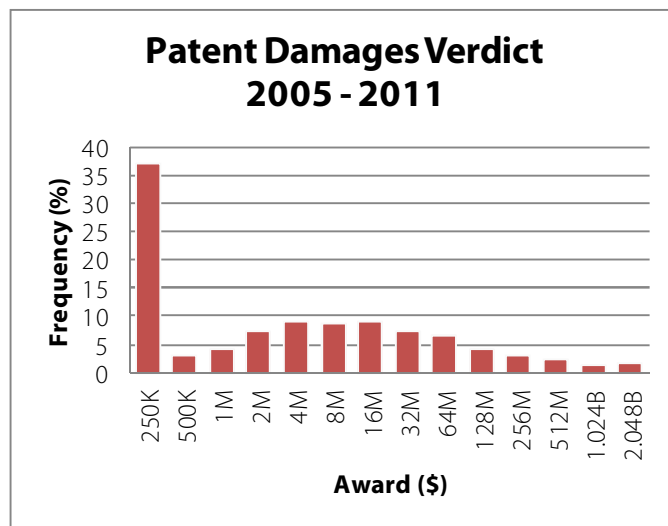


## The High Cost of Patent Litigation

According to the 2012 Betterley Report on Intellectual Property and Media Liability Insurance Market Survey, one of the challenges that causes patent infringement insurance to have a low market penetration rate is the lack of intellectual property (IP) insurance available in other commercial insurance coverages. Bob Parisi, Managing Director at Marsh, was quoted as saying, "Whoever figures out how to sell truly broad patent liability coverage at a reasonable price will have more business than they know what to do with." There is a perception in the market that the available limits are not substantial enough to protect large companies against a catastrophic loss. However, this perception may be based upon skewed media headlines regarding patent infringement damages and a lack of knowledge and understanding about the coverage.

In fact, the vast majority of patent infringement cases settle before even making it to trial and data is limited with regard to these settlements. However, a 2011 blog post, "Patent Litigation: Have the Results Been Worth It?"<sup>i</sup> presented research on 284 patent damages verdicts between 2005 and 2011. That research showed that in 27 percent of cases, the award of damages, after trial, is \$0. Overall, more than a third (37%) of cases are adjudicated within a value of \$0-\$250,000. Further, in roughly half of the cases, decisions or settlements resulted in an amount less than the sum of litigation fees through trial. The data shows that the statistical expectation of patent damages awards, net of litigation costs, is approximately \$0. Further, the statistical value of litigating to the ultimate conclusion explains why most patent lawsuits settle well before litigation expenses exceed the likely result of \$2M or less in expected recoveries.



Source: ipmetrics.net "Have Patent Litigation Damages Awards Been Worth It?" 2011

Breaking down the remaining percentage of cases in which damages exceed litigation costs, we see increased frequency in the range of \$4M-\$65M in damages.

One possible explanation for two different experiences is the defendants' revenues. In order to generate damages in the range of \$4M-\$65M, the defendant must have revenues that result in damages within this range, so the defendants in this second group are those with revenues in the range of \$40M to \$650M (assuming a reasonable royalty of 10 percent and ignoring the relatively rare treble damages).

Though the vast majority of patent infringement lawsuits settle before making it to trial, it is important to keep in mind that the average litigation costs to just get through discovery in a patent infringement lawsuit in the U.S. is \$1.6M.<sup>ii</sup> Even though these cases never went to trial, they are still costly.

IPISC notes that the mode decision amount of \$250,000 or less comes close to our experience pertaining to settlement value of patent infringement suits. In our experience, defendants with revenues

smaller than that settle litigation for some nuisance amount less than \$250,000. This is especially true with regard to suits with Patent Assertion Entities (PAEs) plaintiffs, better known as “patent trolls.” PAEs are motivated to settle, and will reluctantly invest in a suit through judgment, because more times than not, this tactic risks their primary asset in so doing. Frequently, PAEs sue retailers, distributors, outside manufacturers, customers and others in the stream of commerce that merely use or sell a product. Rather than extract a large settlement from the user (calculated royalties for these parties are low), NPEs strategically sue customers to put pressure on entities deeper pockets, which the patent trolls sue at some later point.

Because these ancillary parties are increasingly targets of infringement litigation by PAEs, the market demand for IP Defense insurance is growing. Due to media headlines, ordinary businesses selling high tech or trendy products believe their exposure is very high, and thus they are seeking higher limits. However, as we see above, their retail customers are the more likely targets of suit, and the losses for this increasing segment are likely to be low. This presents an opportunity for carriers of IP insurance to profitably satisfy a market demand.

Intellectual Property Defense insurance can be the strongest protection available to mitigate this mounting risk. The policy not only acts as a deterrent to unwarranted IP lawsuits, but it also helps ensure that the funds are available to get through the case on the merits, not on who has the deeper pockets.

For more information on IP insurance, please contact Janet Zahnd, Sales/Marketing Manager, at 502-855-5314, [jzahnd@patentinsurance.com](mailto:jzahnd@patentinsurance.com), [www.patentinsurance.com](http://www.patentinsurance.com).

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<sup>i</sup>IPmetrics Intellectual Property Consulting, 2011, <http://ipmetrics.net/blog/2011/04/29/have-patent-litigation-damages-awards-been-worth-it/>,

<sup>ii</sup> (American Intellectual Property Law Association, 2011)