

**Case Law Created
By Woodsford**

Woodsford Case Study



What impact does a Litigation Funding Agreement have on standing in US Patent Infringement Litigation?

Attacking the propriety of a plaintiff's standing to sue is a common defense strategy in US patent litigation. Indeed, the US Court of Appeals for the Federal Circuit has created a dense body of law regarding the necessary rights for plaintiffs to bring a lawsuit for patent infringement. However, the bulk of that case law was created in consideration of the relationship between patent owners and their exclusive or non-exclusive licensees or assignments between patent owners, rather than considering the question of how a litigation funding agreement may affect a patent owner's standing to sue.

An August 13, 2019 decision from the US District Court for the District of New Jersey in WAG Acquisition, LLC v. Multi Media, LLC (No. 14-2340-ES-MAH, D.I. 190) ("Order") took the question of a litigation funding agreement's impact on standing head-on—and found that the plaintiff's funding agreement with Woodsford did not impair its standing to sue.

In that case, plaintiff WAG Acquisition LLC ("WAG"), a US company owned by the inventors of the asserted patents, alleged that defendants were infringing by providing and hosting adult entertainment videos and related online social venues.

The defendants sought to dismiss WAG's cases for lack of standing by alleging that WAG's funding agreement with Woodsford deprived WAG of the rights necessary to sue independently for patent infringement — all of the defendants' arguments against standing were solidly rejected by the district court.

Key Take-Aways:

A well-prepared litigation funding agreement does not give the funder any independent rights under the patents-in-suit:

As both Judge Salas and Magistrate Judge Hammer noted, Woodsford's funding agreement did not grant us "any independent rights under the patents at all." Under no circumstances could we take action with regard to



Attacking the propriety of a plaintiff's standing to sue is a common defense strategy in US patent litigation. Indeed, the US Court of Appeals for the Federal Circuit has created a dense body of law regarding the necessary rights for plaintiffs to bring a lawsuit for patent infringement.



the litigation or the patents on its own, as the court's further analysis highlighted—the funding agreement was only intended to give Woodsford the ability to protect its investment.

A funder's first priority to any financial return does not impede plaintiff's standing:

The court determined that Woodsford's first priority to damages was consistent with its position as an investor in the litigation and did not transfer any substantial rights in the patents, especially because our share of any damages would be less than fifty percent.

A litigation funding agreement should not give the funder a right to initiate litigation, practice, or license third parties under the patents:

Our funding agreement did not give us any right to initiate litigation either unilaterally or alongside the plaintiff, which showed that our interest did not vitiate the plaintiff's standing to sue. Moreover, the court found that plaintiff continued to possess all substantial rights in the patents since it "retain[ed] legal title to the patents, and can practice under the patents, expand and strengthen them, license them, and sue third parties for infringement."

A funder's right of first refusal to fund subsequent litigations does not impact standing:

That a funder may have a contractual right to fund future litigation does not limit the plaintiff's ability to bring future litigation, regardless of whether the funder elects to fund. Moreover, the court rejected the defendants' unsupported speculation that the plaintiff's financial ability to bring its own suit had any bearing on whether a right of first refusal for future funding could impact the standing analysis.

Requiring a funder's consent to settlement or to assign, transfer, sell, or license the patents does not impair standing:

Our funding agreement with the plaintiff required our consent for settlement and, where plaintiff and Woodsford did not agree on settlement, a third party expert would make a binding decision. The court found that this arrangement did not disrupt standing as the plaintiff remained the only party with the right to initiate litigation and our limited rights prohibited us from forcing settlement. Likewise, that the plaintiff was restricted from assigning, transferring, selling, or licensing the patents without our consent, which could not be unreasonably withheld, was not found to significantly restrict the scope of plaintiff's rights.

Giving a funder a security interest in the patents does not confer rights on the funder:

The court determined that our security interest in the patents was acceptable because it was a security interest protecting our investment, rather than an ownership right in the patent.

Granting a funder contingent rights to terminate funding is permissible:

Defendants argued that our contractual rights to terminate funding if certain circumstances were to occur, such as if counsel withdraws from representing the plaintiff, transferred exclusionary rights to Woodsford. The court disagreed, finding that such contingencies not to be exclusionary interests in a standing analysis.

Judge Salas's opinion denying the defendants' motion to dismiss due to plaintiff WAG Acquisition LLC's alleged lack of standing carefully reviewed and declined to adopt many of the common attacks on standing related to litigation funding agreements. Her opinion provides a helpful roadmap for would-be plaintiffs seeking litigation funding on how to prepare a strong funding agreement. Patent owners considering financing for their litigation strategies should be sure to consult experienced patent litigation funders, such as Woodsford, to ensure they are prepared for any standing challenges in their own cases.

About Woodsford

Founded in 2010 and with a presence in London, New York, Brisbane, Philadelphia and Minneapolis, Woodsford is a leading ESG, access to justice and litigation finance business.

Whether it is helping consumers achieve collective redress, ensuring that investors and universities are properly compensated when Big Tech infringes intellectual property rights, or helping shareholders in collaborative, escalated engagement up to and including litigation with listed companies, Woodsford is committed to ensuring the highest ESG standards while providing access to justice.

Working globally with many of the world's leading law firms, our legal experience, investment, business and technical expertise, in tandem with our significant financial muscle, makes us a powerful partner and a formidable adversary.

For further information, visit
www.woodsford.com

Member of the International
Corporate Governance Network



Founder member of



Founder member of

