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Nutrition Industry Protecting Intellectual Property

by Robert Fletcher

From dietary supplements to all-natural and organic foods and beverages, the nutrition industry has generally managed to avoid the pitfalls of the recent recession, as evidenced by its growth in 2010, which topped \$101 billion in sales. Concerns over food safety, the increasingly high cost of health care, an aging population of Baby Boomers and numerous economic changes have all contributed to the solid growth experienced by the nutrition industry. This extremely competitive industry of researchers and developers is constantly on a quest for the next innovative product, aimed at improving overall nutrition and enhancing the quality of life. The industry recognizes these products must be protected by intellectual property (IP) rights, which will be their competitive advantage. IP rights take the form of patents, trademarks, copyrights and trade secrets, which, interestingly, may be needlessly at risk if the entrepreneur becomes engaged in IP litigation. The inability to protect IP is a leading cause of failure for companies vying to lead the nutrition industry.

Virtually all nutrition-based companies possess IP that, in many cases, may be critical to their bottom line. Recent studies have found up to 80 percent of a company's value may reside in its IP. 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 their commercial general liability (CGL) policy may not be providing coverage for their most valuable asset: IP.

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

CGL Policy Coverage: CGL policies do not offer any meaningful IP coverage, since these policies are 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 is limited in scope. The accused infringing activity must be a direct result of the actual advertising itself.

Professional Liability Policies: Professional liability policies are designed to cover defects in design and performance, thus leaving a narrow opportunity for an insured to secure defensive coverage for IP infringement.

Credit and Working Capital Reserves: With litigation costs and damages reported in the millions of dollars, many companies may find themselves struggling 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, which is always in a company's best interest. Then, if a company finds itself in court, as a plaintiff or a defendant, the funds are available to thoroughly and 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 going out of business.

Companies that are more successful or have more innovative IP are more likely to be involved, either offensively or defensively, in an IP lawsuit. According to the American Intellectual Property Law Association's most recent 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, most surprisingly, doesn't even include damages, which could easily reach several millions of dollars.

Consider the following IP insurance policies that are available to help manage a company's IP risk:

- **IP 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.

- IP Abatement (Enforcement) Insurance is a unique plaintiff's policy, which reimburses the litigation expenses to enforce IP against alleged infringers.
- 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 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.

Rudy Telscher, an IP litigator with the firm Harness Dickey in St. Louis, recognizes the benefits of holding an IP insurance policy. Telscher said, "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. 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 intellectual property litigation. Instead of settling, larger companies know 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 positions are hurt significantly."

Telscher further noted the difference insurance makes, commenting, "Without a doubt, the smaller companies, when backed by the insurance proceeds of [an experienced firm], 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 said clients who simply hold an abatement [enforcement] insurance policy can significantly level the playing field. Telscher added he has "handled several cases now where the insured would have been bowled over by the bigger opponent without insurance to back them."

IP insurance offers many advantages. Companies can ensure their most valuable asset is protected by demonstrating their ability to fight to the end of an IP case on its merits. In addition, IP insurance greatly reduces companies' risk of going out of business or being forced to drain working capital to pay legal fees to enforce or defend IP rights.

Despite the established value and availability of the policies, many companies are still unaware of IP insurance. Equally surprising is the number of companies that assume they are covered for IP risk under their CGL policy. IP insurance ensures companies have the money available to maximize their chances to win on the merits of the case. More importantly, the innovatively focused nutrition companies will have the ability to protect their IP, i.e., their competitive advantage. □

Robert Fletcher is the founder and president of Intellectual Property Insurance Services Corp. (PatentInsurance.com), a leading provider of IP insurance in the United States and worldwide with more than 20 years of expertise and experience.

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