio can deter competitors from suing on their patents, out of fear of a countersuit over your patents. It also can create settlement options, like cross-licensing your patents in exchange for a license to the plaintiff's patents (with or without any cash payments). Without your own patent portfolio, your most valuable assets are vulnerable and exposed. This was a reason cited by Google for its recent multi-billion dollar purchase of Motorola Mobility and its arsenal of 17,000 patents: to protect its Android™ system from patent suits by competitors. Similarly, Halliburton ramped up its patenting efforts after losing to BJ Services in a hydrofracturing patent suit. In 2003, a Houston jury awarded BJ $98 million in damages, and Halliburton had to stop selling its infringing system. >

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In the five years before the verdict, Halliburton averaged 142 patent awards a year; since then, it has averaged 234 patents a year – a 65% jump.

2. After Conquering the Mountain, Take Pictures and Plant a Flag.

For each newly commercialized product or process, develop a procedure for archiving documents proving the timing of the launch. Doing this now can strengthen your ability to defend later patent suits over the product or process. By law, if a plaintiff asserts its patent is infringed by a product or process that was sold (or even just offered for sale) more than a year before the patent was sought, the patent is invalid. This sounds deceptively simple, but the proof you need to deliver is stout. You must prove the prior sale or offer by "clear and convincing" evidence, the highest standard in civil litigation. This standard is more difficult to satisfy in the current age with its greater emphasis on going paperless. Normal document retention policies tend to limit storage of pertinent documents, and this important evidence can gradually disappear. A narrow, targeted retention process can preserve this key proof of initial commercial sales – quotes, purchase orders, invoices, marketing materials, press releases, job reports, and the like.

3. Know Thy Adversary.

Patent suits often arise between competitors who know each other well – take BJ's suit against Halliburton, for instance. Occasionally, these suits will arise between a supplier and its customer. Increasingly, suits are brought by patent holding companies, sometimes referred to as patent monetizing entities, non-practicing entities (NPEs), or "patent trolls." Whichever type of plaintiff you face, make it a priority to find out what's driving it to sue, know its risk tolerance, and evaluate the resources it's likely to commit to the suit. Learn whether the plaintiff has a history of litigating these or other patents, and understand what ended the prior suits. Knowing this can help identify your adversary's pressure points, such as exposure of its own commercial products and processes to potential counterclaims from your patents, or rapidly escalating case costs from a vigorous defense, particularly where the defense makes clear that the plaintiff's prospects of a successful outcome are declining.

4. Consider Re-examination of the Asserted Patent.

U.S. patent law allows a defendant to petition the Patent Office to take a second look at the claims of the asserted patent, along with submission of prior publications and patents that may affect validity of the asserted patent. This is an out-of-court way of challenging the patent. If the Patent Office grants the petition and preliminarily rejects the patent as invalid, the court where the suit was filed may put the case on hold until the Patent Office finalizes its decision. Thus, re-examination is a way to reduce the scope of the asserted patent's claims, or even eliminate them entirely. But only take this step carefully. Often, the patent emerges from re-examination with at least some claim intact, and it still may cover your product If so, your adversary will be able to tell the jury that the Patent Office confirmed the validity and novelty of the patent "not once but twice."

5. Own the Case and Treat it as Yours to Win.

Too often patent defendants are reactive and, well, defensive. Instead, take charge of the case. From the outset, appoint a business leader to work closely with the litigation team, to improve knowledge flow about the technology. Moreover, use downtime in the case to develop your attack. Patent litigation runs in ebbs and flows. Flurries of document gathering, witness interviews, depositions, and filings with the court can be followed by weeks or even months of little activity. During this quiet time, evaluate each side's strengths and weaknesses, and the performance of its attorneys and witnesses as the case progresses. Compare the evidence promised by each side on the important issues to the level of evidence actually established >

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so far. Where you see a deficiency, shore it up. In short, rather than relaxing and wondering when the plaintiff will lose interest in the case, keep working.

The thread connecting these tips is careful planning and continual evaluation of your case. In an era of frequent, sometimes staggering jury verdicts in patent suits, and where the burden for a plaintiff to prove its case can seem comparatively less than the burden to invalidate the patent, it can be easy to feel that the odds are stacked against you as a defendant. But feeling overwhelmed and gun-shy is exactly the wrong response. Instead, remember these five tips and that success will follow if you are the *best prepared party* in the suit, even as the defendant. ▪

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Paul Yetter *has defended and prosecuted complex lawsuits, including patent litigation, for clients in a variety of industries in state and federal courts around the U.S., for almost 30 years. He has been recognized by the* National Law Journal, Chambers USA, *and* Best Lawyers in America *for his clients' success in several areas of litigation, including commercial, intellectual property, antitrust, and securities. His firm, Yetter Coleman LLP, specializes in high-stakes business and technology litigation, and has been named among the top American litigation boutiques.*

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About Yetter Coleman

Yetter Coleman LLP is a litigation boutique specializing in high-stakes business and technology litigation from investigation and the filing of a complaint through final resolution on appeal. Our lawyers successfully prosecute, defend and resolve patent disputes associated with a wide range of industries including energy, automotive, healthcare, telecommunications, and technology.

Firm Recognition

Yetter Coleman has developed a solid reputation as one of America's best litigation-only firms, including:

- In 2012, Yetter Coleman was named to *The National Law Journal's* inaugural Litigation Boutiques Hot List, which recognized ten firms located around the United States that represented clients in the courtroom in connection with bet-the-company cases.

- In 2010, Yetter Coleman was among 20 firms selected by the *National Law Journal* for inclusion on its Appellate Hot List of top appellate firms in the country.

- In its two nationwide surveys of litigation boutiques, conducted in 2005 and again in 2009, *The American Lawyer* recognized the results that our clients have achieved by naming our firm among the top Litigation Boutiques of the Year both times.

- Yetter Coleman received national and Texas state recognition for its intellectual property litigation practice in the 2013 "Best Law Firms" ranking issued by *U.S. News – Best Lawyers*. The rankings also included Texas metropolitan recognition for capabilities for its commercial, appellate, antitrust, eminent domain and condemnation, defendant personal injury, and securities litigation practices.

Yetter Coleman lawyers are recognized in the *2012 Chambers USA: America's Leading Lawyers for Business,* the *2013 Best Lawyers in America® Guide,* and in Thomson Reuters' *Super Lawyers* for various areas of commercial litigation. The firm also has seven lawyers recognized as 2012 "Texas Rising Stars" by Thomson Reuters' *Super Lawyers* in appellate, business litigation, and intellectual property litigation.