

# Protect against infringement with insurance coverage

By **NANCY P. JAMES**

You may have more than a theoretical interest in intellectual property, because you probably have one or more technology contracts addressing your IP obligations to a client, partner or vendor. How you handle these complex issues will separate you from your competitors; it may even determine your long-term solvency.



**Nancy P. James**

A scenario: a technology company developing state-of-the-art products aggressively pursues a contract with a large corporation in need of those products and services. Negotiations begin, hurdles are passed and the relationship looks good.

Then it begins. The corporate department sends the contract with intimidating wording such as, "YourCo hereby indemnifies and holds harmless and agrees to defend BigUsCo for all claims, demands, charges, suits, proceedings, damages, direct or consequential ... for any and all injury or damage ... intellectual property infringement, including but not limited to trademark, copyright, patents, invasion of privacy, plagiarism, unfair competition."

Required limits of liability usually follow, with specifics of coverage and "additional insured" status requirements.

Indemnification is a term associated with a financial guarantee to provide legal defense for a claim. You should not undertake indemnification casually and without attempts to transfer the risk to your insurer. The general liability areas and even errors and omissions liability are more easily accommodated.

In addition, your Web site carries a number of intellectual property exposures, which many businesses have not previously encountered. Web sites are publications by any definition, and as a publisher you are exposed to claims of infringement.

Vastly more difficult are the intellectual property indemnification clauses of your contract.

First, some interesting statistics and facts from American International Group, one of the largest insurance providers:

- Damages of up to \$1 billion, often \$20 million to \$30 million, are common.

- Insurance limits up to \$15 million coverage per patent are available, with a minimum deductible of \$50,000.

- Defense expenses are covered by policies: legal fees, declaratory actions, injunctions and appeals.

- Insurance coverage premiums start at \$25,000 per patent for \$1 million in coverage with an infringement search and opinion letter required.

- From 1982 to 1994 patent litigation doubled. The number of patent infringement cases filed since 1994 increases 25 percent annually.

- Fewer than 4,000 of the largest corporations holding 100 or more unexpired patents accounted for more than 50 percent of all lawsuits in 1991. That trend continued through the 1990s.

- In 1998, U.S. revenues from licensing, litigation and settlement of U.S. patents were \$100 billion up from \$3 billion in 1980.

The median costs through trial of intellectual property lawsuits increased dramatically in just four years. The results of 1995 and 1999 American Intellectual Property Law Association (AIPLA) surveys are in the chart above.

The best way to protect yourself is to contact a risk specialist who can approach insurers willing to look at your

contract obligations. As you may know, insurers took an estimated \$50 billion hit to a \$300 billion industry due to Sept. 11. That, coupled with a 10-year soft market and investment income declines, have resulted in limited additional insurance capacity. Coverage once thrown in is now either not offered at all or offered at high rates.

Taking into consideration all of the above, it is important to review what coverage IP policies offer.

Following is typical coverage to look for in an infringement policy:

- Defense expenses, including legal fees, declaratory actions, injunctions and appeals

- Damages covered, including judgments and settlements (90 percent are settled prior to trial); lost past royalties and past profits; interest and costs; attorney fees assessed by the court

- Who and what is covered: directors and officers, employees, company and all subsidiaries; all products; all patents — utility, process, design

- Coverage for new acquisitions; past acts; expedition of dispute resolution procedure, or arbitration

These facts and coverage information can help you measure your protection needs and requirements against contract obligations and risk transfer decisions. Don't get caught in a costly IP dispute.

*Nancy P. James is the principal of N.P. James Insurance Agency in Concord, where she specializes in risk analysis and insurance for technology-based clients. She can be reached at [npjames@npjames.com](mailto:npjames@npjames.com).*

## Costs of IP Lawsuits

	1995	1999	% increase
<b>Patent</b>	\$1,000,000	\$1,503,000	33%
<b>Trademark</b>	\$249,000	\$300,000	17%
<b>Copyright</b>	\$200,000	\$248,000	19%

SOURCE: AMERICAN IP LAW ASSOCIATION