

An Online Patent Enforcement Strategy That is Immune to the COVID-19 Pandemic

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The COVID-19 pandemic has wreaked havoc on brick and mortar businesses. Consumers, confined to their homes, have flocked to online markets, where products offered by patent owners often compete with infringing products from across the globe. Fighting these infringers has never been easy, but the problem has been exacerbated by the pandemic, which has caused significant delays at the courthouse. Patent owners, therefore, should consider alternative strategies for enforcing their patents against infringing goods sold on the world's largest online marketplace: Amazon.

Amazon operates an internal patent enforcement procedure, called the "Utility Patent Neutral Evaluation Program." Through this program, a patent owner may shut down infringing product listings from multiple vendors in a single action.

Vendor participation in this program is voluntary. But Amazon will promptly remove the accused product listings for any vendor that refuses to participate. If the vendor agrees to participate, Amazon refers the dispute to a "neutral evaluator"—an experienced patent litigator who will evaluate the infringement claim after analyzing the parties' written arguments. The process takes 8-10 weeks from the time the neutral evaluator is assigned, and the cost is nominal compared to other patent litigation options because the proceeding is very streamlined and efficient by design. Amazon limits the dispute to one claim from one patent and one legal issue: infringement. With very limited exceptions, the process allows only one defense: non-infringement. Also, the process excludes discovery and live hearings, so it is immune to the pandemic delays at the courthouse.

After the parties brief their infringement arguments, the neutral evaluator rules within two weeks. If the neutral evaluator gives a thumbs-up, the accused vendor may continue selling. With a thumbs-down, Amazon will remove the accused listings, and bring a potentially significant source of online infringement to an immediate halt. There is no appeal because the parties, as a condition of participating in the process, waived their right to challenge the evaluator's decision.

The evaluator's decision is not binding outside of Amazon, so dissatisfied parties may take their dispute to court. But again, the court process can be slow—even without pandemic-related delays. And in the meantime, the parties must live with the evaluator's decision which, for some, can greatly affect company revenue. Moreover, district court litigation is expensive and beyond the means of many smaller companies. By contrast, Amazon's streamlined process is affordable, and therefore accessible, to most Amazon sellers. The participation fee is \$4000, but the evaluator will refund that fee to the winner.

Parties (corporations or individuals) may represent themselves or may retain counsel to represent them. Given the complexities of patent law, represented parties hold a significant advantage and the legal fees associated with an Amazon evaluation are relatively modest. In most cases, those legal fees should not exceed the cost of drafting a set of summary judgment briefs.

To initiate an Amazon Utility Patent Neutral Evaluation, patent owners must file an infringement report. (To obtain an infringement report form, click [here](#) and then log in to your Amazon account.) Once the patent owner has submitted the form, Amazon will contact the accused sellers and invite them to participate in the evaluation process. If the sellers

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fail to participate, Amazon will remove their accused listings.

With increasing numbers of cooped-up consumers shopping online, the Amazon Utility Patent Neutral Evaluation procedure provides a very fast, effective, and affordable way for patent owners to enforce their rights against online infringers. By the same token, this process can be hazardous for wrongly-accused sellers who fail to hire an experienced lawyer to represent them.

Miller Canfield lawyers have participated as evaluators in some of Amazon's earliest evaluations, and we are thoroughly familiar with the utility patent neutral evaluation process and procedures. If you are a patent owner seeking to enforce your patent against online infringers, or you have Amazon listings that have been wrongly accused of patent infringement, please contact your Miller Canfield attorney or the authors of this alert to discuss how we can help.