

Intellectual Property Insurance: Coverage that Fits the Risk

By Bob Fletcher

Many companies are unaware that the insurance they purchase may not protect their most valuable assets, intellectual property (IP). That's because most insurance policies exclude intellectual property, especially patents. This is a disturbing reality since often 80 percent of a company's value resides in its IP.

Virtually every business has IP risk. IP insurance is for any business that makes, uses, sells, offers for sale or imports a product or service and wants to protect the features that give them a competitive edge. Many companies have issued patents, or have established rights in trademarks or copyrights for the products they sell, making IP insurance a critical part of their risk management plan.



Lawsuits Await

Companies that are more successful or have more innovative intellectual property are more likely to be involved, either offensively or defensively, in an IP lawsuit. According to the American Intellectual Property Law

Association's 2009 survey, the average litigation expense incurred by each side (plaintiff and defendant) through trial, when the amount in controversy is between \$1 million and \$25 million, is \$3.1 million. This number does not even include damages, which could easily reach millions of dollars.

Taking into account the insufficient coverage under a commercial general liability (CGL) policy for IP exposures, virtually all companies are either purposely or inadvertently self-insuring their IP risks.

Companies without IP insurance may be forced into litigation with larger competitors who have plentiful resources to litigate, either

as a defendant or a plaintiff, leaving companies with the following alternatives to insurance:

- Abandon the products or IP rights.
- Attempt to enter into a license agreement from a weaker financial position.
- Sue the alleged infringer, or be sued by the IP owner, possibly depleting any available cash reserves in legal costs.
- Incur a burdensome royalty payment.
- Be forced to settle due to lack of funds to litigate instead of fighting the case on the merits.

IP insurance is designed to help fund the high cost of IP litigation and level the playing field.

Benefits of Coverage

Rudy Telscher, an IP litigator with the firm Harness Dickey in St. Louis, Mo., recognizes the benefits of holding an IP insurance policy.

"Smaller companies in many instances are nimble and develop cutting edge technologies. Just about the time the smaller technology companies are making some headway in the market, larger companies take notice and either copy their technology or assert marginally relevant patents against the smaller company," says Telscher. "Either way, the goal is simple, impede or stop the smaller company. The larger companies know very well that the smaller companies cannot afford the multi-million dollar price tag of a patent or other IP litigation. Instead of settling, larger companies know that they can pursue the litigation for several months and eventually the smaller company will either collapse altogether or will take a very unfavorable settlement to get out of the litigation. Often times, their competitive position is hurt significantly."

Telscher further noted the difference that insurance makes.

“Without a doubt, the smaller companies when backed by insurance proceeds drastically shift the power structure. The larger company knows that the smaller company is not paying for the litigation and can therefore withstand the battle to the end if necessary. This puts the smaller company in a very favorable position to negotiate a good settlement.”

Telscher acknowledges that any client who simply holds an [enforcement] insurance policy can significantly level the playing field. Telscher says that he has “handled several cases now where the insured would have been bowled over by the bigger opponent without insurance to back them.”

D&O Exposure

Companies that do not insure their IP may also be creating an unnecessary D&O exposure by not properly protecting their IP assets.

For example, the Federal Circuit con-

sidered a case where a patent plaintiff won on infringement and sought personal liability of the defendant’s president, who was also the only stockholder and employee. In *Wechsler v. Macke International Trade,*

Inc., 486 F.3 1286 (C.A. Fed. 2007), the plaintiff argued that the defendant was undercapitalized in part because it “does not carry patent infringement liability insurance.”

Although the court did not penalize the president

for the company’s lack of coverage, the growing acceptance of IP insurance will increasingly raise questions about whether corporate executives have specific fiduciary obligations to insure their IP risks.


The increasing awareness of the value of IP may compel the courts to become more rigorous when it comes to an officer’s duty to the company and its shareholders. Part of the due diligence is to consider transferring the company’s IP risk to insurance, since reallocation of risk to insurance is certainly not a new concept for companies.

Intellectual property insurance provides the client with the funds necessary to get

through the case on the merits.

An IP enforcement policy is a plaintiff’s policy, which reimburses the litigation expenses to enforce IP against alleged infringers.

An IP defense policy reimburses the litigation expenses to defend against charges of infringing another’s IP rights by the products or services that they are selling, and may cover potential damages or settlements. These insurance policies ensure a company’s ability to fully protect their IP by filling the gap left by their CGL policy.

Surprisingly, despite the established availability of these policies, most business owners have not been made aware of the existence of IP insurance. Equally surprising is the number of business owners who think they are covered for IP risk under their GL policy. It is important to discuss IP insurance with an insurance agent or broker that is knowledgeable about intellectual property insurance. 

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