

PROPERTY CASUALTY 360°

February 4, 2015

NATIONAL UNDERWRITER P&C

RPX introduces new patent litigation coverage

By Joseph Jaafari

The tech boom has been great for innovation, benefiting large companies like Apple and Google as well as Northern California's economy as a whole.

However, it has also been a "great time" for patent litigation and those who buy up patents in hopes of litigating and then profiting off of unknowing and sometimes small startups.

The solution for a few years was to simply negotiate and settle patent suits, but after 2005, when patent suits almost doubled, the task of negotiating with companies that bought patents and litigated them — called Non Practicing Entities or NPEs — became more difficult.

Enter RPX Corp., which offered subscription-based protection from such suits by buying up patents on behalf of its clients. However, NPEs soon started going after smaller companies that couldn't necessarily afford RPX's membership fee. As a result, the firm last year announced a new insurance option for businesses of all sizes to protect them from the financial damages of a patent lawsuit.

To learn more, PC360 sat down with RPX Corp.'s Senior Vice President, Paul Scola. Here is a transcript of that conversation.

PC360: What is RPX all about when it comes to patent acquisition?

Our core business is really a risk mitigation business. We have focused on the end of the market that has the largest risk first to tackle the severe expense and waste for companies.

Our business model is to aggregate dollars from across many different companies to buy patents before they wind up in the hands of NPEs, also known as "patent trolls." Doing so clears the risks they represent to those companies more efficiently than the companies can manage on their own — all without the wasteful expense of litigation. We buy defensively, which means we will never litigate or assert the patents we buy and our clients receive a license/sub-license to everything we buy.

When we launched RPX in 2008 we went to companies that experienced the most risk, and that's where we were able to demonstrate the model and how effective it was. We very quickly got to \$100 million in revenue and that was a testament to how effective the core operating model was. So big technology companies that might see 20 to 40 cases a year and are accruing tens of

millions in exposure annually. They could spend five or six million dollars with us and we could easily clear \$10 to \$15 million in risk for them.

PC360: But simply paying into the core membership doesn't guarantee any exemption from future litigation?

Some lines of the insurance business seem to have forfeited all claims activity to attorneys, both inside and outside counsel. This risks loss of attorney/client privilege. One court observed, "Most courts have adopted a rebuttable presumption that neither attorney-work product nor attorney/client privilege protects an insurer's investigatory file on an insured's claim from discovery before a final decision is made."

PC360: So, is the goal to clear all litigation from ever happening?

Yes. Fundamentally, we're working to solve the multi-billion dollar problem of patent risk. Our research shows that NPE-driven patent infringement litigation costs companies nearly \$13 billion per year, split almost evenly between settlements and legal fees. Through

our services — acquiring patents defensively, offering NPE litigation insurance, and providing intelligence on patent market activities and trends — we are helping companies mitigate, manage and, eventually, eliminate NPE patent litigation.

PC360: And where does insurance come into play?

We took the risk clearance capability of our core business and we added the value of a risk transfer service so that it could be leveraged by companies that might have less risk and less sophistication in the patent space. Using all of the data that we have collected through the operations of our core business, we were able to build an underwriting process and an actuarial model that allows us to project and price risk. That enabled us to bring the risk transfer service — our insurance offering — to companies that might not be able to understand the nuances of a standalone risk mitigation service, but for whom insurance makes sense. By offering insurance, we're able to partner with the client more directly, making sure every element of this exposure is managed as efficiently as possible and with the benefit of data: from assertion or demand letters to indemnification requests to invitations to license to being named in a lawsuit.

PC360: You are able to cover yourself through your own reinsurance?

Yes. We're able to be so comfortable taking on the risk associated with our insurance because we actively clear risk in the market above and beyond what we're doing with the insurance business. You should think of it as: we have our risk mitigation business that

spends about \$130M a year, buying patents and clearing risk. We then have an insurance service, and the two businesses dovetail tightly — when we're clearing risk for our core clients, we're also clearing risk for our insureds and vice versa.

PC360: I understand that, quite often, it's the users of technology who are sued. What kind of things are they doing that NPEs look for in pursuing a company in litigation?

What happens on the NPE world is that let's say a given company is selling a product on their website and may use a technology — search within a search or some feature that allows you to look at a 3D image in the way you look at a piece of clothing on a mannequin — that's the kind of stuff they can get sued on.

PC360: It sounds like every company is essentially at risk.

Patent litigation insurance is what every modern company should be thinking about because every company has this risk on some level. Insurance is the answer for this risk just like it is for all other kinds of operational risk. If you're a mortgage broker or an E-commerce provider and you get a letter from an NPE or are named in a case by an NPE, you'll likely have no idea how to handle it and will have to pay lawyers a high hourly rate just to figure out what happened. This is our entire business — we probably knew about the patent at issue before the NPE bought it or we have negotiated patent purchases with that NPE previously. There's then no need to spend money with a lawyer because it's just operating knowledge for us. And as such, we're able to clear and manage risk more efficiently than companies can on their own.