This type of insurance is often overlooked by companies in the Life Science sector despite their Intellectual Property (IP) being a considerably valuable asset. A major reason for this is that historically the insurance market made the application process complicated and drawn out by insisting upon IP risk audits being completed, usually at the Insured’s cost, before providing quotations. If and when quotations were provided, these were often expensive and restrictive in terms of the cover.

Research commissioned by the UK Government and the Intellectual Property Office suggest that the average cost of a patent litigation claim in the UK is over £700,000 to each party. In the USA, legal costs can often reach millions of dollars unless settlement is reached early. Successful claimants or defendants in the USA do not often get their legal costs paid by the other party.

Recently, new Insurers have entered the market to bring much needed competition to re-define the underwriting approach, enhance policy coverage and drive down pricing to be more commensurate with the level of risk. An IP policy can provide protection for defence costs and for damages awarded where an action has been brought against a company for infringing or alleged infringement of third party Intellectual Property. It can also provide cover for professional fees and expenses for pursuing infringement or theft of a company’s Intellectual Property. This type of policy will enable a company to defend infringement allegations efficiently, whilst also protecting innovation by allowing the opportunity to pursue infringers of their own rights. Furthermore, the policy can cover costs incurred to avert or mitigate potential litigation, which may entail product recall expenses, pre-emptive and assertive actions or counter-claims.

There are a number of good reasons why companies in the Life Science sector should now be looking at Intellectual Property Insurance as a key protection for the business, whether an early stage start up or multinational:

**Business Enabler:** Investors would rather deal with companies that can meet their indemnification obligations and which will not spend its research budget on expensive litigation. In addition, the policy will help to meet indemnities in third party contracts and will provide protection for licencees and customers in terms of litigation associated with your IP.

**Processes:** Cover is no longer limited to products. Policy wordings can be tailored to cover claims arising from process patents, business method patents and trade secret misappropriation, to ensure protection across the entire business activities of the company.

**Single contract protection:** Cover can be tailored to apply to a single contract, a specific division of a company or a specific product. Insurers now offer the flexibility to provide cover to meet companies specific requirements rather than a one size fits all approach.

**80/20 Rule:** Patent attorneys perform freedom to operate opinions to minimise the risk that products infringe third party patents. However, non-infringement can never be guaranteed and even if a search reveals 80% of the risk, there will be some outstanding. Real freedom to operate can be achieved by having the financial means to defend a claim, provided by an IP Insurance policy.
Patent cover where excluded elsewhere: Claims arising out of intellectual property, and specifically patents, are often excluded from many policies including Directors’ & Officers’ Liability and Professional Indemnity Insurance. This can be a key risk for the business yet remains uninsured relative to both the company and its individual Directors where named as a joint defendant.

In the event a company is forced to stop selling a product due to an alleged IP breach, such as a patent infringement, the policy can also cover any potential loss of profit the company has suffered during the period it has been unable to sell its product. As such losses are not consequent to physical damage to tangible property, cover would not be provided under a typical Commercial Business Interruption policy.

An IP Insurance policy can be tailored to remove all these gaps in cover.

Legislation changes: in addition to the “known unknown” risk of litigation, there is added uncertainty at present due to pending changes in the legal structure around patents. In the USA, several bills have been implemented or are currently going through the legislature in respect of patents and it is not certain at this stage how the changes will impact litigation in general or in relation to specific business sectors. The same applies to the implementation of the unitary patent and courts system in Europe. There is potential that this will encourage the spread of patent troll activity in Europe.

About Arthur J. Gallagher

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WOULD YOU LIKE TO TALK?

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