HOT TOPICS PANEL

Paul Roeder, Hewlett-Packard
Karen Boyd, Turner Boyd
Michael McCoy, Appsterdam Legal Defense Fund
Douglas Luftman, CBS Interactive
Lisa Buccino, SAP
Damages Aspects of Defense

- The law of damages calculations after *Uniloc*
  - Apportionment based on sound economic evidence
  - Prior licenses must be analogous

- Litigating damages pre-trial
  - Attack damages from the start
  - Reverse bifurcation
  - Discovery
  - Motions for summary judgment
  - *Daubert* motions

- Presenting damages evidence at trial
  - Proving apportionment
  - Resisting prior licenses

- Call to action:
  - Revive the Domestic Industry and Public Interest requirements in the ITC
Smaller Company Options

- Don’t be afraid to lead
- Don’t be afraid to follow
- Don’t be afraid to ask for something “weird”
  - What in the world is “reverse bifurcation”?
- Remember your first year of law school
  - Is there personal jurisdiction?
  - Is there subject matter jurisdiction?
- Be proactive about indemnification
App Maker Aspects: Fear & Loathing in the Patent System

- **Appsterdam**
  - A Haven for Indie App Makers — Developers, Innovators, Creatives and Businesses

- **Appsterdam Legal Foundation** — The Legal Center of Appsterdam
  - The Power of the Collective
  - Education, Cooperation & Partnership

- **Cost of NPE litigation (Allison and Lemley 1998)**
  - Nearly half of all patents litigated to judgment are ultimately found invalid
  - 2,600 New Patent Lawsuits Per Year
  - 345% Increase in Litigation from Non-Practicing Entities
  - Cost of Non-Practicing Entity Litigation – $400M
  - Median Annual Damages – $2.2M-$10.6M

- **Strategy**
  - Open Sourced Prior Art & Collaborative Research
  - Proactive Business Structuring & Product Design
  - Gaining a Voice in the Legislative Process

- **Legislative Reform**
  - “If your enemy’s forces are united, separate them.” – Sun Tzu
  - 1,500 App Maker Members & Counting
  - Exclusions & Limitations for Non-Practicing Entities
Fee Arrangement Aspects of Defense

- Hourly billing is the most typical type of fee arrangement
- However, companies are looking for alternatives and law firms are eager to accommodate. Why?
  - Companies want predictable costs; surprises are disfavored
  - Clients want firms to share the pain for poor results or cost overruns
  - Frequent NPE litigation means companies are looking for ways to eliminate the pressure to settle
- What are some of the ways we can use fee arrangements to address these issues?
- Litigation docket retainer agreements
  - Outcome based billing / contingency agreements
  - Fixed fees and capped fees
  - Volume discounts
  - Efficiency bonuses
- What are the pros and cons of these? Other considerations?
Collaborative Defense Issues and Tactics

- Reexaminations revisited
  - Retrospective
  - Today
  - Future

- Multi-defendant litigation
  - Reducing transaction costs
  - Things to do before calling your outside counsel
  - Joinder dynamics

- Other collaborative defensive solutions
  - Patent purchasing entities
  - Prior art crowd-sourcing
  - Reexamination entities
  - Captive insurance pools