

Patent value continues to soar in 2005

Intellectual Property Economics, a US IP economics consulting and research firm, has assembled the top 25 judgments/settlements of US patent infringement cases for 2005. The figures show that the sums being generated are higher than ever

By **A Tracy Gomes** and **Thomas George**

While the overall number of patent infringement cases may have declined in the US during 2005, it does not appear that the stakes are any less. If anything, a look at the sums involved in the leading suits during the year seems to confirm that the potential value, if not outright importance, of intellectual property continues to climb.

Also noteworthy is that among the companies featured in the top 25 cases are 18 which are based outside the US, once again highlighting the global importance of the US market. Interestingly, two of the companies are from mainland China – China Petrochemical and Semi conductor Manufacturing International – and both were defendants: perhaps an indication of things to come.

At number one

Topping the list for the largest single award in 2005 is the US\$1.35 billion verdict against Medtronic for the infringement of certain patents, technology and other rights and claims of Dr Gary Michelson, relating to his spinal-fusion technology. The doctor and his company, Karlin Technology, had previously licensed the technology rights to implant maker Sofamor Danek, which was subsequently acquired by Medtronic.

Other high-profile/large-dollar cases decided by trial, included Boston Communications Group Inc and the US\$148 million damages award that was made against it and in favour of Freedom Wireless; and Lexar's US\$456 million victory over Toshiba for misappropriation of trade secrets and infringement of flash memory technology.

The number of out-of-court settlements naturally exceeded the number of awards and yet the dollar amounts were generally comparable. Such settlements included: Medinol's US\$750 million agreement with Boston Scientific regarding certain patents and breach of contract; IBM's US\$400 million deal with Compuware and Intel's payment to MicroUtility for US\$300 million. While tentatively settled at US\$450 million, NTP and Blackberry maker RIM apparently still have a long way to go before a final conclusion and the final dollar amount is reached.

Although not the result of a dispute, also noteworthy in terms of its size was Gilead and Royalty Pharma's US\$525 million buyout of future royalty payments to Emory University for its development of what came to be the anti-retroviral HIV drug Emtriva.

From an industry standpoint, the medical devices market was tops in 2005, in terms of both dollar amount and numbers, with US\$2.6 billion transferred among six of the top 25 cases. The semiconductor industry was not too far behind, registering five cases totalling US\$1.4 billion.

Shoot-out at the OK Corral

During 2005, we witnessed the increasing emergence (and success) of patent assertion companies, as well as companies establishing patent assertion programmes to defend and enforce their patent rights more proactively.

In addition to companies such as Acacia Research, IP Innovations and Intellectual Ventures, a hoard of single sector (or even single patent) companies have entered the IP arena, with every intention to receive what they see as their fair share - if not through the marketplace, then through the courts.

US Patent Infringement Awards/Settlements 2005

Rank	Industry	Date	Defendant	Plaintiff	Amount (US\$m)
1	Medical devices	22/4/2005	Medtronic (US)	G Michelson (US)	1,350
2	Medical devices	21/9/2005	Boston Scientific (US)	Medinol (Israel)	750
3	Semiconductor	17/10/2005	Toshiba (Japan)	Lexar (US)	465
4	Telecommunications	8/4/2005	RIM (Canada)	NTP (US)	450
5	Software	5/12/2005	IBM (US)	Compuware (US)	400
6	Semiconductor	24/5/2005	Hewlett Packard (US)	EMC (US)	325
7	Pharmaceuticals	26/10/2005	Abbott Laboratories (US)	Cambridge Antibodies (UK)	305
8	Semiconductor	20/10/2005	Intel (US)	MicroUnity (US)	300
9	Telecommunications	30/12/2005	Nokia (Finland)	InterDigital (US)	232
10	Medical devices	19/12/2005	Advanced Medical Optics (US)	Alcon (SWZ)	213.9
11	Semiconductor	31/1/2005	Semiconductor Mfg Intl (China)	TSMC (Taiwan)	175
12	Medical devices	13/9/2005	Tyco Intl (Bermuda)	Masimo (US)	164
13	Telecommunications	18/10/2005	Boston Comm Group (US)	Freedom Wireless (US)	148.1
14	Pharmaceuticals	8/9/2005	Barr (US)	Organon (NTH)	142
15	Semiconductor	21/3/2005	Rambus (US)	Infineon (Germany)	100
16	Electronics	28/3/2005	Sony (Japan)	Immersion (US)	90.7
17	Software	8/9/2005	SAP (Germany)	ePLUS (US)	76
18	Medical devices	3/10/2005	Kinetic Concepts (US)	Novamedix (NTH)	75
19	Medical devices	5/10/2005	BrainLab (Germany)	Medtronic (US)	51
20	Biotechnology	21/12/2005	Arriva Pharma Corp (US)	AlphaMed (US)	48
21	Manufacturing	12/9/2005	Cardinal Corp (US)	Asahi Glass (JPN)	43.7
22	Telecommunications	22/11/2005	Ericsson (Sweden)	Atmel (US)	43.1
23	E-commerce	11/8/2005	Amazon (US)	Soverain (US)	40
24	Chemicals	13/9/2005	China Petrochemical (China)	Celanese (US)	28
25	Biotechnology	19/12/2005	Third Wave (US)	Stratagene (US)	15.9

Source: IP Economics, 2006

Backed by contingent counsel, a few investors and several high-profile wins, companies such as NTP, Freedom Wireless and the TPL Group are more determined than ever to take the fight to the corporate giants and stake their claims.

Then there are the individual inventors: Dr Gary Michelson with his giant win against Medtronic in the amount of US\$1.35 billion; and Carlos Amado (outside the top 25) with a much smaller, though equally noteworthy, US\$9 million win against the software giant Microsoft.

2005 awards/settlements: by industry

Industry	Count	Amounts (US\$m)
Medical devices	6	2,603.9
Semiconductor	5	1,365.0
Telecommunications	4	873.2
Software	2	485.0
Pharmaceuticals	2	447.0
Electronics	1	90.7
Biotechnology	2	63.9
Manufacturing	1	43.7
E-commerce	1	40.0
Chemicals	1	28.0

Looking forward

With patent applications up, patent awards/settlements up and more individuals, assertion companies and corporations asserting their IP rights, it is hard to imagine the future being anything other than just more of the same.

In the US, there has been an increasing outcry to Congress demanding that something be done. As a result, the legislature is now debating the Patent Reform Act, with changes to practice at the US Patent and Trademark Office up on the docket alongside provisions that would place limits on the use of injunctive relief in the US

courts, something that is also being considered by the US Supreme Court in the case of *eBay Inc v MercExchange*. It is the view of many inside the US patent community that there certainly is a case to be made for better patent laws, ie, stricter and more rigorous scrutiny of patent applications.

With such large settlements and awards being made, but no signs of economic or profitability slowdown, the question remains, is this an administrative problem or an economic one?

In any event, solutions are not likely to come overnight. Large corporations are going to have to navigate in rough waters for some time to come. This is likely to mean more spending to substantiate and/or acquire essential IP. It will also probably mean individuals and assertion companies will receive a more receptive response to their initial inquiries. But at the same time, corporations will become more (pro)active in the defence of their patent positions. ■

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