INSURANCE FOR IP DEFENSES AND CLAIMS

Don't Get Left Holding the Bag

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Businesses today often receive the dreaded "cease and desist" letter from out of the blue, accusing it of violating intellectual property rights of some kind. This could range from a competitor's letter claiming that your product design too closely resembles its alleged trade dress design to a non-practicing entity (NPE) or "troll" letter accusing you of unlawfully downloading a music file or infringing a patent that you have otherwise never heard of before. In any of these situations, you are likely faced with having to contact and hire outside legal counsel to provide advice and, potentially, defend you against the claims. Upon receipt of the IP cease and desist letter, your first question should be "is this claim covered by insurance?"

On the flip side, imagine the situation where your company just invested a significant amount of money to obtain patent protection for the next big idea or innovation that could change your business forever. And then, after getting that patent, you discover that a new competitor has come along and already tried to copy you. Do you have the resources to invest more to pursue legal action against that competitor?

Consider that in its 2019 survey, the American Intellectual Property Law Association ("AIPLA") estimates that the median cost for litigating a patent infringement case with less than $1 million at risk to be $700,000 (through appeal). For copyright infringement and trade secret cases with less than $1 million at risk, the median costs are $550,000. For trademark or trade dress infringement cases with less than $1 million at risk, the median costs are estimated at $275,000 to litigate. And these are the low-end numbers. As you can imagine, the costs of litigating IP cases with more than $1 million at risk can increase dramatically (estimated $4 million in litigation costs for patent infringement cases with more than $25 million at risk). Even if the claims asserted could be considered frivolous, it could still cost hundreds of thousands of dollars in defense fees just to get to a point in litigation where a favorable decision could be made. Make no mistake, intellectual property litigation can be a high-stakes game, and you have to pay to play.

As a company that owns IP, in any form, it could be your company's greatest asset. As your company's most valuable asset, it should be protected at all costs. Conversely, if your company is faced with an infringement or misappropriation suit, that lawsuit could carry with it the risk of incurring staggering litigation costs and the prospects of an adverse judgment that could effectively wipe your company out from a financial

perspective. In either of these situations, to effectively evaluate risk and potential opportunity, you must understand the possibility that insurance coverage could exist that might help you. Understanding and evaluating the insurance options available to you is critically important.

IDENTIFYING POTENTIAL INSURANCE COVERAGE

Most businesses maintain Commercial General Liability ("CGL") insurance policies to protect from losses that could arise under a variety of circumstances. These CGL policies are the starting point for analyzing whether IP claims could be covered by insurance. The analysis of whether there is insurance coverage under an existing policy will largely depend on an interpretation of the specific CGL policy or policies at issue combined with an in-depth review of the type of legal claim being asserted as well as the conduct which is claimed to violate the respective IP rights at issue.

Starting with the policies themselves, most CGL policies contain an "advertising injury" section. While the language of these provisions has changed over the years, generally speaking, the 2013 Insurance Services Office ("ISO") standard CGL policy, which is the predominate CGL policy in place today (each insurance company adopts different language and some still use older, more insured friendly language), provides express coverage for "use of another's advertising idea in the insured's advertisement" and/or "infringing another's copyright, trade dress, or slogan in the insured's advertisement." Compare that language to older policy forms such as the 1986 ISO, which extended coverage to advertising injuries which arose out of "misappropriation of advertising ideas or style of doing business; or infringement of copyright, title, or slogan."

Over the years, insureds have used the various advertising injury provisions to seek coverage, and courts around the country have broadly construed these provisions to provide some form of coverage for a number of claims, including claims for copyright infringement, trademark infringement, trade dress infringement, misappropriation of trade secrets, violation of the right of privacy, defamation, libel, slander, trade libel, false advertising and even patent infringement.

The key to getting coverage has been showing that those claims arise from the advertising activities of the insured. Traditionally, this has involved asking whether the plaintiff alleges that it has suffered some injury as a result of some advertising-related activity (with "advertising" generally interpreted broadly by the courts), whether the insured's actions did actually involve advertising in some form, and whether there was a connection between the plaintiff's alleged injury and the advertising activity. When these questions can be answered in the affirmative, courts are likely to determine there is coverage (unless the claim is expressly excluded in the policy). The bottom line is that if you can tie the alleged infringing activity into advertising in some way, you very well may have coverage under an existing CGL policy.

DO POLICY EXCLUSIONS APPLY?

Now, the catch here as it relates to CGL coverage is that as courts have gotten more and more receptive to the idea that policies should be interpreted to cover IP-related claims, insurance companies have adapted and included express exclusions within the policy to address those arguments. Indeed, many of the recent ISO form policies expressly state that the four main IP-related claims (patent, trademark, copyright and trade secret) are excluded from coverage (unless those claims arise directly from advertising).

It is also important to know that courts are not always consistent in their treatment of exclusion or coverage language. A court in California might interpret the language of a policy much differently than a court in Texas. The devil will always be in the details of the policy language, past decisions within that particular court, and the unique facts related to the claims at issue.

SPECIALIZED IP COVERAGE IS AVAILABLE

In light of the increase of exclusions for IP cases that are now included within standard ISO form policies, you should know about, and explore options as to, specialized insurance policies designed specifically for IP-related claims. Many companies offer policies that are designed to either cover situations where you are accused of infringement, in some form, or provide coverage for the enforcement of your IP rights. Regardless of the type of business involved, if there is a chance of facing an infringement allegation or a chance that you may need to file a lawsuit to enforce your rights, then standalone IP policies may be worth the investment. These types of policies can help you fill the coverage gaps that could exist with respect to your standard CGL policies. And frankly, they could mean the difference in preventing your company from facing enormous financial risk in litigation compared to comfortably defending or pursuing your legal claims with the backing of a sound insurance policy.

FINAL THOUGHTS

With the potential rise in intellectual property litigation as the grip of the pandemic begins to lessen, and the recent proliferation of IP suits brought by NPE's or "trolls," businesses should be prepared. Investigating and evaluating whether there is existing insurance coverage for IP claims is the first step. Knowing what that coverage provides is the next. And, knowing that you might be able to obtain specialized coverage that will help protect your rights, and your assets, is important for those who own valuable IP rights.

Be proactive in reviewing existing insurance policies and figure out if there are potential gaps in coverage. Know which policies might be applied to a particular IP infringement situation. Note that most CGL policies are "occurrence" based – meaning that even if you have an existing policy that excludes a claim for trademark infringement (as an example), you could have an older policy previously in place that did not have such an exclusion at the time in which the alleged infringing actions took place. Carefully evaluate claims that have been asserted against you. Know that if multiple claims are being asserted that if even one of those might trigger coverage, all of the claims could be covered. Know that courts are more likely to require coverage for the costs of defense as opposed to indemnifying you for a large judgment being entered, even if there is a reasonable question as to whether there is coverage. Contact counsel to assist you in your coverage evaluation. And most importantly, if there is a chance existing coverage might apply, promptly put your insurance company on notice of the potential claim.

If you are not prepared and receive that surprise cease and desist letter from a copyright troll or find out that someone has tried to steal your company's most valuable asset and you cannot afford to invest in the costs of litigation, you could be left holding the bag.

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