

In the bleak crypto winter, counsel eye budgets, NPEs and NFTs

Rani Mehta September 23, 2022



Counsel at Gemini, a fintech company and two firms say they have to be more thoughtful about patent filing and NPE litigation

The summer has come to an end for those of us in the Northern Hemisphere. The days are getting shorter and colder, and winter is fast approaching.

Of course, those in the crypto sector have already faced a chill of their own for a while now.

Investors have dubbed the past several months a crypto winter because of the downturn in the market. The crash has had a cooling effect on trading volume, investments and confidence in the industry, all of which were scorching hot not too long ago.

Bitcoin reached its all time high in November 2021, but the crypto market began to fall alongside the rest of the market shortly after. The downturn became starker a few months ago when cryptocurrencies went down by around \$1 trillion in value in May and June 2022.

Data from **Forbes** published on September 2 found that Bitcoin's value had decreased by 65% from its November high.

Intellectual property counsel have had to adapt accordingly.

While counsel are optimistic about the sector, they've become more cautious when filing patents in an attempt to balance protection and cost efficiency.

Ravi Mohan, partner at Rutan & Tucker in San Francisco, says there's still interest in filing.

"But it's definitely more conservative than it was," he says.

Sources are also bracing for the costs that could come after the crypto winter subsides. As more crypto firms fall victim to the cold, they point out, more patents will be sold to litigious non-practising entities (NPEs).

Some are confident that the snowstorm won't last too long, however.

A senior counsel at a fintech company in the US says she hasn't changed her IP strategy in light of the volatility, adding that she's bullish about the market and happy to wait out the winter.

Sources are also confident about NFTs – even though that market is crashing too.

They say NFTs remain a top industry trend and that they're keeping an eye open for patenting and partnership opportunities.

Frugal filings

Counsel have become pickier about where they file.

Cindy Huang, associate general counsel at Gemini in New York, says she now focuses on countries where her company already has a lot of activity, and puts less emphasis on places where the firm might like to go someday.

She adds that the different regulatory frameworks in various countries have become bigger filing factors too. Companies such as hers should consider whether they'll get the most out of their IP if they file in heavily regulated jurisdictions, she says.

Others argue that it's still important to file broadly, however.

Mohan at Rutan & Tucker says he advises clients to seek patents in a range of countries because they don't know when regulations will change.

"My clients would hate me if I advised them not to file in a country, and then said country became more open to crypto two years later. Not only would that be bad advice, it wouldn't be the most zealous advocacy for the client," he says.

The downturn has driven some companies to focus more on patenting key technologies as well.

Huang says firms should make sure to cover the products they actually intend to launch.

Mohan agrees, noting that businesses might have filed to protect every concept a year and a half ago. They're now broadly homing in on five to 10 ideas and building portfolios around them, he adds.

It could make sense to take more risk in some cases.

The senior IP counsel at the fintech company says a lot of crypto patents protect technology that can't be marketed because of restrictive regulations. The patent are therefore essentially unenforceable.

Companies such as hers will still patent these innovations on the basis that they'll be useful if the law changes.

NPE nuisances

Budget limitations could become less pressing if the crypto winter subsides – but the companies that survive the storm could become the targets of NPE litigation soon after, say sources.

The senior IP counsel at the fintech business says a perfect storm of NPE litigation could be on the horizon.

She points out that legal reforms on the books could lead companies to practise more technologies covered by patents. NPEs flush with newly acquired crypto patents would then have more opportunity to sue.

Fortunately, she says, there aren't too many NPE crypto suits out there at the moment.

Counsel have some tricks up their sleeves to combat such suits, should they become more copious.

Bijal Vakil, partner at Allen & Overy in Silicon Valley, says companies can easily argue that damages shouldn't be too high. He points out that a lot of operating companies aren't making enough to justify high damages.

Lawyers can focus on invalidity and non-infringement arguments too, he adds.

Some firms are already joining forces to limit NPE litigation in the space. Several such as Coinbase, Meta and Coinkite have signed onto the Cryptocurrency Open Patent Alliance (COPA).

COPA members agree not to assert their crypto patents offensively and to grant licences to their foundational patents to anyone developing crypto products.

Operating companies should also be protected from NPEs to a degree by the complexity of the market.

Mohan at Rutan & Tucker says a lot of people don't understand crypto. That broad lack of expertise could limit the number of NPE successes in court.

NFT nuances

In spite of the crypto winter, IP counsel are preparing their clients for long term challenges and opportunities in the market, many of which involve NFTs.

The senior IP counsel at the fintech company says the industry will have to solve a lot of technical problems to facilitate the development of these tokens, including the dilution of high-value NFTs and difficulty storing tokens on multiple blockchains.

She notes that companies could get patents for solutions to these problems.

Sources are also staying abreast of the NFT space because of the influx of new players.

Huang at Gemini says: “I’m doing more monitoring on who is interested in entering the space, what new projects are going on and who’s partnering with whom.”

Perhaps interest in NFTs by itself will be enough to end the crypto winter – maybe even before the actual winter period sets in.

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Rani Mehta

US REPORTER Managing IP

Rani reports on all aspects of IP in the US and the Americas, particularly trademarks and copyright. Based in New York, she covers in-house and private practice lawyers' concerns and insights into the market.
