

Defense Against Patent Infringement Suits



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By Cliff Rudolph, Account Executive

With the cost and complexity of Patent Infringement litigation increasing, many companies are now looking to insurance for specialized coverage to transfer this risk.

Trends in Patent Infringement Suits

PricewaterhouseCoopers (PWC) recently published their report, 2009 Patent Litigation Study, which discusses the current trends in patent litigation. In 2008, 2,896 patent infringement actions were filed and the median award was about \$2.5 million. The study also found that roughly two thirds of infringement cases brought to trial were successful.

In addition to high awards, defense costs can be staggering. In a 2009 American Intellectual Property Law Association Survey, the mean cost of litigation (not including awards and damages) ranged from \$767,000 and \$5,499,000:

Cost of Patent Infringement Suit			
\$ At Risk	< \$1mm	\$1MM - \$25MM	> \$25MM
End of Discovery	\$461,000	\$1,589,000	\$3,340,000
Inclusive, all costs	\$767,000	\$2,645,000	\$5,499,000

The Northwest is far from immune to these national trends. We've seen our fair share of Patent Infringement cases recently. Just in the last couple of months many prominent firms have hit the headlines for their part in patent litigation: Zillow, Likewise Software, Microsoft, Paul Allen's Interval Licensing, and Nathan Myhrvold's Intellectual Ventures to name a few.

Patent Infringement suits are especially pertinent to the Northwest because of competition in the technology industry. Rudolph Telscher, a Partner at the Law Offices of Harness Dickey, states, "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.

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 litigation."

Telscher also believes that companies that carry Patent Infringement coverage can have a negotiating advantage. He cites a case between Digit Wireless v Texas Instruments as an example, "Without a doubt, letting Texas Instruments know about the insurance and the threat of insurance-backed litigation made the entire difference in securing a great settlement for Digit Wireless."

Patent Infringement Defense Exclusions in Standard Liability Policies

Patent Infringement Defense is a specialized coverage that must be purchased separately due to exclusions and limitations in standard General Liability policies.

Coverage for Intellectual Property (IP) infringement has often been focused on the advertising/personal injury coverage within a standard General Liability policy. However, patent infringement is excluded and coverage is typically limited to copyright, trade dress, or slogan, but only as it relates to your organization's advertising. For a technology organization, often Advertising/Personal Injury is completely excluded.

Organizations may have some form of Intellectual Property infringement through a Professional Liability or Errors and Omissions policy. But again, coverage for Patent Infringement is typically excluded.



Patent Infringement Defense Insurance

If the threat exists that your organization could be sued by a competitor or a non practicing entity (one that does not design, manufacture, or distribute products) for Patent Infringement, you should consider Patent Infringement Defense coverage. A Patent Infringement Defense Insurance policy will reimburse outside legal expenses and damages awarded (up to the policy limits) to defend against charges of IP infringement.

A well crafted policy will:

- Enable the insured to mitigate the risk of an unexpected lawsuit
- Provide the resources necessary to hire an attorney with expertise in Patent Litigation
- Prevent a drain on the insured's operating capital
- Relieve pressure to settle due to limited financial resources
- Discourage frivolous lawsuits
- Prevent loss of market share
- Provide coverage for Indemnification Obligations
- Allow you to choose defense attorney

To procure a policy, it is important to have a Freedom to Operate opinion from an established Patent Attorney within the last 6 months. If you do not have a Freedom to Operate opinion, the insurance company may provide an insurability review at an additional fee. Underwriting typically takes 2-3 weeks and will often include a conference call with the underwriter and your organization's technical experts regarding the IP make-up.

When we think about insurance, we often think about insuring the building, computers, and other tangible property associated with an organization. Property/ Casualty, Errors and Omissions, and Directors and Officers come to mind. But often an organization's biggest asset and biggest competitive advantage may be Intellectual Property. Good risk Management can decrease both the likelihood and severity of infringement claims but in many cases, resolution for these issues will result in an expensive legal battle. An alternative to self-funding lengthy litigation would be to transfer some of the risk to an insurance company, thereby reducing the pressure to settle.