



TIP SHEET™

an informational newsletter on intellectual property matters

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INTELLECTUAL PROPERTY PRACTICE GROUP

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Intellectual Property Litigation Insurance

by John Kenney
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Intellectual property consists of many types of intangible assets including patents, trademarks, copyrights and trade secrets. Many businesses use these intangible assets to build a competitive niche which differentiates them in the marketplace. Rights to a valid patent, trademark or copyright can also be licensed to create a revenue source. Protecting these rights can require initiating litigation.

Conversely, the threat of being involved in defending intellectual property infringement litigation can deter legitimate business activities.

Intellectual property litigation, whether pursuing infringement or defending against a claim of infringement, can be expensive. Of course, many factors such as the nature of the product, amount of money at issue, jurisdiction, etc., can cause these costs to vary significantly. Surveys have found median costs range from approximately \$600,000 to \$5,000,000 for patent litigation; \$300,000 to \$1,000,000 for copyright litigation; and \$250,000 to \$1,250,000 for trademark litigation.

Although McAfee & Taft has been able to prosecute and defend intellectual property litigation for amounts significantly less than these median figures,¹ the cost of attorneys' fees and expenses, including experts, can deter or preclude the ability to engage in intellectual property litigation for many businesses. If a defendant loses a claim of infringement, it can also be subject to a substantial damage award. In the case of a finding of willful infringement, treble or punitive damages may be awarded. In some cases, attorneys' fees can be awarded by the Court to the winner.

Businesses with substantial reserves and/or cash flow may choose to assume the risk of incurring these significant costs. On the other hand, in many instances, it makes



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¹ Court awarded attorney fees to McAfee & Taft clients after successful trial in patent lawsuits have ranged from \$247,000 to \$2.2 million, well below the median figures.

good business sense to consider insuring some of this risk. Commercial general liability insurance does not ordinarily cover these claims. (There are exceptions and these policies should be investigated in light of the facts in each case.) However, abatement policies designed to cover this type of claim are available which reimburse litigation costs and other expenses incurred by the insured in seeking to enforce its patents, trademarks or copyrights against alleged infringers. Defense policies are also available which are specifically designed to reimburse litigation costs defending against charges of intellectual property infringement. Coverage is also available to insure all or part of damages which may be awarded against the insured.

Infringement abatement insurance is generally written on an annual basis. It is not prohibitively expensive in many situations. One company that writes this coverage, Intellectual Property Insurance Services Corporation through the carrier Gotham Insurance Company (New York Marine Group), reports that in 2006, average premiums were just over \$20,000 per year. The policy is issued as property coverage. The acts of the alleged wrongdoer must begin after the policy is in effect but may have begun during a previous continuous policy period. The insured is required to provide the insurance company with a favorable legal opinion letter from qualified intellectual property counsel regarding the issues of enforceability, validity and infringement. If the policy terms are met, the insurance company will authorize suit by counsel of the litigant's choice, subject to the insurance company's approval. The litigation expenses will then be reimbursed according to the terms of the policy.

The policy limits per claim can range from \$250,000 to \$5,000,000. There is usually a significant retention or deductible provision and typically a provision for payment of 80% of the costs of litigation by the insurer. A provision for recovery of some or all of these costs by the insurance company in the event of a final judgment in favor of the insured is usually included.

Similarly, coverage is available for litigation expense reimbursement where the insured is sued for intellectual property infringement. Again, the insured must obtain a legal opinion of non-infringement. The insurance company issues an authorization for payment of defense costs under the terms of the policy after the claim is received and all conditions are met. The company shares pro rata in any award of attorneys' fees and costs up to the amount the company has spent in respect to the covered litigation. Willful acts of infringement, lawsuits which the insured was aware of or knew were imminent at the time of the purchase of the policy, asbestos liability and nuclear liability are not covered. Damages that could be awarded against the insured are also typically not covered, although coverage for certain kinds of damages can be obtained as an option. The costs for these kinds of policies are similar to those for abatement policies.

Depending on your type of business and the associated risk of having to pursue or defend intellectual property lawsuits, intellectual property litigation insurance should be carefully considered. It may provide a cost effective means of allowing you to take the necessary steps to preserve your competitive niche. Coverage can be obtained through insurance brokers. PremierSource, www.premier-source.com or toll free (866) 239-4015, is one source for this coverage. We have experience in obtaining the type coverage and in working with the insured and insurer in covered litigation. Any member of the McAfee Taft Intellectual Property Practice Group can advise you concerning intellectual property litigation issues and can assist in considering insurance coverage.

This newsletter has been provided for information of clients and friends of McAfee & Taft A Professional Corporation. It does not provide legal advice, and it is not intended to create a lawyer-client relationship. Readers should not act upon the information in this newsletter without seeking professional counsel.

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