The intellectual property infringement indemnification challenge

Organizations across all industries are leveraging technology at an increasing rate. Patents, trademarks, copyrights, and trade secrets (intellectual property/IP) provide legal protection for technological innovations of all kinds. However, greater use of technology means higher risk of infringing others' IP. Patent infringement presents unique issues.

Situation

Anyone making, using, selling, offering to sell, or importing the invention covered in a third party's patent is an infringer.

Therefore, even companies that did not make but are using the invention can be directly sued for patent infringement.

Consequently, customers typically require their suppliers, especially technology vendors, to indemnify them against patent infringement claims. These indemnities are often uncapped or have high caps.

Challenges

A patent holder may target multiple users of an invention, creating a risk aggregation issue for the technology provider that agreed to indemnify those users.

It can be difficult to determine which technologies allegedly caused the infringement. This means indemnification disputes between the technology users and their technology suppliers can arise.

Increasingly, companies are inventing and using their own technologies. As a result, they cannot shift IP infringement liability risk to technology suppliers through indemnities.

Solutions

Standard lines of insurance do not cover patent infringement liability. However, suppliers can purchase IP infringement liability insurance that covers IP infringement disputes involving themselves and backstops the IP infringement indemnities they provide to their customers.

Many companies have a hybrid model where they make and use some of their own technology as well as use supplied technology. IP infringement liability policies cover them regardless of whether they are indemnified. Additionally, for their technology suppliers, they can set up a vendor IP insurance program.

wtw