

Companies are dependent upon Chief Financial Officers (CFOs) to provide accurate financial and risk management. As financial consultants, CFOs are encumbered with the responsibility of analyzing data, planning, managing and reporting the financial well-being of the company. Their principal goal is to convey financial results accurately and systematically while ensuring the viability of the company as well as meeting shareholder expectations. As risk managers, CFOs must grasp and maintain the company's overall risk exposures. Many times, risk management is left to the CFO to recommend the most comprehensive insurance coverage to ensure the greatest risk mitigation for the company. Conversations should include the very intellectual property (IP) rights that are protecting the company's assets. These intellectual property rights are in the form of patents, trademarks, copyrights and trade secrets; which, interestingly, may be needlessly at risk if IP becomes involved in litigation. The inability to protect IP is a leading cause of the revenue shortfall and failure for companies.

Virtually all companies possess intellectual property that in many cases may be critical to their bottom line. Recent studies have found that up to 80% of a company's value resides 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 becomes involved in litigation, specialized IP insurance policies are the only risk transfer tools that can ensure that the funds are available for paying 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

The CGL Policies do not offer any meaningful IP coverage since the CGL policies are completely devoid of any IP enforcement coverage. Any defensive coverage offered to an insured under a CGL policy may be 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

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 the millions of dollars, many companies may find themselves struggling to fund IP litigation adequately. 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 their 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 & defendant) through trial is \$2.8M, when the amount in controversy is between \$1M and \$25M. This number does not include damages, which could easily reach several millions of dollars.

Consider the following IP insurance policies that are available for helping 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 is a 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.

IPISC Insured, Greg Henson, President/CEO of NoSun, LLC said, "The insurance policy is a lever of sorts. When we were sued, the plaintiff had no idea that we had insurance. Their intention was to bully us out of the business with threats of time consuming and expensive litigation. I will never forget the conference call when our attorney dropped the bomb on them, 'our client has a 5 million dollar patent insurance policy. It's not their money. Let's go.' You could have heard a pin drop."

Greg goes on to say, "Our experience with IPISC is excellent. They were not only interested in settling the claim on our behalf, they were interested in winning! It was not about trying to take the cheap route or compromise. It was about doing what was right for us. The benefit, of having an insurance policy through IPISC, is the peace of mind that we have knowing that the competition cannot stop you with frivolous claims of infringement. We were thrilled with the legal team that handled our claim."

If a company's IP gets challenged in court, as a plaintiff or a defendant, their IP may very well be in jeopardy if funds are not available to thoroughly and vigorously litigate. Thus, it is wise for CFOs to consider the company's ability to fund IP litigation to protect their IP assets. CFOs can also help develop strategic IP plans, realize better ways to monetize assets, improve the company's statements of financial position and boost shareholder confidence.

Conclusion

Surprisingly, despite the established availability of these policies, many CFOs are unaware that IP insurance exists. Equally surprising is the number of CFOs who assume coverage is there for IP risk under a CGL policy. IP insurance ensures that companies have the money available to maximize their chances to win on the merits of the case. More importantly, companies will be better equipped to protect their IP, i.e. their competitive advantage. It is important to discuss IP insurance with an insurance professional who specializes in Intellectual Property Insurance.

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