

2007 Patent and Trademark Damages Study*

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Overview

IP enforcement actions
subside, but remain
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Intellectual property enforcement actions protect patent, trademark, copyright, and trade secrets and continue to be a key area of litigation, but the number of such actions has declined. Reduced filings of business method patent actions, recent Supreme Court rulings, the increased cost of litigation, and reduced damage awards have all conspired to put pressure on plaintiffs regarding their return on investment from IP lawsuits. Nevertheless, as long as companies continue to face fierce global competition, changing business environments, and a heightened desire to be first to market with products or processes, litigation to establish or preserve a market position and serve as a barrier to entry will continue to be a critical corporate strategy. Damages awarded in these matters are both a deterrent to potential infringers and a compensation for economic benefits lost due to the infringement.

Increasingly, there is a disparity in the damages awarded in jury and bench trials, and in the win rate of plaintiffs among the various jurisdictions in the US federal courts system. Meanwhile, the measurement of damages is also undergoing fundamental change. Today, carefully choosing the right forum, venue, and damages issues has never been more important to achieving success in IP litigation. Furthermore, the fundamental value of patents is being challenged after recent Supreme Court rulings. Permanent injunctions in patent cases are no longer granted automatically following *eBay Inc. v. MercExchange, LLC*, and licensees have had more freedom to test the validity of patents without first breaking their licensing agreements since *MedImmune Inc. v. Genentech Inc.* Even with these decisions, IP remains a notable asset and increases in value when companies use the invention or mark. Accordingly, enforcement actions containing damages analysis in IP cases will continue to be a focal point in maintaining the integrity of this value.

Key indicators:

1. Filings of patent infringement cases increased annually from 1991 to 2004, but fell in 2005. Over the same period, trademark infringement filings increased consistently.
2. Patent case filings increased faster than the growth of patent grants until 2004, then leveled off. In the past year they've begun to decline.
3. The mean and median amounts and total number of patent damage awards are also leveling off.
4. Since 2000, juries have surpassed bench trials as the more prevalent forum for patent cases, and in median damages awarded.
5. Bench trials remain the most frequent forum for trademark litigation cases, and the median award has remained fairly low.
6. Plaintiffs' overall win rate since 1995 was approximately 35 percent, increasing to 61 percent after summary judgment.
7. Alleged infringers in declaratory actions win at a greater rate than patent holders serving as plaintiffs, but alleged infringers don't significantly improve their chances when serving as plaintiffs (55%) rather than defendants (66%).
8. The disparity in plaintiffs' win rates among jurisdictions is substantial, varying from 12 to 63 percent.
9. Since 2000, 65 percent of patent damage awards have been based on reasonable royalties, while 32 percent have been based on lost profits. In the 1990s, only 24 percent of awards were based on reasonable royalties.
10. Since 2000, the Treasury Bill rate has replaced the prime rate as the most popular basis of prejudgment interest.

Trends

1. IP rights remain important, but enforcement actions decline.

Companies use patents and trademarks to build arsenals for both offensive and defensive purposes. However, they have become more judicious in using them to enforce their IP rights. The increasing presence of entities that buy existing patents to exact royalties from those who make use of the inventions has caused companies to think more defensively, acquiring IP for which they may not have immediate use in their products and services. Additionally, the spate of business method patents may be subsiding, after tremendous increase in patent issuances and filings in the earlier portion of the 2000s.

As a result, plaintiffs in patent and trademark disputes are bringing cases less often, yet often enough that the number of cases filed remains high (see page 8). In the past, the number of patent infringement cases filed increased every year, from 1,171 in 1991 to 3,075 in 2004. In 2005, though, the number of filed patent cases fell to 2,720, the first decline in 16 years. During the same period, trademark case filings increased 65 percent, from 2,220 in 1991 to 3,668 in 2005.

Patent and trademark cases filed, 1991–2005

Year	Patent private	Patent US	Patent cases	Trademark private	Trademark US	Trademark cases	Total cases
2005	—	—	2,720	—	—	3,668	6,388
2004	—	—	3,075	—	—	3,508	6,583
2003	2,788	26	2,814	3,657	15	3,672	6,486
2002	2,680	20	2,700	3,458	12	3,470	6,170
2001	2,496	24	2,520	3,340	8	3,348	5,868
2000	2,460	24	2,484	4,187	17	4,204	6,688
1999	2,286	32	2,318	3,822	9	3,831	6,149
1998	2,187	31	2,218	3,438	10	3,448	5,666
1997	2,098	14	2,112	3,180	9	3,189	5,301
1996	1,812	28	1,840	2,917	8	2,925	4,765
1995	1,706	17	1,723	2,716	10	2,726	4,449
1994	—	—	1,617	—	—	2,457	4,074
1993	—	—	1,553	—	—	2,419	3,972
1992	—	—	1,474	—	—	2,276	3,750
1991	—	—	1,171	—	—	2,220	3,391

Source: PricewaterhouseCoopers LLP

A historic comparison of the number of US patent grants issued shows an increasing trend up to 2003 (see page 10). Recently, however, patent grants have been trending towards a leveling-off and decline.

US patent grants, 1991–2005

	Utility	Design	Plant	Total
2005	143,806	12,950	716	157,472
2004	164,291	15,695	1,016	181,002
2003	169,023	16,574	994	186,591
2002	167,331	15,541	1,133	184,005
2001	166,036	16,871	584	183,491
2000	157,494	17,413	548	175,455
1999	153,485	14,732	420	168,637
1998	147,518	14,766	561	162,845
1997	111,984	11,414	394	123,792
1996	109,645	11,410	362	121,417
1995	101,419	11,712	387	113,518
1994	101,676	11,095	499	113,270
1993	98,342	10,630	442	109,414
1992	97,444	9,269	321	107,034
1991	96,511	9,569	353	106,433
	1,986,005	199,641	8,730	2,194,376

The downward trend in patent cases filed from 2004 to 2005 does not necessarily imply that the trend will continue. The *MedImmune* matter, in which a licensee declined to waive its right to question a patent's validity after it agreed to pay royalties to the licensor, may encourage more patent actions. Also, with globalization and the declining US dollar, more foreign entities are attempting to introduce products into the US market, some of which may infringe on existing IP rights. This increased proliferation of goods and the need to protect market position sets up a more volatile environment that encourages IP infringement litigation. On the other hand, companies must weigh potential benefits carefully against the rising costs of litigation before engaging in what may be a protracted court battle.

2. Damages awarded in patent cases are leveling off.

While both the average number and size of patent awards have increased in each of the past three decades, these amounts have declined recently. During the period 2000–2006 the number of awards in patent cases increased 59 percent compared to the 1990s and 91 percent compared to the 1980s, while the median award amount increased 54 percent over the 1990s and 87 percent over the 1980s.¹ However, there has been a leveling of median award amounts in the past few years and a sharp reduction in the average award amount during the past year. (See page 13.)

¹ The damages referred to herein have not been adjusted for inflation.

Damage awards in patent decisions have been rising since 2000.

Year of decision	Median award amount (\$)	Average award amount (\$)
2005	6,000,000	5,322,556
2004	2,817,345	31,781,960
2003	3,500,000	29,008,614
2002	7,400,000	16,926,366
2001	7,428,250	5,722,327
2000	762,747	3,691,788
1999	4,485,616	8,020,248
1998	1,651,034	17,639,705
1997	2,577,500	8,282,859
1996	3,096,000	16,711,035
1995	3,050,000	11,860,755
1994	4,392,156	15,253,578
1993	2,307,198	4,067,626
1992	2,057,294	2,336,638
1991	1,590,676	8,506,962

3. Juries award larger damages in patent cases.

A steady shift from bench trials to juries in patent cases has taken place since the 1980s, fueled by juries' tendency to award higher damages than judges. Juries decided only 19 percent of the damage awards during the 1980s and 38 percent during the 1990s. Since 2000, juries have decided 53 percent of patent damage awards.

The median award of damages in patent cases by juries continues to grow as well, and has exceeded the median award by judges in 15 of the past 23 years (see page 15). During this period, the median jury award was \$4.8 million, while the median bench award was \$1.1 million. Since 2000, the difference has been even greater, with the median jury award standing at \$8 million and the median bench award at \$1.6 million. With the increased caseload regarding patents, judges seem to be more consistent in their rulings concerning damages, but the same cannot be said for juries, which now typically award more than five times the damages awarded in bench trials. In the 1980s, the multiple for juries was only about twice that of bench trials. This is remarkable, given that bench trials awarded higher median damages than juries in both 2000 and 2001.

Several causes may have led to the increase in damages awarded by juries in patent cases, including increased claimed damages from the volume of business at issue in such disputes; the emotional factor of compensating a wronged party in a matter that is increasingly painted in black-and-white terms; and juries' reduced sensitivity to the inappropriateness of large dollar awards due to public disclosures of larger profits and net worth from major company defendants.

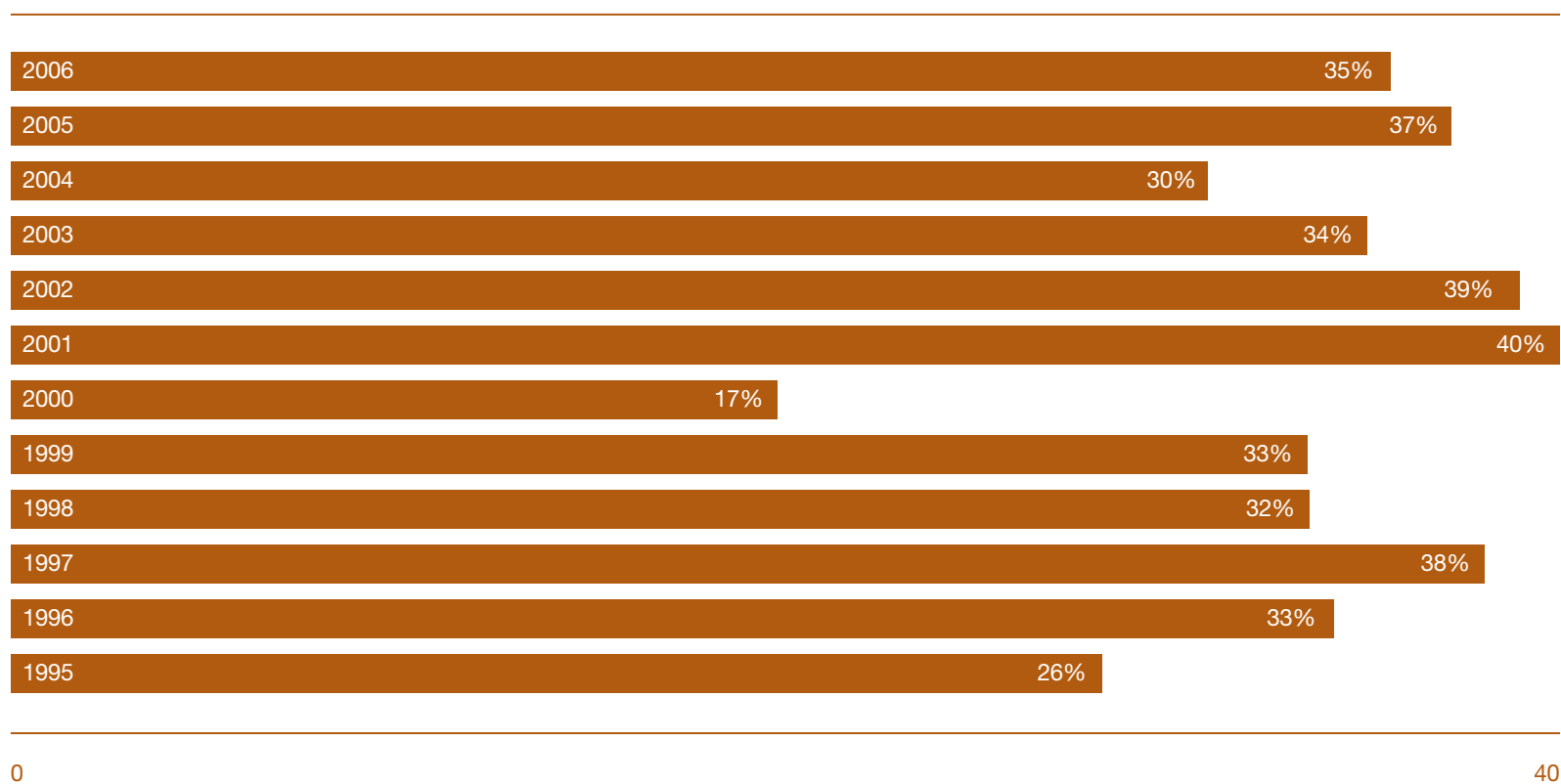
Juries tend to award much higher damages than judges in patent cases.

Year of decision	Median bench award (\$)	Median jury award (\$)
2005	3,175,000	6,428,920
2004	908,601	24,000,000
2003	720,242	9,625,000
2002	973,963	10,000,000
2001	8,064,125	5,591,884
2000	2,222,751	762,747
1999	4,485,616	8,781,684
1998	1,493,490	2,887,508
1997	5,743,373	1,500,000
1996	2,390,882	6,336,084
1995	1,346,295	8,527,091
1994	3,362,582	25,856,017
1993	339,742	0
1992	1,478,861	3,550,256
1991	1,554,164	1,777,866
1990	2,050,000	986,000

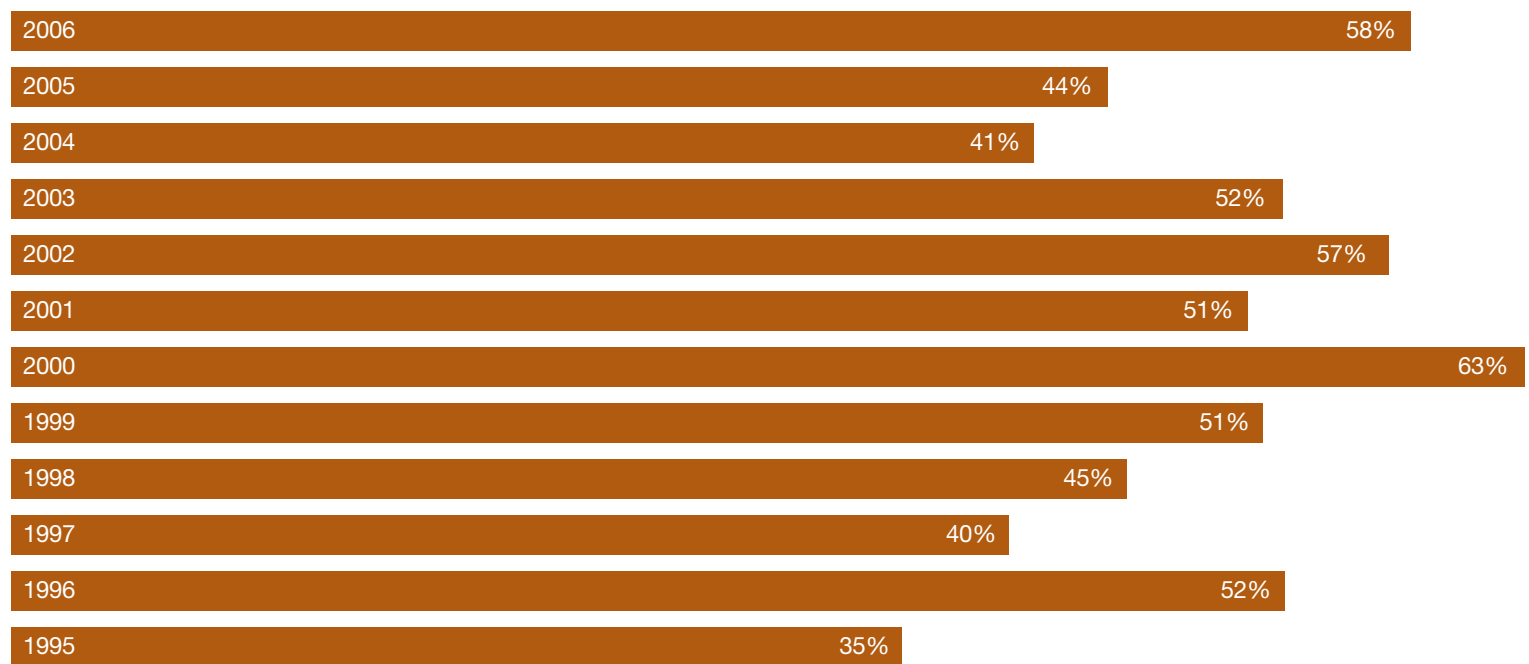
4. Overall, plaintiffs win about 35 percent of the time.

Overall, since 1995, plaintiffs have been awarded damages at trial in about 35 percent in all cases filed. This win rate increases to 61 percent after motions for summary judgment have been considered and the case continues. However, as plaintiffs, patent holders fare much less favorably than alleged infringers, with an overall win rate of about 34 percent for patent holders compared to a 55 percent win rate for alleged infringers.

Overall success rate of patent plaintiffs, 1995–2006



Summary judgments as a percent of total patent cases, 1995–2006



0

65

Patent plaintiff success rate overall vs. summary judgment

	Overall (%)	After summary judgment (%)
Infringer as plaintiff	55	28
Infringer as defendant	66	45

5. Different venues affect plaintiffs' win rates.

There are stark differences among jurisdictions regarding plaintiff success in patent cases. Since 1995, the Western District of Wisconsin has been the most favorably disposed to plaintiffs, with a win rate of 63 percent overall and 91 percent after summary judgment. Other districts with notably higher win rates for plaintiffs include Texas Eastern, Virginia Eastern, California Central, and Delaware (see page 21). The district with the lowest win rate for plaintiffs is the Eastern District of Michigan, with a plaintiff win rate of 12 percent overall and 33 percent after summary judgment. Other districts with notably lower win rates for plaintiffs include Kansas, Florida Southern, New York Southern, and the US Court of Federal Claims.

Average plaintiff success rate, 1995–2006

Top five districts	Overall success rate (%)	Success rate after summary judgment (%)
Wisconsin Western	63	91
Texas Eastern	60	83
Virginia Eastern	47	78
California Central	44	74
Delaware	42	58

6. Reasonable royalties overtake lost profits as a measure of damages.

Since 2000, reasonable royalties have overtaken lost profits as the most frequent basis of damage awards in patent cases. As established in Section 284 of the Federal Code governing equitable compensation, a reasonable royalty is the minimum level of compensation due the IP holder from an infringer. A royalty rate typically is a percentage of the infringer's revenues or profits. The royalty may also be a lump sum or payments made over time, which may be unrelated to sales volume. Lost profits assume that the IP holder would have made all or a portion of the infringer's sales if the infringer had not been in the market with its goods or services. Accordingly, compensation to the IP holder in these cases is based on the profits it would have made on those lost sales.

Since 2000, 65 percent of awarded damages have been based on reasonable royalties and 32 percent have reflected lost profits. This is quite different than in the 1990s, when 24 percent of damage awards were based on reasonable royalties and 73 percent were based on lost profits.

Distribution of patent damages awards



Lost profits
Reasonable royalties
Price erosion

Lost profits damages are losing favor for several reasons:

- The complexity and cost of analyzing and determining lost profits is greater than for determining reasonable royalties. Either actual damages must be proved, where specific sales of the infringing product took sales away from the patent holder, or the particular facts and circumstances must be assessed—e.g., whether there is demand for the product tied to the claims under the patent in dispute; whether there is an absence of acceptable substitutes; whether the plaintiff has adequate manufacturing and marketing capabilities; and whether there is sufficient financial information to complete the analysis.
- IP holders increasingly find the process of supporting such analysis either too disruptive to their operations or they do not want to risk disclosing proprietary cost and profit information—especially in light of new requirements regarding electronic discovery and records retention, and the greater access to information that results.
- Lost profits are more difficult to prove. The proliferation of competition in each US market sector from both domestic and internationally based businesses provides greater access to substitute products. The presence of these alternatives means that even without an infringer's products in the market, consumers may not automatically buy the IP holder's products. Furthermore, the growing use of specialized distribution channels for reaching a specific consumer demographic increasingly supports the infringer's contention that its customers are different from those of the IP holder.
- More of these suits are brought by entities that own patent rights but do not have any manufacturing or distribution capabilities. These IP holders cannot prove that the infringer actually took any sales away from them.

Since 2002, maximum and minimum royalty rates identified in litigated cases stayed within the relatively narrow range of 2 percent and 6 percent of sales, posting a three-year average of 4.6 percent. However, average royalty rates since 2000 have fallen below the average rates for the 1980s and 1990s. This decline in rates is observed across all industries. The decline can be attributed to three factors:

1. The widespread use of licensing as an alternative to litigation resulted in a greater availability of licensing agreements to guide royalty rate analysis.
2. More research is outsourced to universities and non-manufacturing entities, which often operate in a less assertive licensing environment for their patents than that which exists between head-to-head competitors.
3. The greater availability of substitute products and technologies reduces the leverage of the licensor in the negotiations.

7. Interest awards pegged to T-Bill rates are increasingly the norm.

Along with economic damages, the courts often award the IP holder prejudgment interest on the damages incurred. Throughout the 1980s and 1990s, the prime interest rate was the most frequently used benchmark for prejudgment interest, in part because the prime rate was significantly higher than it is today. However, since 2000, Treasury Bills have surpassed the prime rate as the most common benchmark because judges and juries consider them to be a more widely accepted risk-free rate and believe that the IP holder should not profit from taking risk with 20/20 hindsight. (See page 27.)

Treasury Bills are the most common basis for prejudgment interest awards.

Prejudgment interest	1980s (% of decisions)	1990s (% of decisions)	2000s (% of decisions)
Treasury Bills	29	24	54
Prime interest rate	42	45	38
Statutory	29	21	8
Cost of capital	0	5	0
Borrowing rate	0	5	0

Methodology

To study trends in damage awards in patent and trademark cases, PricewaterhouseCoopers identified legal records in two Westlaw databases, Federal Intellectual Property—Cases (FIP-CS) and Combined Jury Verdicts and Settlements (JV-ALL), from 1980 through June 2006.

This study focused on damage decisions in US Federal District Courts, including summary judgments in declaratory actions and motions to dismiss, as well as associated decisions by the Court of Appeals for the Federal Circuit (CAFC).

The study included 2,193 unique US Federal District Court cases (among them 1,367 patent cases, 797 trademark cases, and 29 cases that included both patent and trademark issues) and 350 unique CAFC cases (including 273 patent cases, 70 trademark cases, and 7 cases that included both patent and trademark issues).

We reviewed 14,000 total records. However, since every record reviewed did not include all of the desired information, analyses were limited to those records that contained available information.

Jury verdict information varied by jurisdiction and was particularly limited during the early and mid-1980s.

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