



## Going Public? Beware NPEs

Managing IP

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A study of US litigation data suggests NPEs are more likely to target companies that are preparing to, or have just gone, public – raising concerns for IP owners

US companies that go public are at a greater risk of being targeted by non-practising entities and should consider defensive strategies, according to counsel.

Sources say savvy NPEs are increasingly targeting smaller companies that they believe they can exert leverage over.

The views come as a study commissioned by the LOT Network, which seeks to protect its members against NPEs, revealed that almost 40% of companies that went public between 2017 and 2022 were targeted by an NPE either two years before or two years after they made their initial public offering (IPO).

Steven Moore, partner at law firm Withers in New York, says it has always been a concern for those involved in IPOs that a third party might come “out of the woodwork” to sue the company before it goes public.

“Bringing a suit will cause a dramatic impact on the IPO process and the company involved will be greatly incentivised to settle the dispute rapidly,” he says.

Heightened risk

The [study](#), carried out by intellectual property analytics company High-Tech Solutions (HTS), analysed 6,161 lawsuits filed by NPEs.

Of that total, 247 companies went public during the studied period – and 36.9% were targeted at least once by an NPE either two years before or two years after the IPO.

Some sources believe the fear of NPEs being ready to pounce could scupper the entire IPO process.

“An NPE lawsuit is a distraction and drains resources from a larger company – but it can be devastating for a start-up trying to exit, whether by IPO or acquisition, and can certainly derail exit outcomes,” says Patrick McBride, senior director and assistant general counsel for IP at software company Red Hat in North Carolina.

Jonathan Stroud, general counsel at Unified Patents in Washington DC, says he also recognises this trend.

He points out that technology company Snap was sued in an “objectively baseless suit” right before its IPO in 2017 in a failed attempt by an NPE to gain leverage.

Stroud says he knows of another company that was targeted six times in one quarter prior to an IPO.

Moore at Withers adds: “As most IP suits are filed by what is referenced as NPEs, it is not surprising the NPEs are involved in the lion's share of such ‘IPO interference’ suits.”

Smaller targets

According to the study, the companies most frequently targeted by NPEs were in the manufacturing, finance, and business services sectors.

The HTS study also found that the most attractive targets of NPEs were companies that had completed multiple fundraising rounds before their IPOs, the idea being that they had accumulated significant resources.

However, it seems that not only those with deep pockets are being targeted.

In fact, more than 52% of the businesses sued by an NPE reported annual revenues below \$25 million. Larger outfits – those with revenues of \$1 billion or more – made up 21% of the companies sued.

Stroud at Unified Patents says the notion that those with fewer resources are being targeted chimes with what he has seen.

Although NPEs will still pursue organisations with significant resources because of their increased exposure and the potential for higher damages, those defendants are also well-equipped to deal with nuisance suits and litigation tactics, he notes.

“Many of the larger and, I think, savvier NPEs have just decided to avoid those problems entirely through volume, by targeting inexperienced small or medium-sized companies or companies they can assert a lot of leverage over,” Stroud adds.

Jeff Carter, CEO at HTS in Colorado, says many small companies have a false sense of security that only larger corporations can be hit by NPE suits.

“Companies of any size need to be proactive in developing a comprehensive IP strategy,” he warns.

Stroud says for many smaller companies their most rational response is to settle, even if they have good counsel.

“They generally don’t have the resources or the budget to engage in unanticipated years-long litigation costs to get beyond the demands, and even when they could absorb it, it makes more rational sense to pay the nuisance demands, even if repeatedly.”

Not persuasive

However, not everyone is convinced that the study should serve as a warning shot to companies planning an IPO.

**Nick Matich, principal in McKool Smith’s IP practice in Washington DC, says the notion that there is a link between IPO dates and NPE-led patent infringement suits isn’t persuasive.**

**“The time window they use to identify a correlation – two years on either side of an IPO – is enormous. It’s doubtful that an outsider like an NPE could predict an IPO two years out.”**

**He adds: “The correlation isn’t relevant, because as the study notes, IPOs correlate to success in the market, higher profile, and a greater ability to pay damages. Those attributes of a company, more than a recent IPO, likely explain whom NPEs sue.**

**“Even if an infringement is clear and the patents are strong, it’s usually not worth suing a failing company for infringement. That’s true whether the plaintiff is an NPE or an operating company.”**

On the defensive

One tactic IP owners recommended is joining a defensive network.

The US-headquartered LOT Network attempts to immunise companies against litigation. Members agree that if any of their patents fall into the hands of an NPE, a licence is provided to everyone in the network.

Ken Seddon, CEO of the LOT Network in Arizona, says protecting start-ups' ability to innovate is one of the network's core values.

“Our industry-leading members, like Amazon, Tesla, Red Hat, Microsoft, and Airbnb, help foot the bill to make membership free for start-ups with less than \$25 million in annual revenue, and we provide opportunities for our start-up members to learn strategies from the most IP-savvy companies in the world.”

However, some sources have [previously argued](#) that joining LOT may not provide companies with much extra protection because NPEs don't tend to buy patents from network members anyway.

Whether or not joining a defensive network is the way forward, it seems a safe bet that companies will need to remain wary of NPEs when the time is right to go public.