

# Ethics and Implications of Infringement Allegations

Kevin Kudlac

University of Texas  
Advanced Patent Law Institute  
November 7, 2022

1

## The Premise

- **You Believe a Competitor is Selling Dozens of Infringing Products. Now What?**
  - **Pre-filing Investigation**
  - **Complaint**
  - **Infringement Contentions**
  - **Discovery**
  - **Trial**

2

## The Premise – a hypothetical

- Many cell phone models
- All have a screen
- Screens are a commodity (many manufacturers)
- You have screen patents (and licensees)
- Can't just look at screen and determine infringement



3

**Pre-Filing Investigation:**  
*What, and how much, do you need to do?*

4

# Pre-Filing Investigation– Options

1. **Internet Research only**
2. **Buy and analyze one product**
  - Product A
3. **Buy and analyze one of each product**
  - Products A to Z
4. **Buy and analyze every “version” of every product**
  - Product A, versions 1-10; Product B, versions 1-5, and so on

**PRO TIP: #4 costs a LOT of money**

**QUESTION: How much “analysis” is required?**

5

# Pre-Filing Investigation– Be Reasonable

- By presenting [a paper]. . . an attorney . . . certifies that to the best of the person's knowledge, information, and belief, formed after **an inquiry reasonable under the circumstances** [ ] the factual contentions **have evidentiary support** or, if specifically so identified, will **likely have evidentiary support** after a reasonable opportunity for further investigation or discovery.
  - ***Fed. R. Civ. P. 11(b)(3) (emphasis added)***
- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer **reasonably believes** that there is a basis for doing so that is not frivolous.
  - ***Tex. Disciplinary R. Prof. Conduct 3.01***

**Question: So, what is “reasonable”?**

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Ethics and Implications of Infringement Allegations

Also available as part of the eCourse

[2024 Advanced Patent Law \(Austin\) eConference](#)

First appeared as part of the conference materials for the  
29<sup>th</sup> Annual Advanced Patent Law Institute session  
"Patent Infringement and Products"