

Insurance For Defending Against And Pursuing Patent Infringement

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Patent insurance has grown out of changes made by insurance companies to their Comprehensive General Liability (CGL) coverage to prevent policyholders from claiming that patent litigation is a type of "advertising injury" which is usually covered. Although patent insurance has been around since the early 1980s, only a small percentage of patent owners and businesses are aware that such coverage exists, and only a handful have taken advantage of the protection provided by patent insurance.

Patent litigation can cost anywhere from a few hundred thousand dollars to several million dollars for each side in addition to any determination or award of damages. A determination of willful infringement can result in an award of triple damages. These potential costs can be devastating for an accused company. A small business patent owner facing a large company infringing on a patent may not have the resources to prevent the infringement. The small business patent owner may have to take out loans, seek investors, or find an attorney willing to take the case on a contingent fee basis in order to enforce its patents. Otherwise, the small business may be forced to negotiate a license agreement from a position of weakness or allow the infringement to continue unopposed while directly competing against the infringer's product.

Another common scenario involves a business that is sued by a patent owner, on sometimes dubious grounds, knowing that the business will want to settle in order to avoid the high cost of a patent infringement lawsuit. Patent insurance can help mitigate the costs of a patent infringement lawsuit and provide more options for the policyholder in dealing with an infringement situation.

Having patent insurance will also let the other party know that you are ready and able to litigate if necessary. Patent insurance coverage is often enough to force a more favorable settlement of a patent dispute for the policyholder.

There are generally two types of patent insurance: patent abatement insurance (also referred to as enforcement, assertion, or pursuit insurance), and patent liability insurance (also referred to as infringement defense insurance).

Patent abatement (enforcement) insurance helps offset the costs of litigation when enforcing an insured patent against an infringer, and also the costs of defending a countersuit for invalidity made by the infringing party.

Patent liability (defense) insurance helps offset the costs of not only defending against an infringement claim, but also the costs of asserting patent invalidity as a defense to a charge of patent infringement, as well as costs of reexamination proceedings initiated as a defense strategy arising out of the lawsuit for patent infringement. It is important to note that typical patent liability insurance does not cover damages awarded against the policyholder, and that additional coverage for damages must be purchased.

The cost of the patent insurance is relatively high, with insurance premiums ranging between 1-5% of the insured amount. The insured amount typically ranges anywhere from a low end of \$500,000 up to \$1 billion. There are also large deductibles that must be expended prior to triggering the coverage. There is also typically a co-pay percentage that is paid by the insured up to the limits of the coverage. For example, an abatement policy on a single patent having a limit of \$1 million may have a \$50,000 deductible and a 15% co-pay at a cost of \$15,000 a year.

With all business decisions, the cost of the patent insurance must be weighed against the benefits of having the coverage. Companies involved in highly competitive or litigious industries that are covered by multiple overlapping patents (for example, Internet commerce) should consider patent defense insurance. Companies having a patent or patent portfolio protecting successful, or potentially successful, products that are not easily designed around and provide a significant competitive edge should consider protecting themselves with patent enforcement insurance.

Because of the complexity of most patent insurance policies, companies should work with patent counsel to determine the type of coverage appropriate for the company's particular needs.

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