

IP OBSERVER

Intellectual Property Insurance Services Corporation

Why Intellectual Property Insurance Is Unique

by Robert W. Fletcher, IPISC Founder & CEO



Traditionally, companies purchase insurance to protect against unexpected perils caused by adverse happenings. With respect to certain manufactured products, adverse happenings are frequent enough that intellectual property (IP) insurance is imperative,

even after proper due diligence has been performed and the risk substantially reduced. In addition, companies operating on the assumption that a good offense is the best defense can secure protection for their innovations, brands and messages in the form of patents, trademarks or copyrights. But these rights are often insufficient for purposes of ensuring adequate reward for the time and investment made to develop these assets.

Likewise, there are times when a company's products and rights are so inextricably intertwined with the rights of others that the moral hazard simply excludes insurance as an appropriate risk transfer vehicle. In these cases a bond is the proper vehicle for the risk transfer. In fact, for the high, moral hazard risk, many times carriers choose to only offer bonds.

Clearly insurance is not right for a high, moral hazard loss, such as known patent problems; and a bond is not right for a completely unexpected loss. As a result, IPISC has coupled the bond and insurance vehicles to offer a much needed blend of coverage as an alternative to only partial coverage, which many times is the only viable option to cover a costly IP infringement lawsuit. IPISC's insurance policies, especially IP Abatement insurance, are unique policies covering both the insurable and bondable characteristics of the risk.

Perhaps the biggest financial threat to a company is becoming involved in a costly IP infringement lawsuit. When the amount in controversy is between \$1 million and \$25 million, the average cost to litigate a patent lawsuit, as a plaintiff or a defendant, is \$2.5 million (excluding judgments/settlements). If the amount in controversy rises to greater than \$25 million, the cost

to litigate can easily reach \$6 million. Unfortunately, not all of these litigation expenses arise from purely insurable risk. The unique components of IP Insurance policies help alleviate the financial burden associated with complex and expensive IP lawsuits. These policies include the following basic features:

- Limits available up to \$10M per claim/aggregate (higher limits may be available)*
- Co-pay: 10% minimum
- Self-Insured Retention: 2% of the per claim limits minimum
- Worldwide coverage
- The insured chooses litigation counsel
- The insured controls the lawsuit

* Multi-Peril limits are available up to \$3M per claim/aggregate

The following IP insurance products are available from IPISC:

Abatement: unique plaintiff's policy; reimburses litigation expenses to enforce IP rights, enhancing and strengthening the value of insured patents.

Defense: reimburses litigation expenses and damages (if chosen) to defend charges of IP infringement.

Multi-Peril: first-party coverage due to the loss of insured IP litigation. Business interruption, loss of commercial value and the cost of redesign, reparation and remediation can all be covered.

Unauthorized Disclosure: this policy offers coverage for trade secrets and the unintentional exposure of personal identifier information

Since 1988, Louisville, KY-based IPISC has been the pioneer and worldwide leader in the area of IP Insurance, protecting client's IP and products through specialized insurance products. It is important to work with the proven experts at IPISC to assist in IP risk assessment and specialized insurance solutions.

IPObserver

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"Innovation fueled by the possibility of individual gain is the most powerful economic stimulus in the world."

Robert Fletcher, IPISC Founder & CEO



INTELLECTUAL PROPERTY
Insurance Services Corporation

“STOP STOP” INFRINGING

Or Should These Cases “Run Right Back?”

In June, popular rock group The Black Keys gave black eyes to the public image of two prominent consumer brands, accusing them of “brazen and improper” infringement of the band’s songs. In separate lawsuits, members of the band and their producer sued The Home Depot and Pizza Hut for creating commercials that used portions of the songs “Lonely Boy” and “Gold On The Ceiling.” However, the case, and the ultimate responsibility, may not be as simple to prove as the initial press reports might suggest.

Songs have two separate copyright components. One set of rights belongs to the authors of the composition; this is how songwriters are compensated for others’ performances. The other independent copyright exists in the particular expression of songs; this provides payment to the artist or record company owning a particular recording of a musical performance. The Black Keys’ complaints allege infringement of their composition, but effectively do not allege infringement in their recording.

This supports the conclusion reached from listening to the accused commercials “sounds like” music, which may be the trigger for these disputes. In the case against Pizza Hut, the band also named as defendants the advertising agency and 30th Century Masters which, “is engaged in the business of composing musical compositions in connection with commercial advertisements.”

In the process of video production, music often fills the background behind the voice-over. Clients and creatives may use existing works or artists as shorthand for a desired sound. Imagine if Don Draper, *Mad Men*, fully understood the type of sound his client had in mind when asked to use music similar to the Peter Gunn theme. However, negotiating the rights to use a popular piece of music can be expensive and time-consuming.



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Audio and video producers have long turned to music production libraries for pre-paid music beds that can be used in the background of commercial spots. Historically, these libraries have been available on records or CDs. With the availability of online searching and downloading,

the need for physical products has virtually been eliminated. The spot may need a particular style of music, and the libraries often use keywords to determine which artists or songs are similar. Grey areas develop when keyword descriptions of the track sounds reference familiar music.

Commercially available production music can tread a fine line between influence and infringement. For example, the marketplace for independent content provider, Audio Sparx, offers to license a musical track that “sounds a bit like ‘Lonely Boy’ by The Black Keys,” priced as low as \$182.95 for commercial use. The description also offers that the track is an, “Ultra cool garage rock track with a big, catchy guitar riff and a rockin’ retro drum beat. Perfect music for adding an edgy and hip vibe to your production.”

The Black Keys dispute may come down to how close is too close in the sound and feel of a musical production. The Black Keys can’t claim a monopoly on garage rock with guitar and drums, but production libraries cannot simply parrot the songs exactly either. The band claims to have already consulted a

musicologist on similarity; and, if the cases proceed, the defendants will likely also need their own expert witnesses. Cases like a previous finding that the song “My Sweet Lord” infringed upon “He’s So Fine” will be cited for the band’s legal position. The defendants can argue that one author cannot monopolize a style of music, especially in the blues-rock idiom, which artists such as the Black Keys inhabit.

These disputes show how intellectual property (IP) conflicts are not always clear-cut in liability. Did the music producers make an unauthorized copy of the songs; or, is the band overreaching for an impermissible monopoly over a style or feel of the music? There may be room for honest difference of opinion upon further assessment of the accused recordings.

If the facts develop that the advertising agencies used these types of stock recordings, the clients may be looking to their agencies or to the provider of the track for indemnity. Questions will likely be raised about whether the production contracts or music licensing included explicit transfer of the risks. Existing insurance policies, such as commercial general liability policies, cyber policies and/or intellectual property policies, will be reviewed to establish if the risk is insured.

If parties are negotiating a contract for media production, they may already be agreeing to indemnity allocation between the parties. If the parties that produce and select production music are expected to back up these obligations with insurance, its compensation needs to include allowance for the cost of managing the risk. Policies also need to be reviewed to ensure that the additional insured, the ultimate client, is also listed on the policy to make certain that coverage is provided for their defense and settlement costs.

Insurance is not the only answer to the moral issue of placing responsibility on the parties with the power to change the circumstances. Decision-makers must bear some business risk for the business decisions they make while recognizing and respecting the intellectual property rights of others. **IPObserver**

INTELLECTUAL PROPERTY News & Quotables

NEWS

The Multi-Peril Insurance (MPIP) rider is now available, which includes \$50K or 10% of policy limits, whichever is less, in coverage with the standard IPISC Defense and/or Abatement Insurance policy. MPIP provides first party coverage for loss of value or loss of business income resulting from a loss of an insured IP lawsuit. MPIP Rider Highlights:

- \$50K rider included with the standard Abatement and/or Defense policy



- Perils covered: Business Interruption; Cost of Redesign, Remediation & Reparation; Loss of Commercial Advantage
- Higher limits up to \$3 million are available for additional premium
- Worldwide coverage available
- Claims made & reported

Following are the top U.S. District courts with the most patent lawsuits filed in 2011:

1. Texas, Eastern District: 738
2. Delaware: 380
3. California, Central: 329
4. California, Northern: 261
5. Illinois, Northern: 205

◇ IBM held 6,148 patents in 2011, earning them the top spot!

- ◇ Those in the state of California were granted the most patents in 2011, to be exact, 30,397.
- ◇ Vermont has the most patents per capita, coming in at 95.6 patents per 100 K residents.

Source: IPO’s, *The IP Record*, pgs. 8, 14 and 25, 2012

QUOTES

“I believe in intellectual property. In my view, it’s the foundation of world economies and certainly the foundation upon which Sun Microsystems was built. Copyright, trademark, patent— I believe in them all. I also believe in innovation and competition— and these beliefs are not mutually exclusive.”- Jonathan Schwartz, President & CEO of Sun Microsystems, prior to its acquisition by Oracle, en.wikiquote.org/wiki/intellectual_property, 2012.

INSURED SUCCESS STORY

Octane Fitness.

Octane Fitness is a proven leader as the only company dedicated exclusively to manufacturing elliptical fitness machines in this highly competitive industry. Since 2003, Octane Fitness (Octane) has won more than 55 Best Buy awards from consumer and trade magazines for their innovative, patented fitness products.

Octane was founded by fitness industry entrepreneurs, Tim Porth and Dennis Lee, who bring over 36 years of combined fitness experience, and a passion for perfection in exercise equipment. Both are committed to living healthy and active lifestyles themselves. Their goal is simple...to provide the best total-body elliptical cross trainer; one that will motivate and help achieve fitness goals quick.

Octane knows first-hand the value of intellectual property (IP) to protect its cutting-edge technology and products. A couple of years ago, Octane became involved, as a defendant, in an IP infringement lawsuit. Octane was sued by a competitor for an insured manufactured product, which triggered a claim under its IP Defense policy through IPISC. IP litigation can be a costly and time consuming undertaking, but Octane has been pleased with working with IPISC's litigation management department. Ed O'Connor, CFO of Octane said, "IPISC's litigation management team has managed

our claim highly effectively, and recommended an excellent legal team that is well versed in IP litigation. All legal invoices are closely reviewed, holding the legal firms accountable for their billings. IPISC is reasonable and fair to work with and has earned our trust."

Ed also knows that IPISC's depth of experience and expertise goes beyond litigation management.

"One question always comes to mind when working with insurance companies, will they be there for you when you need them; when a claim arises? With IPISC, the answer is- yes."

Octane appreciates the value in IPISC's insurance product experts. Ed further expressed, "In working with other insurance companies, the point of contact person changes frequently, but I've had the pleasure of working with Bill Ritter, IPISC account manager, for the past seven years. This makes the renewal process go very smoothly. He provides excellent customer service and is knowledgeable and resourceful about the renewal process." In the most recent renewal, O'Connor said, "Bill did a great job ensuring that Octane and the insurer found solutions that worked for all of us." Not only is Ed pleased with the professionalism of the account management and litigation management teams, he also boasts, "The accounting and

recordkeeping at IPISC is accurate and timely. Octane receives periodic reports of all legal invoices, status of payments, etc. and is reimbursed on a timely basis. There are no surprises."

"One question always comes to mind when working with insurance companies, will they be there for you when you need them; when a claim arises? With IPISC, the answer is- yes. We are currently involved in an IP claim and IPISC has been there for us from the beginning and continues to stand by their commitment every step of the way. It is easy to do business with IPISC. The IPISC team has a combination of excellent customer service, industry expertise and integrity," commended O'Connor. **IPObserver**

Sources:
Inside Octane | Octane Fitness- Elliptical Machines- <http://www.octanefitness.com/inside-octane/> (accessed June 16, 2012)
Best Elliptical Product | Octane Fitness- Elliptical, <http://www.octanefitness.com/home/why-octane/best-product/> (accessed June 16, 2012)

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www.octanefitness.com

The Octane Mission:

Octane Fitness focuses on creating and producing superior elliptical cross trainers that customers love and use to fuel their lives.

PATENT TROLLS

Cost U.S. Companies Billions

Joseph Mandour, Managing Partner and IP Attorney, of Mandour & Associates in Los Angeles, CA recently blogged, "Patent Trolls Cost U.S. Companies Billions in Patent Infringement Lawsuits." Mandour states that patent trolls, "make money by suing companies that produce products using the patents or parts of the patent they own." Mandour

cites a recent study from Boston University claiming that patent trolls cost U.S. companies an incredible \$29 billion in damages and fees per year. The study also concluded that companies suffered huge losses during the litigation from over 5,842 patent infringement related lawsuits filed in 2011.

Mandour goes on to say, "The study revealed that small and medium sized companies bear most of the cost burden for patent litigation. Small businesses are the hardest hit because they typically do not have as much funding to devote to expensive litigation."

IPISC's IP insurance products help level the playing field for the small to mid-sized companies; in essence, making them appear larger than they are because the funds are available to get through the litigation on the merits of the case and not be intimidated by the deeper pockets of their opponent.

Read this article in its entirety on Mandour & Associates blog at www.californiapatentattorney.pro, Mr. Mandour at jmandour@mandourlaw.com. **IPObserver**

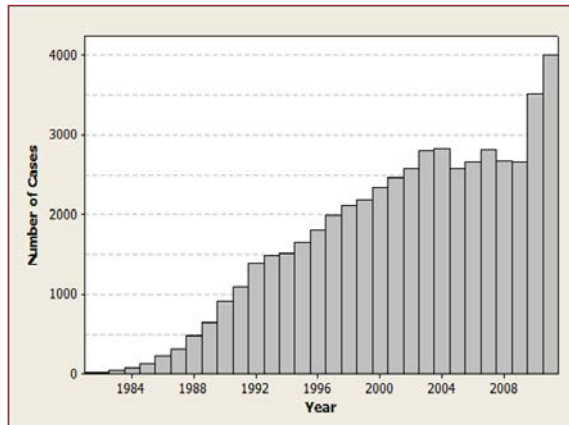
Source: California Patent Attorney- California Patent Lawyer, <http://www.californiapatentattorney.pro> (Accessed July 5, 2012)

PATENT LITIGATION

Frequency & Consequences

Over the past several years, patent litigation has been on a continual rise as our economy has become more technologically driven. According to PACER (Public Access to Court Electronic Records), the primary source for federal litigation data, there has been a steady rise in annual patent cases reaching 1,000 per year in 1991, then topping 2,000 per year in 1998. In more recent years, 2010 and 2011, the number of cases has risen to 3,500 and 4,000 respectively. The staggering growth will likely continue, and that means holders of intellectual property (IP) can expect a greater likelihood of facing a lawsuit in the future.

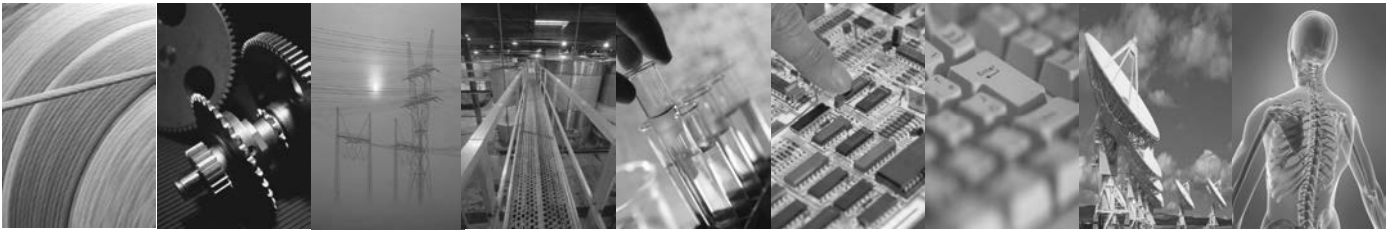
Not only are patent lawsuits frequent, but they are also time consuming, continuing for five years or more before being settled or reaching a verdict in court. Patent lawsuits can also be incredibly expensive. According to the AIPLA (American Intellectual



Property Law Association) 2011 Report of the Economic Survey, the average cost to litigate a patent lawsuit in the U.S. is \$2.8 million dollars if the amount in controversy is between \$1 million and \$25 million dollars. Moreover, damages assessed in the event of unsuccessful litigation average \$9 million dollars.

Companies IP may be needlessly put at risk if companies become engaged in IP litigation. IPISC's IP infringement insurance is the most logical and economical choice that a company can make to ensure that the means are available to fund the high cost and consequences of an IP infringement case. Now more than ever, Intellectual Property Insurance makes sense for enforcing IP rights or defending against charges of IP infringement.

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Mission Statement

“To pioneer the field of intellectual property insurance, enabling our insureds to protect their livelihood and technology, by providing them the basic financial strength necessary, through affordable insurance, to create and contribute the products of their minds, for the benefit of all, with just reward.”

Robert W. Fletcher, Founder & CEO, Intellectual Property Insurance Services Corporation



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