

U.S./Canadian Licensing In 2006; Survey Results

By Richard Razgaitis

Initial Results of a Survey Conducted in February/March 2007 by The Licensing Foundation of LES (USA & Canada), on behalf of The Licensing Foundation.^{1,2}

Abstract and Summary of Findings

This paper is the fourth such report of an annual survey conducted by The Licensing Foundation, a wholly owned subsidiary of LES (USA & Canada). As in prior years, the survey was conducted by an online questionnaire of the membership of LES (USA & Canada). The data were obtained primarily in February 2007 were for the period 2006.³

Two related but distinct survey questionnaires were used, one for IP asset owners (buyers or sellers, licensors or licensees), and one for service providers such as outside law firms and consultants. As in all prior years, once the responses were deemed authentic they were correlated within one of eight segments, and anonymized. The eight distinguished segments were large and small companies,⁴ based on the number of company's employees—greater or less than 500, and, further, by four industry groups: Health, DICE (Digital Information Computers Electronics), Industrial, and University/Government.

For the third year we included two questions relat-

ing to perceived societal/environmental opposition to certain underlying values of licensing such as the right of an IP owner to protect and license, or not to license, its IP. As for the 2004 and 2005 data, these 2006 data report a substantial concern.

The objective of the Foundation's survey is as follows: provide an annual, synoptic perspective on key statistics, events, and trends in "the business of licensing" that can assist licensing professionals in understanding and advancing the business environment in which they operate and to which they contribute, and can be used by the public, academic researchers, and government policy analysts to grasp the issues and impacts of licensing business practices.

Since LES membership predominately reflects technology licensing of patents, know how, trade secrets, and copyrighted software—and relatively under-represents licensing of trademarks and copyrighted content, for example—the licensing industry so characterized by these data is primarily about technology licensing.

Sample and Survey Design⁵

Survey Administration

The survey was administered in the form of an online questionnaire accessed via the Internet. Over 6300 members of the Licensing Executives Society (U.S.A. and Canada), Inc. were invited in February 2007 to participate in the survey via several rounds of e-mail from The Licensing Foundation. The Web survey format was chosen to limit costs, maximize accuracy, and to be minimally intrusive. This type of survey also allows for "dynamic" serving of questions in response to users' input, minimizing the extent

5. The discussion here was provided by Prof. Iain Cockburn of Boston University who, along with Prof. Ajay Agrawal of the Univ. of Toronto were retained by The Licensing Foundation to assist in the development of the survey instruments, and collecting and validating the data.

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1. The Licensing Foundation is a wholly-owned 501c3 subsidiary of LES (USA & Canada). Additional information on the Foundation is available at: www.licensingfoundation.org.

2. The Licensing Foundation during 2007 was managed by its Board comprised of E.B. (Ted) Cross, Ada Nielsen, Tanya Moore, Dwight Olson, Richard Razgaitis, Art Rose, and James Sobieraj, and assisted by Ken Schoppmann of the LES (USA & Canada) office.

3. There is some potential confusion as to survey periods and publications for these four Foundation surveys. The first survey was taken in early 2004, published in *les Nouvelles* December 2004 (p. 139ff) for data (responses) corresponding to the year 2003. Likewise the second and the third survey were taken in early 2005 and 2006 and published in the December 2005 (p. 145ff) and the December 2006 (p. 233ff) issues of *les Nouvelles* corresponding to the data periods 2004 and 2005, respectively. The data reported here were taken in February and March 2007, but respondents were asked to answer the questions for 2006.

4. The term "company" is used as a generic reference to an IP asset owning entity, which was primarily represented by corporate entities but includes representation from universities, research institutes, and government laboratories.

to which respondents are presented with irrelevant or redundant questions. When used for “closed” list-based samples such as the LES membership mailing list, Web surveys have been shown to perform as well or better than traditional hardcopy mail-back survey instruments. Separate versions of the survey were administered to the approximately 3600 members identified as technology creator/users and to the approximately 2700 identified as being providers of professional services (legal, consulting etc.). LES members self-report, job title, company, professional status, and industry affiliation; nonetheless there is substantial scope for errors in identifying respondents as “Technology Creator/User” versus “Professional Services.” The survey Web Site received more than 1200 hits with 613 respondents completing at least one question on the Technology Creator/User Survey plus 344 on the Professional Services Survey. Respondents were guaranteed anonymity, and no records linking their identity to the database of survey questionnaire responses have been retained.

Response Rate

This paper reports results for the Technology Creator/User Survey. Of the 800+ visits to the survey Web Site, 613 respondents completed at least one question. After eliminating records for respondents who appear to have moved through the questionnaire without answering more than a handful of questions, the final sample contains 524 usable records.

While not all respondents answered all questions, response rates to specific questions were generally high, generally greater than 80 percent of the total number of respondents. Note that because the survey questionnaire “branched” at various points to ensure that respondents were only presented with relevant questions, the denominator for calculating response rates is not always 524. For example, of the total set of responses analyzed, only 325 out of 524 were presented with questions about in-licensing after answering “Yes” to Q32—“Is your organization involved in any in-licensing agreements?”

The degree to which the results presented here can be considered statistically representative of all technology licensing activity in North America is difficult to assess. It is important to note that the LES membership list is a “convenience” sample, not a randomized quota based or stratified sample designed to be statistically representative of an underlying population. “Frame bias” i.e. unrepresentativeness of the LES membership list compared to the population of all licensing professionals is unlikely to be a significant problem, unless there are large numbers of people engaged in technology licensing who are

not members of LES, and who differ systematically from those who are. “Response bias,” i.e. systematic differences between the members in the sample who choose to respond and those who do not, is not possible to assess fully. The distribution of respondents across industry sectors approximates the distribution in the entire mailing list, with some over-representation of the Healthcare and University/Government sectors. However since we lack information about other characteristics of non-respondents, such as the size of their organization, it is not possible to evaluate potential bias arising from different response rates across, e.g., large versus small entities.

Though 524 responses from a sample frame of 3600 may seem low, it is in line with similar voluntary surveys that typically have a 10-30 percent response rate. Note that because LES membership is individual, not corporate, a single organization can appear multiple times in the mailing list. The LES members identified as belonging to the Technology Creator/User category come from less than 1200 distinct organizations, with few organizations generating multiple responses. We therefore achieved coverage of about 40 percent of the total number of Technology Creator/User organizations represented in the LES membership.⁶

The following sections of this report tabulate responses to the Technology Creator/User survey.

Throughout, percentages may not add to 100 due to rounding. For questions posed in “tabular” format, if a respondent answered any of the questions in the table, any missing responses to other questions in that table are interpreted as “N/A” or “Don’t know” as appropriate.

Demographics/Background of Respondents

We asked a series of questions about the background, experience, and industry/licensing structure of the respondents:

1. The dominant “primary background/training outside the license field” was “science or engineering” with 62 percent of the responses. The next largest response was “general management,” 18 percent, followed by “legal” at 15 percent, and “other” at 6 percent. The relatively few legally trained responses may be surprising: it was even less than those with a general business management background (presumably undergrad business majors, perhaps followed by MBAs), and only one-fourth of those with science/engineering backgrounds. This result is not inconsistent with LES membership, as these

6. The figure is approximate since individual members do not always identify their organization to LES.

data are for the Technology Creator/Users, which does not include service providers such as outside law firms.

2. The most-frequently cited licensing experience level was 5 to 10 years (30 percent), closely followed by 10 to 20 years (29 percent). 31 percent reported one to 5 years, 5 percent less than one year, and 5 percent more than 20 years. So, more than one-third (36 percent) had five years or less experience.

3. About two-thirds (65 percent) were responding on behalf of a "corporate licensing office reporting for the entire company." The remainder responded on behalf of a licensing office within a business unit or division (30 percent) or a stand-alone licensing subsidiary (5 percent). The respondents were split fairly evenly between being "senior most" (45 percent) and not senior most (56 percent). The reported number of licensing professionals in each entity varied widely: 16 percent of respondents were their entities' sole licensing, professional, 39 percent of entities had two to five, and 34 percent had 5 to 25—so more than three-fourths of the licensing offices had less than 25 licensing professionals—but 2 percent responded that they were part of 100+ licensing groups.

4. Healthcare was the dominant industry (48 percent), generally reflecting LES membership. When asked where "most business" was done by their respective entities 43 percent responded "U.S." and 36 percent "Global." About the same percentage had companies with less than 100 employees (31 percent) as greater than 5,000 employees (35 percent). R&D spending showed a wide disparity as well: 13 percent of those responding worked for entities spending more than \$1 billion per year on R&D, 30 percent between \$1 and 20 million, and 8 percent less than \$1 million.

Relative Importance of Various Forms of IP

One of the repeat questions in 2006 was the relative importance of various forms of IP in creating competitive advantage. 83 percent of the responses gave patents the highest rating, "extremely important," with only 11 percent saying that patents were "moderately important," and almost no responses for "slightly important" (3 percent) and "not important" (1 percent).

The next most important IP form was "know how" which scored, respectively: 46 percent, 34, 13, 4, and 4 (from extremely important to not applicable). Know how was scored more highly than "trade secrets," whose corresponding scores were: 31 percent, 25, 18, 12, and 14. The most frequent response for trademarks and copyrights was "slightly

important" at 34 and 33 percent, respectively; Only 17 percent and 13 percent ranked these as extremely important, which was less than those who ranked them as not important (18 percent and 21 percent, trademarks and copyrights, respectively).

It is interesting to compare the year-over-year results. The responses were similar for the top three IP forms, which were ranked as extremely important: patents, 83 percent (2006) vs. 80 percent (2005); know how, 46 percent vs. 50 percent; trade secrets, 32 percent vs. 34 percent. These differences are so small that they could reflect statistical variation; if they are reflecting a real change, it suggests that the perspective in February 2007 looking back on calendar year 2006 is that patents were held to be more important and both know how and trade secrets less important than the responses a year prior. (It will be interesting to see what effect the recent court decisions on patent matters will have on next year's survey results).

Dealmaking

One of the areas of high importance to licensing professionals is the use of IP as the basis of licensing transactions. After all, the first letter in "LES" is all about dealmaking around and with IP. During these four years of surveying, we have asked many different questions to get at key issues from beginning to end of the business process of IP dealmaking: (1) motivations for creating IP in the first place, (2) dealmaking preparations/impediments, (3) negotiations and deal breakdown, (4) dealmaking remorse, and, (5) deal demise.

(1) Motivations for Creating IP. In this current 2006 survey we repeated questions from the 2005 Survey about motivations. Those most frequently cited as "extremely important" were as follows. Two motivations essentially tied for highest response: generate licensing revenue (43 percent of respondents) and realize higher returns on proprietary products (42 percent). Next most frequently cited were use as a basis for strategic partnerships/JVs (39 percent), manage litigation risk (38 percent), prevent/slow down imitation of technology or products (34 percent), and improve bargaining strength in negotiations or disputes (32 percent). The following three motivations were found to be less important, most-frequently cited as "moderately important": signal capabilities to inventors/partners/customers/prospective employees (33 percent), improve bargaining strength in other business negotiations with customers of suppliers (29 percent), and make life difficult for competitors (e.g. by blocking their technology development, raising their R&D costs) (28 percent).

Unlike the data for the relative importance of various forms of IP, the distribution of these responses was relatively flat. For the six “extremely important” motivations cited above, there were notably frequent responses for “moderately important” (ranging from 22 percent to 30 percent), “slightly important” (11 percent to 24 percent), and even to “not important” (7 percent to 18 percent). This suggests that there is a much greater dispersion as to motivations than as to importance of the IP so generated. The above 2006 data are generally consistent with that obtained for 2005. The two motivations from the 2005 survey that received more than 40 percent responses for “extremely important” were likewise realize higher margins on proprietary products (44 percent) and generate licensing revenue (40 percent), with almost identical percentages as in the current data.

Patent litigation is highly newsworthy; this is enabled by its public nature, the large financial claims made, and (perhaps) because we have an innate interest in observing gladiators in combat. Yet, when we asked—in the past 12 months, about what percentage of your organization’s licensing activities were motivated by settling or avoiding litigation, as opposed to being motivated by a business opportunity?—the responses were heavily weighted away from litigation: 37 percent responded “0 percent of the time,” 29 percent said 1-5 percent of the time, and 18 percent said 5 to 25 percent of the time. Only 3.9 percent responded for any of the categories above 50 percent of the time. These 2006 data exhibited somewhat lower percentages as to time spent on litigation matters than we obtained in 2005, when only 7 percent responded “0 percent of the time,” 39 percent said 1-5 percent, 24 percent said 5-25 percent, and 8.7 percent responded in one of the greater than 50 percent of the time categories. The difference in response for the “0 percent of the time” category, 37 percent in 2006 vs. 7 percent in 2005, seems pretty dramatic.

A closely related issue is the subject of “trolls.” Although it has become a term of art, the word is freighted with unsavory dangers; no children’s book is likely to be entitled “Happiness is a Warm Troll.” To avoid as much as possible coloring the response, we provided an extended definition (for purposes of the survey)⁷ and asked, “the impact of trolls on your organization has been?” 67 percent of the responses replied limited (see previous footnote), 27 percent replied not applicable, and only 6 percent replied substantial. A follow up question

was has your organization sought to mitigate the risks posed by troll litigation by increasing effort on any of four choices. The dominant response was not applicable: did not take any specific action—79 percent. Only 15 percent indicated that they had been proactively archiving prior art relevant to core technologies or key intellectual assets. Less than 10 percent indicated any of: participating in a joint defense agreement (7 percent), filing one or more re-examination requests on troll patents (5 percent), or other (5 percent).

(2) Dealmaking Preparations. The 2006 Survey asked a series of questions relating to the effect of “uncertainty” going into negotiations. The five response choices throughout this series of questions were (1) could not estimate, (2) within 5 percent, (3) within 25 percent, (4) within 100 percent, and (5) within 300 percent. Think for a moment: what would you predict the most-frequent response to have been for every kind of uncertainty and every survey segment (large and small companies, and health / DICE / Industrial / Univ-Gov)? Answer: everyone in every context appears to believe that most of the time they knew “the answer” within 25 percent.⁸

When asked about uncertainty as to the date of first significant sales, all six segments exhibited the largest response for the “within 25 percent” category ranging from a low of 31 percent (Univ/Gov) to a high of 51 percent (DICE) expressed this view. Total market uncertainty? 25 percent to 37 percent believed they knew the number within 25 percent.⁹ Production costs? All but Univ/Gov responded most often with the within 25 percent option (response frequency ranging from 35 percent to 49 percent).¹⁰ All segments responded

7. Entities that apparently exist solely to exploit a specific piece of IP and have no product development, manufacturing, or marketing capacity—have attracted much comment in recent years. For some organizations, the threat of litigation by “trolls” may have only a limited impact, requiring relatively little management time and resources (analogous to the background level of “slip and fall” litigation faced by any business). For others, the impact may be substantial, consuming significant time and resources, and altering the strategic direction of business (e.g., by declining otherwise attractive market opportunities, decreasing investment, redirecting R&D efforts, relocating operations, etc.).

8. Could this be another manifestation of a “25 Percent Rule?”

9. One exception: The Univ/Gov sector responded most frequently (32 percent) for knowing the potential within 100 percent, and 25 percent for within 25 percent.

10. Univ/Gov responded 18 percent; its most frequent response was 29 percent for within 100 percent, followed closely by could not estimate at 26 percent.

to within 25 percent for the probability of meeting technical milestones (frequency of response ranged from 33 percent for DICE to 47 percent for Health); we will return to this subject from a different perspective when we consider deal remorse below. Also asked was their degree of uncertainty in the other party's BATNA: Best Alternative to a Negotiated Agreement. Surprisingly, we received basically the same within 25 percent answer as the most frequent response (ranging from 22 percent for Univ/Gov to 37 percent for Industrial). However, there were relatively high frequency responses for this BATNA uncertainty question expressed by could not estimate (11 percent to 27 percent). The respondents were then asked about the sources of such uncertainties. These data are shown in Fig. 1 below.

No one factor was cited most often as "extremely important," but shown by the bold font are all the factors that received more than 50 percent of the responses as being either "extremely important" or "moderately important." The highest scoring factor was absence of reliable market data at any cost (combined 70 percent "extremely" and

"moderately" important—substantially more than the 55 percent received by the next most cited factor). Shown in the shaded boxes are the most frequently cited categories.

(3) Negotiations and Deal Breakdown. Last year's survey focused on this area.

(4) Deal Remorse (regret). Last year's survey identified, among other things, that the most frequent issues, with the benefit of hindsight, that the respondent would now restructure were business and technical milestones (44 percent and 40 percent of responses, respectively) and field of use restrictions (43 percent of responses). We used this insight to ask questions below relating to deal demise.

(5) Deal Demise. This year we focused on the failure of deals already done, either by some form of unwinding or amending of the agreement, or formal disputes. On series of questions asked the following: What fraction of the following types of deals are likely to 'go bad' in the sense of requiring substantial renegotiation, ending up in arbitration/litigation, or being effectively abandoned by one or more of the parties involved? The choices

Figure 1

Q19: How important are each of the following factors in limiting the degree to which these sources of uncertainty can be reduced?					
	Not important	Mildly important	Moderately important	Extremely important	Moderately + Extremely important
(b) Absence of reliable market data (at any cost)	7%	17%	42%	28%	70%
(i) Overall limitations on our internal ability to do the needed level of opportunity analysis	10%	26%	40%	15%	55%
(c) Insufficient internal marketing experience/capacity	8%	13%	37%	17%	54%
(g) Absence of ANY useful data on comparable deals	11%	28%	30%	21%	51%
(a) Market data too expensive to obtain	15%	29%	33%	17%	50%
(d) Insufficient internal capability to evaluate/forecast technical progress	16%	29%	32%	15%	47%
(f) Data on comparable deals is too expensive/too difficult to obtain	16%	31%	28%	18%	46%
(h) Unable to determine other party's alternatives	9%	38%	34%	12%	46%
(e) Insufficient production experience/capacity to assess costs	19%	30%	27%	13%	40%

given were: 0 percent, 1-5 percent, 5-25 percent, 25-50 percent, 50-75 percent, 75-99 percent, and 100 percent.

The first of this series of questions asked about agreements with small enterprises (< 500 employees). The most frequent response was that 5-25 percent of such deals had “gone bad;” the individual sector frequency responses for this level of deal demise ranged from 26 percent for DICE to 35 percent for both Health and Univ/Gov. We then asked the same question but for agreements with large enterprises. We received essentially the same answer: 5-25 percent of deals was the most frequent answer (ranging from 26 percent for DICE to 35 percent for Univ/Gov). One might have expected a difference, given how different large and small companies are in many respects. But in terms of deal demise, the data were very similar. We also asked about agreements with startups (privately funded firms that do not yet have substantial revenues). Here there was exhibited a slight shift to more frequent concerns, but the effect was modest: the most frequent response was again 5-25 percent (but with generally less frequent responses than for large or small companies, ranging from 12 percent for Industrial to 31 percent for Health), with the 25-50 percent of deals “gone bad” being almost as frequently cited (ranging from 13 percent to 25 percent for the various segments), and about one-fourth responding with a frequency of greater than 50 percent (ranging from 15 percent Industrial to 29 percent Univ/Gov, with 22 percent for “All” respondents). The next two deal contexts, companies outside North America 1 when two or more parties are involved exhibited similar results: again the most frequent response was 5-25 percent, ranging from 24 percent to 35 percent of respondents for outside North America and 12 percent to 28 percent for involving two or more parties. Only when asked for deal demise in cross license agreements and agreements with non-profits such as universities or government labs did a different category draw the most frequent responses: for cross license agreements the most frequent response category was 1-5 percent (ranging from 9 percent to 28 percent), with less than 5 percent indicating any category for 50 percent or greater of all such deals, and likewise 1-5 percent for non-profits (ranging from 23 percent to 30 percent), with less than 10 percent indicating any category for greater than 50 percent of all deals (except Industrial, which responded 15 percent).

These data are summarized for “all” responses in Fig. 2 below. Shown in the right most column is the

sum of all the responses indicating greater than 50 percent of the corresponding type of transactions are likely to “go bad.” Agreements with startups had the highest such percentage (22 percent), followed by agreements with two or more parties (14 percent). Large and small companies had similar results (11 percent and 10 percent, respectively), and the remaining transaction types—non-profits, entities outside North America, and cross license agreements—all exhibited less than 10 percent indicating that a likely of greater than 50 percent of such agreements “going bad.”

Next, we asked with the benefit of hindsight, could this [the deals’ gone bad] have been avoided [not’ gone bad] by structuring the deal differently? The results are shown below in Fig. 3.

The most frequent response has to do with milestones, where more than 50 percent responded, far larger than any other category offered. Responses relating to deal scope, such as field-of-use restrictions and degree of exclusivity exhibited the next highest response rate (41 and 35 percent), closely followed by fee structure and payment amounts (34 and 31 percent). Essentially one-quarter (24 percent) of the responses indicated that problems could not have been avoided under any feasible deal terms. Although such response rate (24 percent) is lower than all but three categories (grant backs, MFN, and reach-through), it seems to be a notably high frequency. This may relate to responses to questions asked in earlier year’s surveys that indicated a widespread belief that IP dealmaking is more complex than other kinds of comparable dollar deals (such as the sale of a physical asset), suggesting that not only is IP dealmaking more difficult in the first place, the road after the deal is not an easy one either.

In looking behind the overall responses of Fig. 3, we can see some segment differences. Large vs. small companies disagreed on several of the categories. Large companies (compared to small) ranked technical and business milestones 13 and 8 percentage points more important, respectively, than did small, as did large companies for terms of use and problems could not be avoided (by 8 and 7 points, respectively). One the other hand, large companies cited less frequently than small companies grantback provisions and payment amounts (by 10 and 12 points, respectively).

DICE differed the most of any segment from all respondents in most of the response categories. DICE more frequently cited payment amounts (16 points), duration of agreement (11 points), and to a

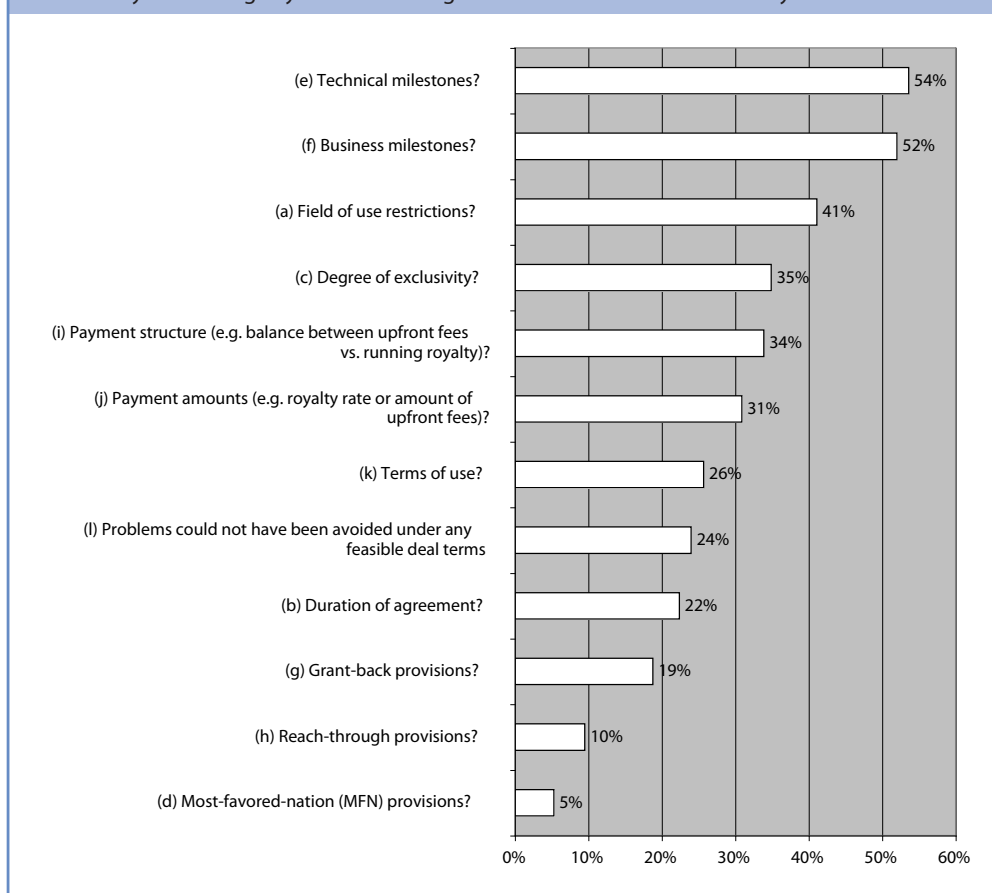
Figure 2

Q11: What fraction of the following types of deals are likely to 'go bad' in the sense of requiring substantial renegotiation, ending up in arbitration/litigation, or being effectively abandoned by one or more the parties involved?

	0%	1-5%	5-25%	25-50%	50-75%	75-99%	100%	> 50%
(a) Agreements with small enterprises (<500 employees)	3%	17%	34%	20%	9%	2%	.	11%
(b) Agreements with large enterprises (>500 employees)	2%	27%	31%	16%	8%	2%	.	10%
(c) Agreements with start-ups (privately funded firms that do not yet have substantial revenues)	3%	9%	24%	20%	14%	8%	0.2%	22%
(e) Agreements with entities located outside North America	3%	18%	30%	13%	4%	1%	0.2%	6%
(g) Agreements involving more than two parties	3%	14%	20%	16%	11%	2%	1%	14%
(d) Agreements with non-profits such as universities or govt labs	7%	26%	23%	9%	6%	1%	0.2%	7%
(f) Cross license agreements	6%	20%	14%	7%	2%	1%	.	3%

Figure 3

Q15: When deals have gone bad, with the benefit of hindsight, could this have been avoided by structuring any of the following contract characteristics differently?



lesser extent MFN (6 points). DICE less frequently cited technical milestones (18 points), degree of exclusivity (13 points), field of use restrictions (10 points), and terms of use (9 points). These differences are likely explained by the DICE industry doing more non-exclusive licensing.

Finally, the differences between Industrial and All, and between Univ/Gov and All were quite similar. Both put more emphasis on business milestones (11 points more for Industrial compared to All, and 16 points for Univ/Gov compared to all), on technical milestones (6 points difference, and 7 points difference, respectively), could not have been avoided (13 and 7, respectively), and payment structure (6 and 7, respectively). Industrial

put 14 points less emphasis on payment amounts compared to All.

Next we asked the three most common reasons why deals done end up in serious disputes.¹¹ The results are shown in Fig. 4 below.

Note that unlike the previous questions, we permitted only three responses. The clear 'winner' (perhaps 'loser' would be a better term) is one or more parties has revised its business strategy with nearly two-thirds of the responses (63 percent). Note that this is closely related to several other responses: one or more of the parties is not putting their best effort (45 percent), change of control (27 percent), and departure of a deal champion (27 percent). It is likely that any one of these latter

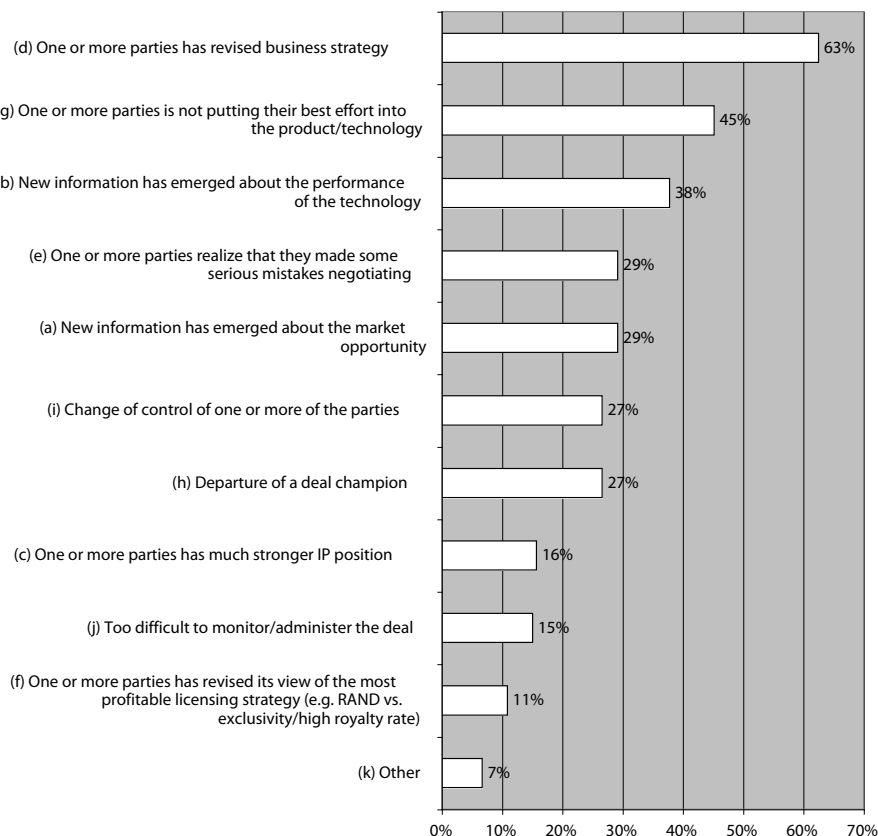
three responses is at least partially the cause of the revised business strategy. New information about the technology (38 percent) and market (29 percent) were also highly cited, but these were cited much less frequently than the revised business strategy. Finally note that serious mistakes in negotiating received more than one-fourth of the responses (29 percent), as a reason why deals done are in serious disputes; there were only three factors cited more frequently than this (business strategy, not putting in best efforts, and new technology information).

The relative importance of negotiation mistakes is further noted by the

results that 61 percent of the responses indicated that a licensing deal in your organization has become the subject of a serious dispute in the last year. The (relative) good news here is that

Figure 4

Q16: In your experience, what are the three most common reasons why deals become the subject of serious disputes.



11. A serious dispute implies that a conscious decision has been reached by your organization that some form of renegotiation or arbitration/litigation is necessary.

the resolution is primarily by means of renegotiation: the most frequent responses (23 percent) indicated that 50-75 percent and 23 percent that 75-99 percent of such agreements were or will be resolved through renegotiation compared to the most frequent response of 5-25 percent of the agreements being terminated, or 1-5 percent of the deals will be resolved by litigation, and least of all arbitration (a combined 56 percent indicated that arbitration was used on less than 5 percent of all such agreements).

Dealmaking Best Practices

The survey asked fill-in-the-blank questions for the three best and three worst practices before, during, and after the deal. Summarized here are the data obtained from the professional service providers (all the previous data in this article were from the technology owners/creators). It is believed that because such service providers are not themselves the owners of the IP being dealt, and may see many different kinds of deals because of the nature of their practice, could provide a better perspective on such best (or worst) practices.

1. Before the Deal. The predominant best practice observation can be summarized by do your homework. This was expressed by more than 100 phrases containing words like know, understand, research, due diligence, study, analyze, prepare, plan, identify, evaluate, develop, estimate, assess, define. For example, 18 responses began with the word identify(ing), 26 with know(ing)/knowledge, 8 with prepare/preparation, 13 with research(ing), 34 with understand(ing). As might be expected, there was a variety of things that were identified as the object of to know/understand/etc. Although the market was the most frequent word mentioned in this context probably followed by valuation, the span of things do homework on was deep and wide: key decision makers, goals, walkaways, other party's needs, patent position, competitors, IP strengths, BATNA.

It should also be noted that there was frequent response of people issues: build a project team, "courtesy wins in the long, run, no matter how painful the interaction," face to face meetings, being flexible/creative, and the like.

Worst practices were in many ways the best practices turned upside down: no preparation and poor people skills. Common words that captured such lack of preparedness were assume(ing), cursory, ignorant(ance), unaware, sloppy, unclear. One response captured such unpreparedness as follows: "'make me an offer' (no preparation)." On people

matters, words used were arrogance, bad faith, close minded, bluff, shoot from the hip.

2. During Negotiation (Dealmaking). Many of the responses captured the best practice idea of being wholly sentient, most often expressed by listening, but also including other forms of observation (body language). People issues were even more important here: be courteous, ethical, flexible, polite, respectful, patient, positive, discuss/don't argue, honesty, humor, open(ness). These practices relate to another common observation regarding the practice of flexibility, which may again point to the greater complexity of IP dealmaking than other kinds of business negotiations.

The worst practices included many references to assume (reflecting here perhaps more a lack of listening rather than as above a lack of preparation). Other worst practices included dirty little tricks, bait and switch, arguing, bullying, changing people on the negotiating teams, changing terms, delay, ego, getting insulted ("it isn't personal, stay positive"), nickel and diming.

3. After the Deal. The most common best practice centered on communicating(ion). Among the terms and phrases used in this regard were various forms of follow-up, maintain(ing), monitor(ing), manage(ing), staying connected.

For the worst practices, characteristic words used were complacency, assume(ing), failure to (follow-up, communicate, etc). On the people side, there was two particularly poignant pieces of advice of behaviors to avoid: continued antagonism, and it's opposite, crying over spilled milk—human feelings all too easily experienced from dealmaking that had limited degrees of freedom for one of the parties.

Anti-IP Environment?

IP and licensing issues are being regularly reported on by various business and even popular news sources. RIAA lawsuits regarding music downloads, such lawsuits now numbering more than 20,000, grandmothers included, is a regular news item for which popular opinion seems to be on the side of grandmothers rather than RIAA. The "open source movement" has, at times, an anti-IP tenor. The prices of pharmaceuticals, especially during election years, regularly leads to discourse about why U.S. citizens cannot acquire drugs at prices paid by citizens of countries who do not have or do not enforce drug patents. So, we again asked a question relating to perceptions of an anti-IP environment, specifically: Some argue that IP-protected product should be made available at prices below those for which they

are actually licensed or sold. Others argue that there should be no IP protection at all. Still others believe that some form of compulsory licensing should be available under certain conditions. To what extent do you see these forces as being a cause for concern with respect to your business?

The results from this question are shown in Fig. 5 below from the responses for the IP owners/creators.

The top row of data were for all respondents with respect to their current perceptions; the top row of the bottom box is for their current perceptions of how they would have answered the question three years ago. 61 percent of the responses indicated “strong” or “moderate cause for concern” today, whereas their present belief of their prior (three-ago) perceptions would have been 61 percent having “no” or “slight cause for concern.” Further, it is interesting to note that the responses almost exactly move up a concern category going from three years ago to today, namely: 25 percent of the responses believed at the time of this survey that their perception three years ago would have been “moderate concern,” but today it’s 26 percent as “strong” concern; three years ago

36 percent believed (they would have believed) it was “slight,” today it’s 35 percent “moderate;” three years ago it was 25 percent “no cause for concern,” today it 23 percent “slight.” Below the “All” data rows are shown the responses for the segments. Although one can note some variation, Health for instance exhibits a higher level of concern, but every segment showed 50 percent or greater response for moderate + strong concern at the time of the survey, ranging from a low of 50 percent to a high of 69 percent.

These data are quite similar to the results reported last year where 60 percent expressed “moderate” plus “strong” concern, whereas there then assessment of three years prior was 59 percent combined “no” and “slight cause for concern.” So, year-over-year there does not appear to be a change in perceptions, but a confirmation of the same level of concern.

Those of us in LES have a deep appreciation for the importance of IP and the ability to license rights to IP in fair, and creative ways, and the importance of such outcomes in fostering, and rewarding, innovation. The cultural environment in which this

Figure 5

“Barbarians at the gate?”		No cause for concern	Mild cause for concern	Moderate cause for concern	Strong cause for concern	Strong + Moderate cause for concern
My assessment today	All	16%	23%	35%	26%	61%
	Large	16%	23%	38%	23%	61%
	Small	17%	22%	31%	29%	61%
	DICE	23%	27%	37%	13%	50%
	HEALTH	11%	20%	34%	35%	69%
	INDUSTRIAL	30%	20%	34%	16%	50%
	UNIV/GOV	17%	26%	37%	20%	57%
My assessment 3 years ago	All	25%	36%	25%	13%	39%
	Large	25%	37%	26%	12%	38%
	Small	25%	36%	25%	15%	40%
	DICE	33%	38%	21%	8%	30%
	HEALTH	19%	37%	28%	17%	45%
	INDUSTRIAL	40%	28%	21%	11%	32%
	UNIV/GOV	27%	39%	24%	11%	34%

takes place, however, is not entirely sympathetic to such perspective.

Future Plans

The Licensing Foundation is planning to conduct its 5th Annual Survey early in 2007. The responses of LES members to these surveys has been gratifying and, we hope, provided useful insights to us all. We believe the utility of such data and analysis will increase as the survey continues to improve and develop a further history. That will only happen with the continued thoughtful responses of the LES (USA & Canada) members.

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and massive time and wisdom contributions from many different LES members. This is all gratefully acknowledged. The Licensing Foundation has a public purpose, namely: Advancing the understanding of licensing in fostering innovation for a knowledge economy. One of our programs for accomplishing this is such surveying and publishing activities.

We also wish to acknowledge the work of Professors Iain Cockburn and Ajay Agrawal who assisted the Foundation in developing the questionnaire and collecting the data, as they have done for all the surveys taken to date.

Most of all we want to acknowledge the effort made by each of you who responded to our request for participation in taking the survey, and hope that our degree of appreciation will expand in 2008 as even more of you join your colleagues in adding your data and wisdom to this effort.

Notes: