

Companies Steering Clear Of Major IP Traps: Study

By **Jessica Dye**

Law360, New York (October 05, 2010) -- Despite the recent surge in false marking suits and the ongoing peril posed by patent trolls, corporate leaders say that IP legal challenges haven't taken a significant bite out of their businesses' bottom lines this year, according to a survey released Tuesday by Foley & Lardner LLP.

Foley & Lardner's inaugural survey of IP industry leaders found that companies are feeling confident about their ability to take some of the biggest IP threats in stride — particularly the feared onslaught of false marking cases in the wake of the U.S. Court of Appeals for the Federal Circuit's December ruling in *Forest Group Inc. v. Bon Tool Co.*

More than half of respondents — 54 percent — said that they have yet to feel the effects of fallout from *Forest Group v. Bon Tool*, which some members of the legal community feared would encourage a rash of opportunistic plaintiffs hoping to cash in on the Federal Circuit's decision that penalties can be assessed on each falsely marked article.

While the decision did indeed spur an increase in false marking suits, the majority of respondents told Foley that they have not felt a significant impact from it. More than half of respondents said they also had the good luck to avoid any run-ins with a patent troll, or non-practicing entity, in the last year.

That attitude is reflected in the majority of respondents' budgets, according to the survey. Eighty-six percent of those surveyed said they do not proactively include money and efforts to combat patent trolls, false marking plaintiffs or other “non-essential lawsuits” in their company's annual strategy and budget development.

Capturing the general sentiment of respondents about the short- and long-term impacts of false marking plaintiffs and patent trolls on their businesses, one individual told Foley that there is not a “significant impact, but it does consume some time and money, which is diverted away from other cases.”

One reason for the optimistic outlook may be the Federal Circuit's June 10 ruling in *Pequignot v. Solo Cup Co.*, which clarifies issues related to burden of proof and the element of intent in false marking cases, according to Stephen B. Maebius, chair of Foley's intellectual property department.

“While we have seen an increase in the number of false marking lawsuits filed nationwide, the Solo Cup decision requiring proof of intent may be limiting the financial impact of these cases, perhaps accounting for the confidence expressed by some respondents to our survey,” Maebius said. “Our survey reveals that the respondents clearly recognize the strategic business importance of their IP assets, though, and are primed to utilize them when necessary.”

The survey also found that 46 percent of respondents saw their legal or business budget remain steady from 2009 to 2010, despite the economic downturn. About 22 percent actually spent more money on legal or business budgets in 2010, compared to 2009, according to the survey.

The vast majority of those surveyed — 75 percent — say they are pleased with their company's focus on protecting IP assets, and 93 percent said they believe the importance of IP to either be greater or the same as it was since the economic downturn began.

“It's very encouraging that so many respondents, across a variety of industries, continue to understand the critical importance of IP rights,” Maebius said.

The survey was completed by 75 executives, advisors and consultants within the IP industry in August 2010. It was released simultaneously with Foley's “Winning a Game of Inches: Gaining Momentum Through IP” conference held in New York on Tuesday.

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