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Toward More Efficient Patent Monetization

Leveraging AI for Evidence of Use (EoU) Analysis

Strategies and Case Study

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Executive Summary

Strong patent protection means nothing if an owner does not have the money to extract value from their patents. Many innovators that have invested in portfolio development to "protect" their technology from infringers find that the costs associated with extracting value from their portfolios exceeds their ability to do so. This is especially true for those companies that have created valuable new technology, but that have been unable to generate a sufficient revenue to remain viable in their market segments. That is, if there is no money to keep the company alive, there is likely not sufficient funding to pay for pressing the company's patent rights against infringers.

Patent monetization models, such as in licensing campaigns, third party litigation funding, or brokered business sales leveraging patents, can enable companies to realize value from their portfolios. However, patent monetization requires an owner to first demonstrate that the subject portfolio holds value for the other party to the transaction. ***The first step in showing such value is via documentation that persuasively demonstrates Evidence of Use (EoU), that is, "infringement."*** However, in today's complex product environments, infringement analysis by experts is an expensive endeavor.

Fortunately, preliminary EoU documentation can now be obtained using properly trained AI models. When used on the front-end of a patent monetization project, AI-generated EoU analyses can reduce the time needed for a patent expert to validate the existence of infringement supported by publicly available evidence. Combining AI-generated preliminary EoU reports with human IP Strategy expertise can greatly reduce the cost of presenting a patent portfolio to a potential partner. In short, ***use of AI-generated EoU analyses with an appropriately selected human expert can enhance the ability of patent owners to extract value from their patent portfolios***.

This White Paper describes the most prevalent patent monetization models, explains how EoU operates as a critical feature of patent monetization efforts, and explores how AI-assisted EoU documentation generation can reduce the costs associated with extracting value from patents. This document also provides a case study of how AI-assisted EoU creation incorporated on the front end of a client's patent monetization project could have reduced the time and cost associated with bringing an electric vehicle (EV) patent portfolio to market.

1. The Misconception of "Patent Protection"

Patents are often said to "protect" an invention. This is not actually the case. Rather, it should be said that ***"if you have enough money, you can protect your invention."***

Often, an innovator is faced with a need to litigate or otherwise extract revenue from its patents because other companies have developed competitive products based on the innovator's technology. This can happen after the innovator has labored for years to both develop the technology and establish the viability of a market for their product. Competitors, especially incumbent companies with greater resources and established customer channels, will often create *"knock off"* products or technology to that of an innovator.

Given the widely held belief that patents *"protect"* one's inventions, conventional wisdom dictates that bringing a credible case of infringement against another company would operate as a means to generate this revenue. That is, wouldn't a company that finds itself in jeopardy of patent infringement seek to mitigate that risk by entering into in settlement or acquisition discussions? Unfortunately, many of these incumbents will do so even knowing that the innovator owns patents that would be infringed by such competitive activity. Put simply, many established companies recognize that there is little risk that an innovative company will have the resources to sue them for patent infringement.

In the face of infringing activity from a better-resourced company, many innovators owning apparently strong patent rights will then consider patent litigation as providing a viable option for revenue generation or exit.

Management may then seek to build patent litigation into its business strategy. In the face of competition from established companies, this effort is often a last-ditch effort to maintain a viable position in the market. In other cases, unfortunately, the innovator may find that its patents are the only tangible way to extract value from the hard work of building a startup enterprise.

When litigation is considered as a viable business strategy, the innovator's leadership team will seek representation from their existing counsel or from another law firm specifically qualified to litigate patents. Patent owners are often told by these lawyers that they have a "strong case" and that bringing a lawsuit "will bring the infringer to the settlement table." And part of this may be true: ***in many cases a clear-cut case of infringement can be legally and factually demonstrated before a patent lawsuit is brought.***

With such assurances that they have a "strong case," the patent owner will enthusiastically get on board with the litigation idea, often with the expectation that, while expensive in the short term, the end-result will mean that revenue or exit will follow in the not-to-distant future. Unfortunately, it can be quite rare that the other company will immediately want to engage in settlement discussions after being sued.

To this end, patent owners are often surprised and disappointed about what happens next in many cases. Companies accused of infringement are typically represented by legal teams that are as able to make a claim that their client's products do not infringe as the innovator's own lawyers are to make a case saying the exact opposite. Lawyers representing an accused patent infringer - often a large company with literal armies of lawyers at its beck and call - will then frequently engage in highly contentious, and perfectly legal, litigation activity that causes the patent owner's lawyers to respond to complex legal filings early in the litigation. Of course, the goal of such activity is largely to deplete the patent owner's resources early so that they are forced to give up early instead of taking their "strong case" to trial. And this is often a good defense strategy: while every litigation is different, most patent owners seeking to enforce their rights against a third party can expect to spend $10's of thousands of dollars on lawyers even in the early stages of a litigation.

It is often the case that an innovator that holds strong patent protection may find themselves between a classic "rock and a hard place." Not only are their patent rights infringed, but also litigation has, or will shortly, exhaust much of the company's remaining revenue. A usual next step is that the patent owner will find it impossible to continue paying their legal teams, and settlement talks, at significantly lower values, must commence. It is worth noting that settlements or acquisitions conducted under financial duress cannot be expected to lead to optimum financial outcomes for the patent owner.

For companies that are "non-practicing entities," (NPEs), the challenges of litigation can be even more substantial. Companies that are actually selling products covered by their own patents, generally termed "operating companies," can ask a court to stop an infringer from selling the infringing product via an injunction. This potential legal remedy can be a strong incentive to get a company accused of patent infringement to the settlement table. For NPEs, which are sometimes derisively called "patent trolls," no injunction is possible. As a result, NPEs owning patents that are infringed by incumbent companies must be prepared to litigate a lawsuit to the end, which typically means trial and even appeal, in order to recover damages for patent infringement. Given that a minimum amount for a litigation through trial can be expected to be far greater than $1 million, and often much more, only the most highly resourced NPEs can bear the financial risks associated with bringing a patent infringement lawsuit as a patent owner.

The financial realities of patent litigation means that many patent owners, even those with strong proof of infringement, are often faced with an untenable decision: whether to spend huge sums to prove their case, even while doing so may effectively bankrupt them. To look at things from a different angle, for many companies, patents should only be viewed as being akin to an option to sue at some time in the future. If the owner of an option does not have the resources to exercise it when the opportunity to do so arises, the option must go unexercised. In other words, ***"patent protection" means only that you have permission to sue for infringement, not that you can actually do so.***

2. Patent Monetization Models

Patent monetization can take several forms, each leveraging different strategies to generate revenue from intellectual property assets. There are four primary patent monetization models in use today:

A. Patent Licensing Campaigns

Patent licensing campaigns involve identifying those companies that are potentially using the patented technology with a goal of generating revenue by granting third parties the right to use the patented product or technology in exchange for licensing fees or royalties.

Patent licensing programs can be managed internally by a company's legal or intellectual property department or externally by specialized licensing firms, law firms, brokers, or patent monetization consultants. Strategic management of potential target companies is key to a successful patent licensing campaign. Clear understanding of the relevant patent landscape is also critical to the success of such programs to ensure that a licensing offer is not met with an allegation that the subject patent(s) could be invalid.

Patent licensing campaigns typically begin with a portfolio analysis to identify high-value patents and identify potential target companies that may be making, selling, using, or importing products that may infringe the subject patent's claims. If not properly structured, however, the accused infringer may choose to litigate, instead of settling. To avoid this serious problem, patent owners should never send a letter to a potential infringer without first having an experienced patent litigator first review it for compliance with the complex rules associated with an "offer to license" a patent in a monetization campaign.

B. Patent Litigation Financing

In litigation financing, third-party funders provide the capital needed to enforce patents in infringement lawsuits in exchange for a share of any settlement or judgment. This model can be useful for individual inventors, startups, or small companies lacking the capital to enforce their patent rights against larger defendants.

The funder covers litigation-related expenses and receives a pre-negotiated percentage of any settlement or damages awarded. If the litigation is unsuccessful, the patent owner owes nothing. Funders conduct extensive diligence before committing to investing in a potential damages recovery. This review includes legal and technical reviews, damages modeling, and validity assessments.

Litigation funders often partner with law firms, which may charge a reduced hourly rate and manage ongoing expenses in exchange for a share of the potential recovery. The patent owner typically receives revenue "on the back end" after a lawsuit is settled or a verdict is rendered. However, in some cases, the patent owner may receive a lump sum up front payment, as well as a percentage of the recovery.

C. Contingent Fee Law Firm Representation

Contingent fee representation involves a law firm receiving a percentage of the proceeds recovered from a lawsuit settlement or damages award. The law firm covers litigation costs and is paid only if there is a successful outcome. ***Contingent fees usually range between 30% and 50% of the net recovery, that is, after all litigation expenses and costs are deducted.***

This model can be attractive to independent inventors and small companies lacking the resources to pay for full-scale litigation. However, it may limit control for the patent owner, as the firm has a vested interest in how and when a case is resolved. For example, the firm may recommend settlement to reduce capital outlay, minimizing the risk of low or no recovery if the case is taken through trial and appeals are completed.

While a law firm engaging in contingent fee representation in a patent litigation is ethically obligated to act in the best interests of the patent owner, it should be acknowledged that the interests of the lawyer are not always directly aligned with those of their client. In this regard, it is possible that the lawyer may find that achieving a maximum possible recovery for their client could impart an unacceptable risk to their own business.

In some cases, a contingent fee law firm may encourage a patent owner to take a settlement that generates an acceptable return for the lawyer, but that falls short of what could have been obtained if the litigation was continued through trial and appeal. Notwithstanding the lack of alignment of interests that can exist in contingent fee patent litigation, patent owners who lack the resources to fund their own lawsuits may find it necessary to rely on law firms that can provide funding in exchange for a significant portion of any recovery.

D. M&A Consultants

Mergers and acquisition (M&A) consultants can help companies with strong patents attract acquisition interest by positioning intellectual property as a key strategic asset. These professionals assess a company's patent portfolio, packaging this information with financial information, growth potential projections, and competitive advantage assessment to market the company to potential acquirers. Potential buyers can include competitors, strategic partners, private equity firms, or companies looking to enter a new market or strengthen technological capabilities.

M&A consultants deploy their network connections, conduct outreach, and manage confidentiality to ensure sensitive information is shared appropriately. They can highlight how the patents of a company being offered for sale can enhance revenue streams, leverage market position, and block legal competition. During the acquisition process, consultants help structure and negotiate the deal, emphasizing the patent portfolio's role in future value creation.

creation. It is important to note that not all M&A consultants have the skills and experience to leverage a company's patent portfolio when generating marketing materials in an offering package. Moreover, if potential acquirers do not value patents as a business asset, management may find that their patents do not increase the value of the company over that shown from standard financial assessments. It follows that patent owners should not necessarily expect that the sale price of a company having strong patents will be greater than that of another that does not have patents.

3. Patent Brokers: Facilitators of Monetization for Patent Owners

Often, patent owners find that they need to engage a patent broker to avail themselves of the various patent monetization types. The patent broker business model centers on connecting patent holders with prospective buyers or licensees interested in acquiring patent rights. Patent brokers can also identify litigation funders or contingent fee law firms.

A patent broker typically acts as an intermediary, using their networks and market knowledge to identify interested parties and negotiate deals. Selection of a competent patent broker can reduce the transaction friction in the patent monetization marketplace by assessing patent quality, conducting due diligence, preparing marketing materials and targeting appropriate counter-parties to enable a company to extract value from their patent(s).

Patent brokers often operate on a contingency or success-fee basis, meaning they only receive compensation if a deal closes. This fee typically ranges from 20% to 35% of the total transaction value, with the actual amount depending on factors like the broker's involvement, the size of the portfolio, and the complexity of the negotiation. Some brokers may also request a small retainer fee to cover initial costs such as market research, technical analysis, and outreach, especially for portfolios where the owners are not experienced in developing sales packages. In some cases, brokers collaborate with legal and licensing teams in litigation campaigns, in collaboration with legal and licensing teams.

The success of the patent broker model depends heavily on the broker's network and credibility within the IP and technology ecosystem. A skilled broker not only understands patent valuation and licensing strategy but also has relationships with in-house counsel, licensing executives, and patent buyers at major technology firms and aggregators. Because patent sales are complex and buyers are often risk-averse, brokers must be able to articulate the strategic relevance of a patent portfolio to a potential counterparty in a patent monetization transaction. Overall, the broker often plays a crucial role in transforming patents into tangible revenue or strategic leverage for a patent owner.

4. The Critical Role of EoU Analysis in Patent Monetization and as a Barrier to Entry for Patent Owners

Before embarking on a patent monetization program using any of the described models, an Evidence of Use (EoU) analysis must be conducted. Basically, an EoU analysis is what the words convey: it is a determination of whether one or more companies are using the product or technology covered by a patent's claims. The EoU assessment is directed toward identifying a presence of third-party products that the subject patent claims "read on." This analysis is critical because if there is not enough third-party infringement activity associated with relevant potential business opportunity or damage awards, there is likely little, if any, monetization value associated with the patents.

For licensing campaigns, EoU documentation strengthens the patent owner's negotiating position by providing evidence that target companies are likely infringing the patent owner's patents. If the patent owner decides to sell their patents to another company, the realized value of a transaction may be increased with ashowing that others may be infringing the patents with a product or technology that is being sold. Litigation financers and contingent fee lawyers require an EoU analysis before becoming involved in patent monetization activities because this assessment provides a range of value that might be possible if they invest in a patent owner's portfolio. For M&A opportunities, strong patent coverage must demonstrate the patent's claims are relevant to the potential acquirers financial projections that are the driver of the transaction. In sum, without credible EoU documentation and accompanying expert legal commentary, organizations with proven experience in patent monetization are unlikely to engage in initial consultations with a patent owner unless compensated for their time.

When a patent owner engages a broker to assist them, the EoU analysis and associated documentation used to market their patent(s) may be covered by the fee paid at the completion of a successful monetization program. However, companies seeking representation by a broker may nonetheless find that they cannot attain engagement unless they can first demonstrate credible EoU. It can therefore be useful for a patent owner to generate at least some EoU information before approaching a patent broker.

An EoU analysis begins by identifying potentially infringing products based on publicly available information or industry practices. Technical data such as datasheets, user manuals, product specifications, or software outputs are collected, and in advanced cases, reverse engineering or product teardowns are conducted. This information is used to build a "claim chart" that matches each patent claim element to specific evidence found in the product. Mapping of each claim element for at least one claim of each patent involved in a patent monetization campaign must be demonstrated for infringement to exist.

The skills needed to perform an EoU analysis are somewhat unique, requiring a keen understanding of both patent law and the technology underlying the product. Legal experts interpret the claim language and prosecution history, whereas technical experts help surface how the features of a target product correspond (or not) to each claim element. In some cases, a single person can conduct both the legal and technology analysis, but it can be difficult to find an expert who holds the requisite skills to create a credible EoU analysis.

Once the analysis is completed, information that clearly demonstrates EoU for one or more third party products or technology can be generated. To be credible, the final EoU documentation should include claim charts that marry the claim elements to product features. An EoU package typically includes annotated figures, screenshots, technical references, and narrative explanations to clearly link the patent claim to the target product.

As should be evident, if U.S.-based legal and technical experts are engaged to do the work required to perform an analysis, the cost of generating even a basic EoU chart can be substantial for a patent owner, especially if a law firm is tasked with conducting the work. Savvy patent owners may thus elect to reduce the costs of EoU generation by outsourcing some of the analysis steps to lower cost search and patent analysis firms located outside of the US. However, these firms are not typically staffed by patent lawyers who are specially trained to analyze claims. This means that for an EoU analysis to be "credible" for the purposes of a patent monetization project, a U.S. patent expert must be engaged to review and validate an initial EoU analysis prepared by the external search firm.

In a typical outsourced preliminary review followed by an expert U.S. patent analysis, patent owners should expect a minimum cost for a basic EoU chart to be at **$5,000 to $10,000 per patent**. Depending on the complexity of the patent claims and or the patented product or technology, the per patent EoU cost can sometimes be significantly higher.

Notably, most successful monetization programs are premised on the existence of multiple patents that are each infringed by a third party's products, thus adding to the overall cost of a pre-monetization review needed by a patent owner. While the cost per patent can be lower if multiple patents include similar claims and cover similar products or technology, the cost cannot be expected to be much **less than $5,000 per EoU chart** even for larger portfolios.

Given the fact that many, if not most, patent owners who seek to monetize their company's patent portfolios are doing so because they need revenue, the upfront cost of obtaining credible EoU documentation can be a substantial barrier to entry. That is, if the patent owner's business was generating revenue from product sales, the company would not need to engage in patent monetization.

When combined with the uncertainty that the patent owner will, in fact, be able to generate revenue from patent monetization, often the initial costs of EoU development cannot be justified by management, especially for companies that do have experience in IP monetization activities and/or may be struggling financially.

5. How AI Can Streamline of EoU Analysis Generation

As noted, often, a significant portion of the preliminary work needed to prepare a credible EoU analysis can be outsourced to properly trained patent search firm personnel. While the analysis is specialized and requires adequate training, the work is nonetheless repetitive and programmatic. Such processes are ripe for automation, and the emergence of AI has the potential of dramatically reducing the cost of EoU documentation production.

In this regard, a properly trained AI model can dramatically reduce the human effort, and therefore the overall cost, required to the generate EoU analyses necessary for patent monetization workflows. AI models have the ability to automatically process vast volumes of technical literature and product documentation, as would be appreciated.

Perhaps more importantly, AI trained on patent-specific information, such as claim charts and prior litigation information, can generate preliminary determinations of whether a third-party product could infringe a patent's claims in a fraction of the time needed for a human to conduct the same analysis.

By automating the initial stages of review and narrowing the investigative focus, AI can dramatically reduce the time required to create a preliminary EoU analysis. While, as discussed below, expert human review is still needed prior to creation of credible EoU documentation, experience demonstrates that the quality obtainable from an AI-generated EoU first draft meets or exceeds the work product obtainable from an outsourced patent search firm, as well as that generated by a law firm associate trained to analyze patents.

In this regard, while a human expert is necessary to provide the interpretive depth and legal framing necessary for contextual understanding of an EoU chart, AI can accelerate subject matter analysis, hypothesis generation, and document formatting.

6. Maintaining AI-Generated EoU Analysis Quality With Expert Human Oversight

As with many aspects of AI today, reliance solely on AI to generate work product upon which business and legal decision-making depends can be incomplete or even dangerous. Use of unvalidated documentation can also give rise to legal liability. In high stakes areas, such as patent monetization, AI is not yet able to replace human subject matter expertise and, for complex areas such as patent claim analysis, AI may never not be fully able to replace a human expert. Instead, AI must operate within an expert human-in-the-loop system. Moreover, any human expert who seeks to rely on AI-assisted EoU documentation preparation must understand the native limitations of automated systems.

In this regard, those using AI-assisted EoU analysis processes must be willing to view AI assistance of claim chart generation and associated EoU analyses topics as they would a competent assistant that needs various levels of supervision based upon the quality of each work product in context. This also means that any person reviewing the output of an AI-assisted patent analysis process must hold the requisite level of expertise to understand whether an automatically generated work product is accurate for the information it contains, as well as for the context in which it will be used in a patent monetization project.

In summary, an AI-assisted EoU analysis and documentation generated from such an effort can streamline the work needed by experts, but it cannot provide expertise to a human that does not already possess that expertise resulting from substantive experience in patent monetization. Instead, the combination of AI and subject matter expertise can be viewed as a tool to increase the efficiency of EoU documentation preparation, with the responsibility for accuracy and quality remaining with the human patent expert.

7. Case Study: Electric Vehicle Motor Control Patent Monetization Project Employing Partially Automated EoU Analysis Generation

An entrepreneur filed a patent application prior to 2010 covering various aspects of an electric vehicle (EV) operating system. Thinking that their concept would eventually become a central feature of a then just emerging market category, they kept the portfolio pending after the initial patent issued. This eventually led to several issued patents.

Unfortunately, the claims of the earlier patents were drafted without reference to how EV products was evolving in real time, even while the patent specification included content that could enable claims reading on evolving EV operation to be generated. The entrepreneur eventually recognized that their patent counsel was ineffective, and they engaged an IP Strategy expert to assist in patent monetization efforts.

Since the patent family remained pending, the IP Strategist recognized that claims could be drafted to read on existing EV componentry that had entered the market after the original application filing date. To generate patent claim coverage that read on these EV products, the IP Strategist drafted new claims for filing in a continuation application having priority back to the pre-2010 filing date.

As part of this process, the IP Strategist also manually conducted a deep dive to identify patents and non-patent documents that could render the new claims invalid. The claims filed in the continuation case were allowed by the U.S. patent examiner using an accelerated patent examination option, and the entrepreneur now owns a patent having claims that were likely infringed by several brands of EVs currently in the market. Moreover, the claims as issued in this new patent likely would be infringed by virtually every EV that could be introduced in the future.

The IP Strategist reached out to their extensive network to seek a patent monetization partner, with a patent broker model being identified as the best option for this portfolio. Prior to doing so, they created an informal EoU analysis that made the patent broker understand that this newly issued patent certainly was infringed by many EV manufacturers, and that the potential damage recovery could be substantial. However, since the entrepreneur did not possess the financial resources required to generate a substantive EoU analysis, the IP Strategist could only obtain interest from a patent broker upon payment of a substantial engagement fee. Much of this fee was allocated to generation of a formal EoU analysis. This EV patent portfolio is now being monetized by the patent broker in an ongoing licensing campaign.

After engagement of a patent broker, the IP Strategist became familiar with an ex-U.S. patent search firm that had developed an AI EoU analysis product that was specifically trained to analyze patents and product information to create preliminary documentation as needed for patent monetization. This firm conducted an automated EoU analysis for the claims of the recently issued EV patent for validation by the IP Strategist.

The IP Strategist found that the automatically generated EoU analysis by the properly trained AI model closely aligned with their manually conducted analysis. Notably, the review the IP Strategist conducted to develop the information needed to generate a preliminary infringement assessment required at least 25 hours of detailed evaluation of the prior art and relevant EV product information, which had previously been paid for by the entrepreneur. Moreover, this initial manual assessment identified only a few likely infringers, whereas the AI-assisted EoU analysis provided a much larger universe of potential target products.

The IP Strategist concluded that if the AI analysis had been initially conducted, the entrepreneur would not only have saved a considerable amount of money, but the resulting work product would also have been as good, or may even be better, than their manual expert EoU analysis. In other words, the combination of the AI-generated EoU documentation as validated by the human IP Strategy expert would have been “credible” as required for a patent monetization process.

Moreover, the AI-generated EoU analysis generated by the firm added additional value to the entrepreneur's patent licensing campaign. In this regard, the automated EoU analysis identified a potential gap in the coverage of the claims in the recently issued patent. The information developed by the AI-generated EoU analysis surfaced a new claim drafting strategy that would enable this potentially larger source of licensing revenue to be leveraged by modifying the claim coverage to encompass more companies.

Since the patent family remained pending, the IP Strategist was able to draft new claims in a second continuation application whereby this additional source of potential revenue could be developed in the patent licensing campaign. From this information, the IP Strategist was able to conclude that the work product provided by the EoU firm created additional value over and above the scope expected initially.

It was determined that if the AI models had been available when the IP Strategist began work on drafting strategic claims for the continuation application, ***the cost of developing claims that broadly read on several EVs currently in the market would have been reduced by at least 80%.*** Further, the broader claim strategy that was surfaced by the AI model for filing in the latest continuation case would have resulted in claims with enhanced potential infringement damages being obtained earlier. The IP Strategist has therefore made the decision to adopt AI-based EoU generation as a first step in their patent monetization analysis for any new client matters.

8. Conclusion

Patent owners must be armed with credible EoU documentation when pursuing patent monetization assistance. The costs associated with obtaining EoU analyses may prevent many patent owners from pursuing remedies for patent infringement. However, when properly deployed, and with the right human expert review of the results, AI can reduce the cost of EoU creation substantially. AI can also identify potential targets for monetization campaigns.

As AI models become better in the future, the most successful patent monetization efforts will be driven not only by strong patent coverage, but also by teams that can combine AI-driven patent insights with human IP Strategy expertise. Patent owners that leverage AI with the right human expert guidance can expect to be more successful in monetizing their patents. Or, if there is no commercial value in their portfolios, this can be known more quickly at reduced cost so the owners can move on to more profitable business endeavors.

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