

Patent Litigation Filings May Rise as GDP Falls for First Time in Three Years: Key Insights for Plaintiffs and Defendants

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While there's no definitive consensus, economists are closely monitoring the [possibility of entering a recession](#) this year. Economists agree a recession is not imminent, but caution [the odds of facing a recession are higher than usual, and it's important to understand recessions are declared months after significant economic slowdown](#), when two consecutive quarters of decreased gross domestic product (GDP) are recorded. Last quarter, [the U.S. GDP decreased](#) for the first time in three years. At worst, this indicates the beginning of a recession, and, at best, an economic slowdown.

Historically, [patent case filings increase during economic slowdowns and recessions](#). In particular, a decrease in the GDP, like the one last quarter, is an economic indicator [correlated with significant increases in patent litigation](#). Companies who choose to “double down” on their patents during economic slowdowns may emerge stronger than their competitors. On the other side, companies that anticipate being subject to patent disputes should prepare now to minimize risk and potential harm.

Agile companies understand that identifying alternative revenue streams and opportunities for growth, such as leveraging intellectual property assets, are key to navigating economic slowdowns. Economic slowdowns typically trigger patent asset divestments by operating companies because they are experiencing financial distress or because they are looking for new revenue streams amid the difficult economy. Many of these divestments often occur to litigation-prone licensing entities, which may increase the overall number of patent litigations. On the other hand, companies with valuable patent assets may choose to enforce their patents in venues such as the International Trade Commission, where [powerful remedies like exclusion orders and cease-and-desist orders](#) can protect their domestic revenue by ensuring their U.S. market share is not depleted by infringing imports. A strong patent portfolio and enforcement strategy may optimize long-term success during economic uncertainty.

For companies that have identified potential threats of patent litigation, steps can be taken now to better position themselves to mitigate risk and prevent significant financial setbacks.

Top Tips for Potential Plaintiffs

(1) **Understand the scope of your intellectual property.** Take inventory of your company's patent(s), pending patent application(s), and information protected as trade secrets. Start building your knowledge of your company's IP assets through discussions with your in-house counsel, engineers and technical experts, and intellectual property attorneys.

(2) **Appreciate the varying beneficial outcomes available in asserting your patent.** Evaluate your company's goals to identify the most beneficial enforcement strategies. Offers to license, cease-and-desist letters, exclusion orders, injunctive relief, or money damages may all be considered when determining whether to bring suit and how.

(3) **Consider alternative financing for litigation costs.** During economic slowdowns, companies face a real concern when taking on new expenses related to litigation. However, this shouldn't be a bar to planning enforcement strategies. Options may exist to support patent holders with funding and alternative or contingent fee arrangements. Consulting with an experienced litigation funding professional and setting realistic goals for litigation costs and outcomes may empower companies to enforce their patents at a reduced financial burden.

(4) **Double-check your patents' maintenance fees.** All of the patents you plan to assert should be checked to ensure all fees are paid and that the patents did not expire from lapse in payment. Unintentional delay of fee payments can be rectified by submitting a petition for reinstatement with the overdue fees and applicable surcharges.

(5) **Don't assume infringement is not happening.** Infringement can exist in numerous ways. It's not limited to exact copying of your products; the pool of potential infringers is a lot larger than you might think. Often well-drafted patent claims are broader than the actual product that the patent application may have arisen from. This is where item #1 from above plays an important role. Companies should periodically revisit and review the scope of their patent claims as issued by the U.S. Patent and Trademark Office.

Top Tips for Potential Defendants

(1) **Engage patent counsel.** Immediately upon receiving notice of infringement, potentially by notice letter or by the initiation of an action, consult with experienced intellectual property attorneys who specialize in patent infringement. Early involvement of legal experts is essential to navigate the complexities of patent law effectively. Patent counsel can help devise a strong defensive strategy, discuss options for response, and provide a detailed analysis of the alleged claims and asserted patents. Better yet, retain and work with experienced patent litigation counsel even before any suit or threat of suit occurs to develop a response plan for early assessment and dispute resolution.

(2) **Preserve and gather evidence.** Proper documentation, including product design files, development records, communications, and any prior art relevant to the asserted patents, can be crucial in defending against infringement claims or challenging patent validity. If a suit has already been filed, time is of the essence to preserve documentation and get organized. Counsel can assist with litigation holds and evidence collection.

(3) **Understand the threat and legal claims.** If a suit has already been filed, carefully review the complaint to identify asserted patents, allegedly infringing products, designs, or functionalities, and other claims. If litigation is anticipated or actually threatened, consult with an attorney to assess the risk of infringement or other claims that may be anticipated, such as breach of contract claims or business torts.

(4) **Evaluate your design and potential alternatives.** Identify the key technical specialists or engineers on your team that could determine if there are noninfringing alternatives or design-around solutions to avoid anticipated

claims of infringement. This proactive measure can mitigate potential infringement claim damages.

(5) **Assess the impact to develop a strategy.** Litigation can have far-reaching impacts. In addition to financial risk, litigation may impact operations or risk reputational harm. Identify your overall business objectives and values to appropriately consider strategic options to resolve the dispute, including settlement negotiations, licensing agreements, or proceeding to trial.

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