

# Intellectual Property:

*Insurance Protection for  
Technology's Most Valuable Asset*



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Economic theory has historically postulated that the value of a company was equal to its assets plus an estimated discounted cash-flow of its future earnings potential. Indeed, as recently as 1975, 60% of the market capitalization of publicly-traded firms was based on assets, the remainder on future earnings capacity. Today, that number is 25% or less. The difference, of course, is the greater value of future earnings which are driven more than ever by the value of intellectual property (IP) rights.

Not surprisingly, then, the cost of establishing, maintaining and protecting IP rights has become much greater over that same period. Whether protecting against infringement by others, or defending actual or alleged IP violations, litigation has become a fact of life, particularly for fast-growth, technology companies.

Corporate America buys insurance to protect its physical assets. It buys insurance to pay for legal defense and settlement costs for litigation ranging from products liability to securities litigation. So, why does it not buy insurance to protect intellectual property, its greatest asset?

The answer is that until now it has not been widely available and determining the economic value can be difficult. William Gallagher Associates (WGA) has been working with underwriters and has effectively brought coverage into place for a growing number of firms, particularly technology firms. The specific types of insurance currently available are described herein.

## LEGAL ENFORCEMENT OF IP RIGHTS

IP rights include Patents, Copyrights, Trademarks and various forms of brand value. Each of these can come under siege by others, either deliberately or inadvertently. Pursuit of legal enforcement, however, is costly. It can also mean working in countries around the world with varying legal codes.

IP Enforcement Insurance will pay a percentage of these costs to determine validity, pay for countersuits, and enforce license agreements. In fact, insurers are willing to share these costs at a reduced premium in return for a share of successful enforcement proceeds.

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Philip J. Edmundson is President and CEO of William Gallagher Associates, a leading provider of insurance brokerage, risk management and employee benefits services to firms in selected fast-growth industries including high technology, life sciences, financial services, healthcare services, energy, and environmental services. WGA has offices in Boston, MA; Columbia, MD; Princeton, NJ; and Paris, France.

## **IP LEGAL DEFENSE AND SETTLEMENT**

Perhaps an even greater exposure is defense against the legal costs of IP related litigation, due to the unlimited nature of the downside of strategic litigation. While proper risk management techniques of extensive patent searches may reduce risk, there is no way to eliminate the possibility of IP litigation. IP Defense insurance pays legal bills and can pay settlements. IP legal expenses often rival the largest insured losses for many technology companies.

Further, some established technology companies have used IP litigation to delay the development and capital-raising ability of younger competitors. IP Defense insurance allows the developing company to neutralize the attacker with the shield of an effective insurance plan.

## **IP ASSET PROTECTION**

Calculating the proper limit of insurance is often very difficult. In fact, a company's IP litigation losses may go well beyond settlement and defense costs. Keep in mind that the market valuation of a company is partially based on IP value and accordingly, the impairment of a company's IP will lead to deeper losses.

Insurance can be tailor-made, which is based upon any of the following risk factors:

- Lost market value for some or all shareholders
- Lost R & D expense from prior years including corresponding loss of use of capital
- Loss of future profits

Triggering events for a claim can include:

- Lost IP litigation resulting in an inability to sell a product
- Government action
- Invalidity or revocation of IP rights

IP Insurance products can be customized for individual companies, however, they can also be developed for a group of loosely related companies such as a venture capital firm's portfolio companies.

In addition, certain insurers will provide buyouts for ongoing IP litigation. An insurer's expertise and institutional patience concerning slow-moving litigation can be effective weapons in a battle against a larger company.

Whatever your IP risk management concern, contact [info@wgains.com](mailto:info@wgains.com) or call us for a consultation to apply the best solution. William Gallagher Associates – Making a Science of Insurance.