

Intellectual Property (IP) attorneys are held to very high standards as experts in their respective disciplines. As trusted advisers, IP attorneys have a responsibility to advise their clients about the real risk and potential financial consequences surrounding IP litigation. The reality is an opinion of non-infringement does not in any way guarantee their clients will not become entangled in a high cost IP litigation case, either as a defendant or a plaintiff. Clients frequently, after the fact, turn to their trusted advisors to determine if they have any insurance coverage in place to help fund the high cost of IP litigation, and quickly learn they don't. The inability of companies to effectively fund an IP lawsuit is the leading cause of their failure.

Virtually all companies possess intellectual property, which, in many cases may be critical to their bottom line. Recent studies have found that up to 80% of a company's value may reside in its IP. These companies can no longer afford to ignore the importance of insuring this asset. Although companies are becoming better educated regarding the lack of true IP coverage in other policies, many companies are simply unaware that their commercial general liability (CGL) policy may not be providing coverage for their most valuable asset, IP.

If a company's IP is involved in litigation, specialized IP insurance policies are the only risk transfer tools which can ensure that the funds are available to pay legal expenses. Without specific IP insurance in place, companies are often left with less than favorable means to cover the cost of litigation. These less-than-favorable means include:

CGL Policy Coverage

The CGL Policies do not offer any meaningful IP coverage, since the CGL policies are completely devoid of any IP enforcement coverage. The defensive coverage offered to an insured under a CGL policy is found in the "Advertising Injury" section of the policy, but it is rather limited in scope. The accused infringing activity must be a direct result of the actual advertising itself.

Professional Liability Policies

The coverage afforded to an insured under this section of a CGL policy is extremely limited in scope, meaning the infringing activity must be a direct result of the actual advertising itself, thus leaving a very narrow opportunity for a client to secure coverage. These policies are designed to cover defects in design and performance, thus leaving a very narrow opportunity for an Insured to secure defensive coverage for IP infringement.

Companies' Credit and Working Capital Reserves

With litigation costs and damages reported in millions of dollars, many companies may find it difficult to adequately fund IP litigation. Thus, it is wise for companies to evaluate their borrowing capacity.

The only alternative may be accessing working capital reserves. Obtaining insurance specific to this exposure leaves working capital to be used to grow, capture market share and maintain profitability. Then, if a company finds itself in court, as a plaintiff or a defendant, the funds are available to vigorously litigate. Needless to say, the lack of IP insurance could lead to the company losing its IP rights, incurring burdensome royalty payments under licensing agreements, being forced to settle, or to go out of business.

Therefore, it is in the mutual interest of the attorney and the client to obtain insurance specific to this exposure, which will be able the client to adequately fund IP litigation. If the client's product gets challenged in court, as a plaintiff or defendant, the IP may be in jeopardy if there are not funds to vigorously litigate. The lack of IP insurance could lead to the client losing their IP rights and the IP attorney not being fully paid for services rendered. Fortunately, there is a product available to serve the IP attorney and their client in the event of IP litigation, Intellectual Property Insurance. By putting IP insurance in place before a problem occurs, attorneys can avoid potential coverage gaps should a lawsuit arise. The inability to protect IP is a leading cause of failure for companies, and IP insurance can make the difference in the outcome of the case. Consider the following IP insurance policies which are available to help manage a company's IP risk:

Defense Insurance

Defense insurance reimburses the litigation expenses to defend against charges of infringing another's IP rights by the products or services that are being sold, and may be purchased to cover potential damages or settlements as well.

Enforcement Insurance

Enforcement insurance is a unique plaintiff's policy, which reimburses the litigation expenses to enforce IP against alleged infringers.

Unauthorized Disclosure Insurance

Unauthorized Disclosure insurance reimburses the litigation expenses to defend against charges of the unauthorized or unintentional disclosure of a third party's entrusted confidential information.

Multi-Peril Insurance

Multi-Peril insurance is first-party coverage for a decrease in value of the insured's assets resulting from losing IP litigation. It reimburses money directly to the policyholder beyond the legal costs and damages (awards) of the underlying case.

Greg Sater, a nationally renowned IP attorney with Rutter & Hobbs in Los Angeles, CA, recognizes the value of holding an IP insurance policy, and is a vocal supporter of IP insurance. Sater recently represented a smaller company against a larger infringer with much deeper pockets than his client's. Sater explains, "There is no doubt that I could not have achieved the result I achieved for my client in that case if my client had not purchased IP [Abatement] insurance. The insurance was outcome determinative."

Sater further noted the difference that IP insurance makes: "That case was the prototypical case in which the little guy normally would lose, or be forced to give up the fight early, even if he's in the right, because he just can't afford the legal fees and costs of a full-blown IP infringement lawsuit; and, looking at him, the other side knows it too. The infringement abatement insurance was a game-changer in the case. It

leveled the playing field, financially." "Having the policy made all the difference; it was like getting an injection of adrenaline just at the right time!"

There are many advantages to IP attorneys being informed about the existence of IP insurance, such as furthering goodwill with their clients. As a trusted advisor, the IP attorney can go a step further than just writing a freedom to operate opinion or securing patents for their clients. The IP attorney can demonstrate that they have the best interest of the client in mind by ensuring the client can protect their IP assets.

In addition, there are numerous opportunities for IP attorneys to serve their clients that involve IP insurance.

License Agreements: When drafting or reviewing license agreements, require that the indemnifying party has an IP insurance policy.

Supplier Agreements: When drafting or reviewing supplier agreements, require that the supplier has IP insurance, including coverage for UCC warranty of non-infringement.

Freedom to Operate/Non-Infringement Opinions: At the time a client applies for IP insurance, they may need a freedom to operate or non-infringement opinion from their IP attorney for the products or IP they want to insure under the IP insurance policy.

Claim Submission: Most IP insurance policies require a favorable opinion of non-infringement (defense) or a favorable opinion of infringement (enforcement) at the time of a claim. This is done by an independent, third-party IP attorney.

Surprisingly, despite the established availability of these policies, many IP attorneys don't even know that IP insurance exists. Equally surprising is the number of IP attorneys who think their clients are covered for IP risk under their CGL policy. IP insurance ensures that both the client and the attorney can maximize their chances of winning on the merits of the case. It is important to discuss IP insurance with an insurance professional who specializes in Intellectual Property Insurance.

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