

## Patent Troll Insurance Useful If Buyers Read Fine Print

By Ryan Davis

*Law360, New York (November 12, 2014, 8:06 PM ET)* -- For startup companies worried that lawsuits by so-called patent trolls could cripple their business, insurance plans covering such litigation, like one recently launched by RPX Corp., can be a worthwhile investment, attorneys say, but companies must investigate to ensure policies provide the protection they need.

RPX is a defensive patent aggregator that uses membership fees to buy up patents that are being used or could be used by nonpracticing entities. In a separate business, it has offered insurance policies that cover the cost of infringement suits brought by such companies for a few years, but this week, it announced a new, lower-priced policy aimed specifically at startups and small businesses.

RPX premiums start at \$7,500 for \$1 million in coverage for litigation costs related to suits brought by nonpracticing entities. RPX co-founder and CEO John Amster said in an interview that one of the reasons the problem of nonpracticing entity litigation exists is the huge cost of defending cases that are inexpensive to bring.

"Having insurance changes the game," he said. "There is no longer that economic asymmetry."

Insurance against patent litigation costs can let emerging companies focus on building their business by turning the threat of a nonpracticing entity suit into a manageable business risk, he said. If more companies had insurance to cover litigation costs, it would be a "great deterrent," he said, since nonpracticing entities would know "they're not going to get a cheap and easy settlement."

RPX joins a small number of companies offering insurance covering the cost of nonpracticing entity litigation. Such insurance can be beneficial, but any potential purchaser must do due diligence to understand what it covers, according to attorneys who said they had examined patent litigation insurance but weren't familiar with the particulars of the RPX policy.

"This a potentially valuable product that startups ought to take a look at because of the high cost of patent litigation," said Richard Milone of Kelley Drye & Warren LLP. "A startup company could easily be wiped out by the cost of the case."

However, companies should look closely at the policy they are considering so they clearly understand what it covers, said Milone, chair of the firm's Washington, D.C., litigation group and co-chair of its insurance recovery group. Many of the insurance policies on the market covering patent litigation tend to be expensive or include catches that limit coverage, he noted.

That's because patent litigation is tough for insurers to underwrite, given the difficulty of determining how likely it is that a company will be sued for patent infringement and the expense and unpredictability of patent litigation, he said.

"It's really incumbent on the startup to negotiate beneficial language," said Ivan J. Snyder of Gilbert LLP, who handles insurance and intellectual property cases.

Litigation costs in patent litigation can escalate quickly into millions of dollars, so companies seeking insurance must negotiate a limit on coverage that they think will be sufficient, he said, although higher limits usually result in higher premiums.

In addition, patent litigation insurance policies often exclude coverage for acts prior to a retroactive date, Snyder said. Companies should therefore negotiate an earlier retroactive date so that the policy covers any alleged infringement that took place before the beginning of the policy.

"Making sure to negotiate with insurers so you're well-positioned is important," he said.

For startups in e-commerce and Web-based companies, where nonpracticing entities have been active, the particularly acute threat of a patent suit may be worth insuring against, said Joshua Lorentz of Dinsmore & Shohl LLP.

Looking into patent litigation insurance "definitely belongs on the checklist," said Lorentz, chairman of the firm's intellectual property department. Whether it is worth buying depends on what the insurer can offer and the company's specific needs, he said.

"It's something that startups should at least consider as part of getting going," he said. "The last thing you want is to get up to speed and have investment and a great product, and then find out it might fall within the claims of a valid patent."

Startups should consider patent litigation insurance if a nonpracticing entity suit would present a risk of a catastrophic loss that could threaten the company, Snyder said.

"Larger companies that have a big IP portfolio may have the resources to fight an NPE suit," he said. "Startups might not have the war chest to fight if a suit comes over the transom."

When investors are considering putting money into a startup company, they are increasingly concerned with avoiding tangential obstacles like nonpracticing entity suits, so insurance to protect against that risk could give companies an advantage, Lorentz said.

"This isn't foolproof, but it is able to provide some security," he said.

--Editing by Kat Laskowski and Kelly Duncan.