



Intellectual Property Scenarios

Patent Dispute

Organisations now recognise the significance of their intangible assets, of which Intellectual Property (IP) is often considered the most important as it underpins the most valuable elements of a business.

The investment in building a new product/service can easily run into millions of dollars and the ongoing spend on maintaining and marketing can be significant. Competitor patent infringement analysis can often be the last thing to be considered. TMK's IP insurance solutions are designed to protect an enterprise, when an unforeseen patent dispute arises.

This scenario looks at how some of these disputes can arise and the different outcomes you could see.

Case Example

Head to head with a competitor: patents dispute

Ashcorn Inc is a successful investment broker generating revenues circa USD75m. The innovative firm has developed a platform which they provide to clients alongside account management services. They do not have any registered patents as development of the software has been ongoing as clients' needs and requirements evolve. Ashcorn has recently received notice that they are being sued by a competitor which is alleging that Ashcorn is infringing 5 patents and has applied for an injunction and damages. The estimated cost of defending the case is USD4m and potential damages are estimated to be around USD9m.

Scenario 1 – Ashcorn is uninsured and loses the case

Ashcorn appoints a representative for its defence, goes to trial but unfortunately loses the case. The cost of defence and damages awarded by the court run to approximately USD13m causing considerable harm to the company's balance sheet and forcing them to issue a profit warning.

Scenario 2 – Ashcorn has purchased Intellectual Property insurance – Wins Case

Sample policy**

Coverage:	Infringement Defence
Limits of Indemnity:	USD15,000,000 any one claim and in the aggregate – Representatives Fees & Liability
Excess:	USD75,000
Co-Insurance:	10%

Ashcorn notifies the insurer and agrees on the appointment of a representative to fight the legal case.

Ashton successfully defends the suit, incurring USD4.5m in representatives Fees & Expenses which are reimbursed by insurer.*

Scenario 3 – Ashcorn has purchased Intellectual Property Insurance – Loses Case

Sample policy**

Coverage:	Infringement Defence
Limits of Indemnity:	USD15,000,000 any one claim and in the aggregate – Representatives Fees & Liability
Excess:	USD75,000
Co-Insurance:	10%

Ashcorn notifies the insurer and agree on the appointment of a representative to fight the legal case. The appointed representative is reimbursed by the insurer.

Unfortunately, the Court finds that Ashcorn's in-house developed platform is infringing 3 of the 5 disputed patents and orders damages of USD7,500,000 to be paid, which are also reimbursed by the insurer.

Scenario 3 – Costs

Representatives Fees & Expenses	USD4,500,000
Damages	USD7,500,000
Total reimbursed by insurers	USD12,000,000*

* Less any applicable self-insured retention and coinsurance

** These coverage scenarios are hypothetical only and do not increase or limit your coverage, the nature and extent of which will depend on the specific circumstances of each case, which remains subject to all policy terms, conditions, limitations and exclusions.

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Intellectual Property Scenarios

Contractual Indemnity

Organisations are increasingly required by clients and customers to provide a contractual indemnity in respect to the goods and service they are supplying. This indemnity is becoming more important considering the costs when they arrive unexpectedly.

Case Example

Weak links in your supply chain: contractual indemnity

Blackthorn Distribution is a multi-million toy manufacturer, selling products via numerous retailers and provides a contractual indemnity to Casars plc. The contract with Casars specifies that should Casars be sued by a third party in respect of intellectual property infringement caused by the goods supplied by Blackthorn, then the latter shall indemnify and defend Casars against all defence costs and damages.

Casars has been selling Blackthorn Distribution's products for six months when they receive notice that they are being sued by a third party toy manufacturer in relation to patent infringement. Casars currently makes USD6m profit from selling Blackthorn's products. Blackthorn makes USD1m profit from its sales to Casars.

Scenario 1 – Blackthorn Distribution is uninsured

Casars contacts Blackthorn informing them of the alleged infringement and request indemnity. Blackthorn appoints a representative to defend Casars (as contractually required) and Blackthorn itself. The costs of defending both are met by Blackthorn from its balance sheet. Defence costs are estimated at USD2.5m and damages (if found to be infringing) of USD4m based on the profits generated by Casars per annum.



Scenario 2 – Blackthorn Distribution has purchased Intellectual Property Insurance

Sample policy**

Coverage:	Infringement Defence
Limits of Indemnity:	USD5,000,000 any one claim and in the aggregate – representatives Fees & Liability
Excess:	USD75,000
Co-Insurance:	7.5%

Casars contacts Blackthorn informing them of the alleged infringement and request indemnity. Blackthorn notifies the insurer and agrees to the appointment of a representative to fight the legal case on behalf of both Blackthorn and Casars (as contractually required).

Defence costs are estimated at USD2.5m and damages (if found to be infringing) of USD4m based on the profits generated by Casars plc per annum, both of which are reimbursed by the insurer on behalf of Blackthorn Distribution and Casars plc.*

* Less any applicable self-insured retention and coinsurance

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Intellectual Property Scenarios

David v Goliath: when big meets small

David v Goliath cases like this one are becoming more common as industry leaders attempt to stifle innovative fledgling companies before the start-up has even considered itself as a 'competitor'.

The media is dominated with competitor versus competitor IP lawsuits as demonstrated in the ongoing titanic battle between Apple and Samsung. Making the situation ever more perilous, IP lawsuits do not come cheap. The estimated average cost of an IP lawsuit in the USA is between USD3m and USD5m. The question then arises – how can companies, be they large or small, fend off such attacks on their IP, while protecting their balance sheet from sizeable representative fees and the considerable liabilities awarded by the courts? The scenario here looks at how some of these disputes arise and the different outcomes you could see.

Case Example

BeatLink is Toronto based start-up in the process of securing second round funding for their tech business which offers mobile security technology for smart devices. One of the most interesting features of the new technology is the way it identified security threats such as violating privacy and malicious code in a smart environment. BeatLink is tipped for big things and has not gone unnoticed by Bluesoft, the third largest technology company in the world. Bluesoft issue a 104 page cease and desist letter alleging the software utilised in BeatLink's App is infringing US Patent 1,123,4XX* and files suit in the local district court for an injunction and damages.

In a situation where BeatLink is **uninsured** – it appoints a representative for its defence and receives the quotation for defence costs through the trial for in excess of USD2m. Unable to afford the cost of defence, BeatLink has no option but to negotiate a settlement from a weakened position or continue to fight the case and risk bankruptcy.



Intellectual Property Scenarios David v Goliath: when big meets small

In a situation where BeatLink has **purchased** Intellectual Property insurance and wins the case:

Sample Policy**

Coverage:	Infringement Defence
Limits of Indemnity:	USD3,000,000 any one claim and in the aggregate – representatives Fees & Liability
Excess:	USD50,000
Co-Insurance:	5%

BeatLink notifies its insurer and agrees to the appointment of an experienced representative to fight the legal case. The appointed representative is reimbursed by the insurer up to the values agreed in the Intellectual Property insurance policy (less any applicable self-insured retention and coinsurance).

*Fictional patent, for illustration purposes only.

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