



# Defense Insurance Program Summary

## Issue

Any company is vulnerable to charges of IP infringement by simply making, using, selling, importing or offering for sale a product and/or service; or, if it holds sought-after technology on products, processes or methods of doing business. Also, companies experiencing or planning a merger and/or acquisition, and vendor and supplier contracts requiring indemnification for IP litigation all have exposure to IP litigation.

## Solution

Defense Insurance is the solution to the coverage gap left by the commercial general liability policy for IP risks. This Policy provides the funds to help defend against charges of IP infringement, whether frivolous or not, and is vital to transfer the burden of managing this costly and potentially devastating risk.

## Coverage

- Threats and/or charges of Infringement brought against the Named Insured.
- Post Review Grant/Re-Issue Proceedings and Patent Invalidity Counterclaims.
- Damages back to the date the infringing activity began (if chosen).
- Scheduled coverage for products, processes and/or services.

## Partial List of Conditions

- Underwriting due diligence requires the Applicant to remit an underwriting insurability search fee; or, in lieu of the search fee, submit a comprehensive, recent (6 old months or less) freedom to operate opinion and/or non-infringement opinion from outside counsel. If the Applicant has an opinion from counsel, the Applicant must submit it in conjunction with the application.
- Threats of Infringement must occur during the Policy Period to be covered. The infringing activity can begin, if unknown, before the Policy Period and still be considered Covered Litigation under the Policy. Calculation for Damages reverts to the date the infringing activity began, not when the threat of Infringement was made or when the Policy was purchased.

The Policy excludes threats of, or actual Civil Proceedings alleging, Infringement brought during the initial 90 days of the Policy. The 90 days of coverage are not lost; they are added to the end of the last Policy held by the Named Insured. Newly Added Insured Manufactured Product(s) and/or Manufactured Work(s) are subject to the 90 day, exclusionary period.

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- Limits available up to \$10 million (USD)
  - Policy terms available up to 3 years
  - Worldwide territory coverage available

## Claims

- Claim Authorization is based upon a Favorable Infringement Opinion from an independent, outside counsel, chosen from a list of panel counsel provided by the Company, regarding IP Infringement.
- Upon compliance with the Policy terms, the Company will then give its decision in writing regarding authorization of the suit and, if favorable, the Policy will begin to reimburse the Named Insured for the Litigation Expenses.
- In the event that Covered Litigation results in the Named Insured receiving Recovered Costs, recovery is shared pro rata between the Company and the Named Insured in proportion to their respective contributions to Litigation Expenses.

## Partial List of Exclusions

- Pre-existing threats of Infringement are excluded from coverage under the Policy. Threats include, but are not limited to, warning letters and/or emails and verbal threats of Infringement.
  - Lawsuits which the Named Insured was aware of, or knew were imminent, at the time of Policy purchase.
  - Any litigation not specifically included in the Policy.
  - Expenses incurred prior to the initiation of a Civil Proceeding underlying the Covered Litigation.
  - Any loss, costs or expenses arising from any declaratory actions of any nature.
  - Willful acts of the Named Insured giving rise to Infringement.
  - Criminal acts.
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- MPIP coverage of \$50K or 10% of policy limits, whichever is less, included with the Policy
  - SIR- 2% of Policy limits/ Co-pay- 20%

*Our expert consultants at IPISC can help with IP risk assessment and offer unique and innovative solutions.*

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# Defense Insurance Features & Benefits

The Defense Insurance Policy is the solution to the coverage gap left by the commercial general liability policy for intellectual property (IP) risks. This Policy accommodates any entity that makes, uses, sells, offers for sale or imports products and/or services in commerce.

## Key Coverage

- Companies making, using, selling, importing or offering for sale products and/or services.
- Companies possessing sought-after technology on products and/or processes.
- Litigation expenses to help defend against charges if infringing another's IP rights, and can include damages.
- Cost of invalidity defense to charges of Infringement and patent post grant review proceedings are covered.

## Reasons to Insure

- Litigation is expensive. Based upon the most recent American Intellectual Property Law Association Survey, U.S. median litigation costs for an infringement suit through trial, when the amount in controversy is between \$1M and \$25M, can range from \$350K for copyrights to \$2.8M for patents. These numbers exclude Damages or settlements.
- IP is an extremely valuable asset, having a significant impact on the U.S. and global economy and job creation.
- The ability to defend against charges of IP Infringement is often the key to a company's survival.

## Advantages

- Reduces the risk of abandoning the accused infringing product due to the inability to afford the cost of litigation.
- Reduces the pressure of entering into an undesirable license agreement or the risk of incurring burdensome royalty payments. Prevents abandoning market share.
- Prevents unexpected cash drain on operations. Deters frivolous suits by demonstrating the ability to be financially protected. Reduces the pressure to settle Infringement cases.
- Makes a company more attractive to investors.
- Strengthens the viability of a company.

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- Limits available up to \$10 million (USD)
  - Policy terms available up to 3 years
  - Worldwide territory coverage available

## Adding Products

- The Insured must provide detailed information about the products, processes and/or services to be added to the Policy. There is a mandatory conference call with an IPISC underwriter during the underwriting process to clarify products, processes and/or services to be added to the Policy.
- Insured must submit an opinion of non-infringement or remit a fee for an insurability search for any new products or services to be added to the Policy. (Please see Coverage and Conditions in the Defense Policy for details).
- Upon underwriting approval, the additional products and/or services will be added to the existing Policy.
- Newly Added Insured products, processes and/or services are also subject to the 90 day, exclusionary period.

## Premium

- The actual cost is dependent upon the number of insured products, risk factor, litigation history and/or litigation potential, Policy limits and other underwriting factors. Contact IPISC for a premium indication.
- Financing is available for all terms. If financed, a down payment of 20% of the premium (plus any applicable taxes) is due 15 business days after binding coverage.

## Quotes

- Contact IPISC to obtain an application or a specimen Policy. Send completed application, reflecting all products the applicant wishes to insure to an IPISC account representative.
- As part of the Defense underwriting due diligence, Applicant must include, along with the application, the underwriting, insurability search fee; or, in lieu of the search fee, a comprehensive freedom to operate opinion from outside counsel that is 6 months old or less.
- Include descriptions of the subject matter to be insured, i.e. product brochures, operational manuals, relevant patent claims, if any, sample specimens and/or source code.

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# Defense Insurance FAQ's

The following are representative questions posed to IPISC about the Intellectual Property (IP) Defense Insurance Policy. IPISC has taken every effort to answer the questions clearly and concisely. As always, please consult IPISC or an insurance professional should you have additional questions.

## What makes IPISC's Defense Policy unique?

The Defense Policy is the solution to the coverage gap for IP risks due to the continual limitations by insurance carriers for any type of IP coverage under the commercial general liability policies.

## How does the Self Insured Retention work?

The Self Insured Retention (SIR) is like a deductible but does not erode Policy limits like a typical deductible. The SIR is paid out-of-pocket by the Named Insured and must be satisfied before the Policy begins reimbursement. Once the SIR is satisfied, the Policy begins reimbursement up to the full amount of the policy as required.

## Is there a Waiting or Exclusionary Period?

Yes; threats of or actual civil proceedings alleging Infringement brought during the initial 90 days of the Policy are excluded from coverage under the Policy. However, to compensate for up-front loss of the 90 days; they are added to the end of the last Defense Policy held by the Insured.

## Can products be added during the Policy term?

Yes; products can be added during the Policy term for an additional premium; however, any products added to the Policy will be subject to the 90-day exclusionary period.

## Can coverage be purchased if there is known infringement?

No, any pre-existing accusations and/or threats of Infringement may be excluded from coverage. However, coverage may be obtained for other exposures. Threats include, but are not limited to, warning letters and/or emails accusing Infringement and verbal threats of Infringement.

## Are Invalidity Counterclaims and Post Grant Reviews Covered?

Yes; they are automatically covered under the Policy.

## How are claims handled?

The Named Insured will notify the Company upon being contacted about the Infringement, and provide other relevant facts. Upon being sued, the Named Insured must complete a Claim form and provide the Company with a Favorable Non-Infringement Opinion from an independent, outside counsel chosen from a list of panel counsel, provided by the Company, regarding IP validity and Infringement. Upon compliance with the Policy terms, the Company will give its decision in writing regarding authorization of the suit, and the Policy will begin to reimburse the Named Insured for the Litigation Expenses, if authorized.

## Who chooses litigation counsel?

The Named Insured chooses litigation counsel unless otherwise required by endorsement, requested by the Named Insured for a premium reduction or selected counsel does not meet minimum criteria and/or does not agree to the Company's billing guidelines.

## Who controls the lawsuit?

The Company reserves the right to make recommendations as to how the case should or should not move forward but, ultimately the Named Insured is in control of the lawsuit. However, the Company does have the right to approve all settlements where it will be obligated to reimburse the Named Insured.

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# Defense Policy Claims

IPISC's mission is to promote efficient and effective Claim resolution by building a strong working relationship with the Insured, and by doing all that is possible, within the terms of the policy, to help support the Insured in enforcing and/or defending their Intellectual Property (IP) rights. The following are actual Defense Claims experienced by IPISC policy holders. In an effort to protect the identity of our clients, names have been omitted, except for those giving express permission to disclose. For additional questions about IPISC's Litigation Management Services and Claims, please contact IPISC or an insurance professional.

## Software Industry

A non-practicing entity (NPE), aka- patent troll, was enforcing patents in the market place solely to collect licensing revenue. The NPE did not produce a product, but rather was using litigation to broadly assert the rights of a patent in the industry. Their tactic was to assert patent rights against a smaller company, the Insured. The NPE was unaware at the time of bringing patent infringement charges that the defendant had an IP insurance policy to fight a court battle. The Defense policy gave the Insured the ability to level the playing field and fight the case on the merits. In addition, the Insured received strong advice and assistance from IPISC's Claims Management Department regarding the decisions pertaining to the case.

## Manufacturer/Distributor Industry

A small shoe manufacturer/distributor was accused of infringement by an NPE. The patent troll's patent had been successfully enforced against smaller manufacturers unable to pay Defense costs, thereby forcing the Insured into signing license agreements and paying royalties. The Insured discussed the situation with IPISC's Litigation Management Department, who was able to offer guidance regarding how to handle the discussion and respond to the accuser and their attorney. Unlike the other small manufacturers that were forced to give up their rights to manufacture, the Insured used the power of the Defense policy, thus preparing them to fight this weak allegation. Simply holding the Defense policy can ward off frivolous lawsuits.

## Electronic Security Industry

An industry leader was successfully defeated by an Insured in a plaintiff-friendly venue in the Eastern District of Texas after the Claim of Patent Infringement of their electronic surveillance tags was rejected by the jury. If the Insured would have lost, they could have easily been put out of business. Fortunately, the money was available to fund a successful Defense. The Insured was quoted as saying, "You never know when you will need insurance."

## Artificial Sweetener Industry

A competitor sued numerous companies in the industry for Patent Infringement. The Insured had limited their insurance to cover only what they deemed the "most valuable" products. However, the plaintiff brought in several products that were outside the scope of the Insured's coverage. By trying to guess what may happen in the future, the Insured set itself up for coverage on a pro-rata basis instead of having the foresight of insuring all of their products. Fortunately, the suit was dropped against them because they had at least enough insurance to fight the accuser.

## Claimant Testimonial – Fitness Industry

IPISC's insured, Octane Fitness, fell victim to a much larger competitor, Icon Health & Fitness, who pulled out an older patent of questionable value and asserted it against Octane. This is a typical scenario; the bigger company preying upon the successful, smaller competitor in order to extract royalties and protect market share. Icon may have wrongly assumed that Octane would be unable to afford the litigation costs to stay in the game for the long-haul and fight the case on the merits.

The total cost of this patent litigation was \$2.7M. Without insurance, Octane would tell you, it could not have afforded to defend this lawsuit. As Dennis Lee, President of Octane, openly admits, "Without patent insurance we would have been dead in the water. We did not have \$2.7M to pay to lawyers to defend us. We would have had to pay Icon, even though they had no real patent claim against our company." "Still further, IPISC helped us pick one of the best litigation teams in the country to help us win this. We had no idea where to even start to find a first-rate patent litigator," remarked Mr. Lee. Contact Octane: Ed O'Connor, [eoconnor@octanefitness.com](mailto:eoconnor@octanefitness.com).

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