

STROOCK
RYUKA

**Reducing Fees and Improving Quality:
Better Ways To Handle Discovery
In U.S. Patent Litigation**

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Common IP Lawsuits Against Or By Japanese Companies

- Patent Infringement
- Trademark Infringement
- Theft of Trade Secrets and Breach of Confidentiality

Plaintiff or Defendant

- Japanese companies used to be seen as litigation adverse easy targets for U.S. Plaintiffs
- Japanese companies are increasingly asserting their Patents and Trademarks in the U.S. Courts
 - We filed the first patent infringement counterclaim for one of the largest Japanese corporations in 1994, the first patent infringement complaint for the same in 1995 and the first ITC complaint for the same in 1997
 - Patent infringement suits by Japanese plaintiffs are now commonplace in U.S. courts

Different Obligations on the Plaintiff

- Less Sympathy
 - A judge might be sympathetic to a Japanese Defendant, who might not understand their discovery obligations
 - A judge will have less sympathy for a Japanese Plaintiff and expect them to strictly comply with their obligations
- Start Early
 - As a plaintiff, it is often beneficial to begin collecting documents and taking other actions well before a complaint is filed

United States Litigation Action Sequence

- Litigation Hold – Stop the destruction of paper and electronic documents
- Discovery Period for the Collection of Evidence
- Markman Claim Interpretation Proceeding for Patent Cases
- Motions Based on a Lack of Evidence (Summary Judgment)
- Motions to Exclude Evidence
- Trial Based on Evidence Collected During Discovery

US Litigation Costs

- Early Investigations
 - Validity and infringement for a plaintiff
 - Invalidity and non-infringement for a defendant
 - Potential damages

Much of this will involve searching the client's records even before a suit is filed

US Litigation Costs, cont.

- Discovery
 - Collection of internal evidence
 - Collection of evidence from opponent
 - Collection of evidence from 3rd parties

Subpoenas

Hague convention

Public searching

US Litigation Costs, cont.

- Motions
 - Discovery motions based on the collected evidence and the evidence that was requested, but not produced
 - Evidentiary motions based on the uncovered evidence
 - Liability motions based on the uncovered evidence

US Litigation Costs, cont.

- Pre-Trial
 - Assembling the evidence to be used at trial
 - Creating demonstrative exhibits, based on collected evidence
 - Preparing the witnesses that will be presenting the evidence, to testify
 - Assembling exhibits to be used for the cross-examination of your opponent's witnesses

US Litigation Costs, cont.

- Trial
- Post trial motions
 - Liability motions
 - Damages motions
 - Jury instruction motions
 - Inconsistent verdict motions
- Appeal

RYUKA's General Role in Cost Reduction

- Someone should understand evidence and work closely with litigation counsels through litigation
- US attorneys cannot sort through Japanese language documents
- **STROOCK-RYUKA** solves those issues.

STROOCK supervises RYUKA in all phases.

RYUKA collect and review Japanese documents.

RYUKA's General Role in Cost Reduction, cont.

- Aki Ryuka is admitted to practice in the U.S.
- His communications with the client are covered by the attorney-client privilege.
- The privilege extends to employees at RYUKA working under Aki Ryuka's supervision.

Litigation Hold

- When litigation is reasonably foreseeable, a company must not destroy any relevant evidence
- This rule overrides any internal document retention policies of the client
- Some data destruction is automated and this must be disabled

Litigation Hold, cont.

- This applies to central storage servers
- This applies to individual employees' computers
- However, if a perfect backup is available, it is not necessary to produce duplicate copies
- Someone (RYUKA) needs to coordinate actions with the client's IT personnel

RYUKA's Role in the Litigation Hold

- Explaining litigation hold to relevant people
- Winning their cooperation
- Answering Questions
- Sending Reminders (patent docket experience)
- Coordinating with IT managers
- Following up to make sure hold is still in place

What Information is Discoverable

- Paper Documents –Lab notebooks, personal files, Department files, notes
- Electronically Stored Documents – Excel spread sheets, network, CAD drawings, letters, reports
- Emails – Internal emails, external emails, all attachments to these emails
- Electronically Stored Data – Sales data, cost data, market data

From Where Can This Information Be Collected

- Department and Individual Paper Files
- Corporate Servers
- Individual Computers
- Individual Devices (Laptops, Smart Phones)
- Personal visits can be very valuable

Discovery Costs

- Survey of Fortune 200 companies found that the average company paid average discovery costs per case ranging from \$621,880 to \$2,993,567.
- Companies at the high end paid average costs of \$2,354,868 to \$9,759,900.
- These costs are likely underestimates as they do not include fixed costs involved in discovery-related technology or the executive and employee time spent on searching for documents.

Source: Lawyers for Civil Justice, et. al., "Litigation Cost Survey of Major Companies", 2010 Civil Litigation Conference.

Additional costs to Japanese Companies

Hosting and culling Japanese documents

Machine Translation:

Scanning, OCR, Inefficient reading

Difficulties in finding Jr. lawyers capable of Japanese languages

Inefficient and slow communication with clients

Human translation

Mosaid Technologies Inc. v. Samsung Electronics Co., Ltd.,
348 F. Supp. 2d 332 (D.N.J. 2004)

- In 2001, MOSAID sued Samsung alleging that Samsung's DRAM chips violated certain of MOSAID's patents
- By the close of discovery on May 31, 2013, Samsung had failed to produce, among other things, relevant schematics, completion reports, and technical emails
- Samsung was eventually compelled to produce the schematics and reports, but was unable to produce any technical emails.

Mosaid Technologies, continued...

- The case began in 2001. Samsung initiated a litigation hold in 2004. By then, Samsung's automated document destruction destroyed all relevant technical emails.
- The court stated that, notwithstanding its document retention policy, Samsung had a duty to preserve relevant documents. Even negligent destruction of documents can warrant sanctions
- The court sanctioned Samsung by telling the jury they were permitted to assume that the destroyed documents might have contained evidence unfavorable to Samsung.
- The court sanctioned Samsung? \$566,839.97 in costs and fees.

Hynix Semiconductor Inc. v. Rambus Inc.,
897 F. Supp. 2d 939 (N.D. Cal. 2012)
and
Micron Tech., Inc. v Rambus Inc.,
917 F Supp 2d 300 [D Del 2013]

- Rambus engaged in litigation against several parties.
 - Rambus began considering litigation in early 1998
 - Rambus also instituted a new document destruction policy in mid-1998.
- While litigation was ongoing in 1999-2000, Rambus destroyed hundreds of boxes worth of documents pursuant to its new document destruction policy.
- Rambus did not keep records of what it had destroyed.

Hynix and Micron, continued...

- The Federal Circuit held that both cases warranted sanctions, and remanded to the district courts for specific determination of sanctions.
- In *Hynix*, the court sanctioned Rambus by issuing a \$250,000,000.00 credit against the damages award.
- In *Micron*, the court stated that Rambus's patents were unenforceable due to the document destruction.

In re Seroquel Products Liab. Litig.,
244 F.R.D. 650 (M.D. Fla. 2007)

- Plaintiffs sued Defendants for injuries caused by AstraZeneca's drug, named Seroquel, an anti-psychotic medication that allegedly caused diabetes and related disorders.
- AstraZeneca limited its production of emails to the documents uncovered by performing a key word search.
- Plaintiffs brought a motion for sanctions, alleging that AstraZeneca (AZ) failed to produce all relevant emails.

In re Seroquel, continued...

- Court found that the keyword search used by AZ was not adequate. There had been:
 - No discussion of search terms between AZ's attorneys and AZ's IT department
 - No discussion of search terms with opposing counsel
 - No sampling or quality control to determine if the keywords correctly identified relevant documents
- Court found sanctions were warranted, but postponed ruling on what specific sanctions to order pending evidence regarding extent of prejudice.

Qualcomm Inc. v. Broadcom Corp.,
2008 WL 66932 (S.D. Cal. Jan. 7, 2008)

- Qualcomm sued Broadcom for infringing on certain video coding patents, specifically those involved in the H.264 standard.
- Broadcom's defense was that Qualcomm had participated in the Joint Video Team ("JVT") which created the H.264 standard, and thus Qualcomm had waived any infringement claims.
- As a result, Qualcomm's involvement with the JVT and the H.264 standard was a key issue in the case

Qualcomm, continued...

- During discovery, Qualcomm never searched for documents using either “H.264” or “JVT” as keywords
- Qualcomm also never searched the personal emails of several of their own witnesses
- During post-trial sanction hearings, Qualcomm discovered 46,000 responsive documents that it had not produced.
- The court sanctioned Qualcomm for its failure to produce documents in the amount of \$8,568,633.24, which represented all of Broadcom’s litigation fees and costs.

Implementing A Litigation Hold

- Identify Document Retention Policy
- Communicating with Personnel
- Communicating with specific Employees with Information

Implementing A Litigation Hold *In Japan*

- RYUKA receives case-specific training and communicates with Stroock regarding litigation hold procedures
- RYUKA can speak directly with the actual IT personnel
- RYUKA can speak directly with company employees

Document Collection

- Collecting Paper Documents – Collection, scanning, saving to a hard drive, saving to a secure website
- Collecting Electronically Stored Documents – Vendor collection, Internal company collection
- Collecting Emails - Individually stored email, email server collection
- Collecting Electronically Stored Data – Save to storage media and transmittal

Issues With Japanese Language Documents

- Review by English speaking attorneys is inefficient
 - Not capable of even getting general sense of a document
 - OCR, Google translate, machine translations not efficient
- Client Involvement is Essential, but Time-Consuming
 - Client reviews documents
 - Client prepares summary sheets

RYUKA's Role in Document Collection

Identifying relevant and non-relevant people by interviews

Acquiring cooperation from the relevant people by explaining risks of not producing relevant documents

Identifying relevant servers, PCs and recording medias

Limiting documents before collection

ex. By senders, recipients, dates, and key words

Logging what has and has not been collected

Hosting And Culling Through Document Production

- Old box and Binder Method
- Computer Systems for Storage, Processing and Review
- Brute Force Method
- Computer Analysis for De-Duplication
- Computer Analysis for Responsiveness

Hosting And Culling Through Document Production, cont.

- Vendors can store data and make it available to Stroock, RYUKA and client via a secure website
- Stroock can store data and make it available to RYUKA and client via a secure website
- Stroock is less expensive
- Problems can be shared with vendors.

RYUKA's Role in Hosting and Culling

Selecting the most suitable software

Supervising vendors or confirming delivery of all identified data to STROOCK

Confirming collected information before being hosted

Identifying rules for excluding non-relevant group of documents

Providing secure review rooms equipped with PCs

Reviewing The Client's Own Documents

- Review for Responsiveness and Privilege
 - Do not produce attorney client privileged documents
 - Do not produce too many irrelevant documents
 - Tag documents to make it easier to locate them in the future

Reviewing Your Own Documents, cont.

- Finding Helpful Documents
 - Your own documents can help your case
- Knowing the record of the produced documents
 - Attorneys need to develop a sense of what is in the record
 - Knowing what we have produced helps us make informed demands on the opponent

Reviewing Your Own Documents, cont.

- Finding Damaging Documents
 - Important to know pitfalls of a case
 - Need to begin to search for explanations for what looks like damaging evidence
 - Need to develop reasons not to produce harmful documents, such as non-responsiveness, privilege and so forth

Reviewing Your Own Documents, cont.

- Preparing for Depositions
 - Need to show witness the difficult documents they will likely see in a deposition before the deposition
 - Need to work on possible explanations and give the witness more time to recall past facts and circumstances

Reviewing Your Own Documents, cont.

- Preparing for Trial
 - Collecting the evidence to prove your case
 - Collecting the evidence to counter your opponent's arguments

Document Review of Japanese Opponent's Documents

- Determine whether opponent responds to all your document requests
- Determine whether to make additional request
- Locate documents helpful to your case
- Identify documents helpful to opponent's case and learn his strategy

Review Process by RYUKA

- Discussing nature of documents with the client to develop a collection and review protocol
- Consulting with litigation counsel at STROOCK
- Choosing relevant information for production
- Identifying privileged documents

- Proactive Review -

Protocol should change as **new information** is found.

Reviewers should consult with litigation counsel.

Way Of Producing Documents

- Today, paper production is rare
- DVD's and Hard Drives
- Uploading to FTP Site
- Need the assistance of someone who can read the documents and make sure they are produced in a useful and accurate way

U.S. Attorney Obligations

- Good faith obligations to the Court
 - Comply with discovery
 - Work out conflicts with opposing counsel
 - Answer court's questions about discovery
 - Account for response
- Therefore, the U.S. attorney needs to understand the document production record

U.S. Attorney Obligations

- Obligations to the Client
 - Effective representation
 - Learn the record
 - Do not wave privilege
 - Collect the best evidence
 - Do not waive privilege

U.S. Attorney Obligations

- Trust is Essential
 - U.S. attorney cannot transfer his obligation to a third party
 - U.S. attorney must be able to explain the progress of discovery to Judge
 - U.S. attorney can be liable for personal sanctions for discovery errors
 - Aki Ryuka is admitted to practice in the U.S.

20 Years Of Developing Trust

- Mr. Siegal and his firm have worked with Mr. Ohba on important patent prosecution and litigation issues for over 20 years
- Mr. Siegal and his firm will personally supervise the training of RYUKA staff on document discovery procedures
- Mr. Siegal and his firm have over 20 years of experience in representing Japanese companies in different types of US patent infringement, trademark infringement and theft of trade secrets litigations

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