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Lost Profits and Economic Damages Newsletter

Number 5 - Intellectual Property Damages in Non-Patent Cases

The Lost Profits newsletter series focuses on the concepts and methods used to calculate economic damages from lost profits. In this final edition, we explain a few of the concepts behind damages associated with the infringement or misappropriation of certain types of intellectual property.

If you would like to see the entire five-part series, [Click Here](#).

Please remember that each engagement is unique and the concepts discussed in this newsletter may not always apply exactly as stated herein. Note that we are not a law firm and are not offering legal opinions, only our financial forensic interpretations.

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Non-Patent Intellectual Property

The three main types of non-patent intellectual property are copyrights, trademarks and trade secrets. Each property type carries unique ownership rights, but the damages available upon an infringement or misappropriation are similar with a few exceptions and can include damages based upon a reasonable royalty or lost profits. Generally, non-patent damages differ from patent damages as follows:

1. Damages can be claimed on the owner's losses;
2. Damages can be claimed on the wrongdoer's profits (unjust enrichment), but not both #1 and #2;
3. The owner only has to prove their loss of revenues and the wrongdoer must prove his costs when making a claim on the wrongdoer's profits;
4. The wrongdoer must prove that only a portion of his profits should be attributed to the wrongful act.

If the owner of non-patent intellectual property can prove that he would have both used the property and licensed it to others, several types of damages can be considered:

1. The owner's lost sales since the wrongdoer's costs were lowered which allowed the wrongdoer to lower prices;
2. The added competition lowered the prices in the market;
3. The owner was deprived of royalty payments he would have otherwise charged;
4. Lower royalty payments to the owner from legitimate third party licensees because those licensees may have also sold less product in the marketplace due to the infringement.(1)

Damages Issues Unique to Copyrights

Owners can establish damages by:

1. Comparing the infringement to actual royalties established and charged prior to the act;
2. Following customary industry practices;
3. Calculating the cost to create the property;
4. Using Lost profits of the owner; this is often used when the owner and wrongdoer compete in the same market;
5. Calculating a reasonable royalty to the owner; this is often used when the owner and wrongdoer compete in different markets.(1)

Damages Issues Unique to Trademarks

Owners can establish damages by:

1. Calculating lost sales based upon trends, projections and market share;
2. Measuring lower prices due to the act;
3. Estimating additional costs actually incurred or projected to incur to restore the value, such as corrective advertising.(1)

Damages Issues Unique to Trade Secrets

Many of the damages issues are similar to copyrights and trademarks. The Tennessee Uniform Trade Secrets Act (2) contains this provision for damages:

47-25-1704. Damages.

(a) In addition to or in lieu of the relief provided by § 47-25-1703, a complainant is entitled to recover damages for misappropriation except to the extent that defendant can show a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation and such renders a monetary recovery inequitable. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

Previous Issues:

- #1 - The general and legal concepts associated with Lost Profits.**
- #2 - The "Before and After" Method of calculating lost revenues.**
- #3 - The "Yardstick" (or "Benchmark") Method, Terms of the Contract Method and Use of the Defendant's Profits Method of calculating lost revenues.**
- #4 - Avoided Costs.**

(1) Excerpts from Weil, Lentz & Hoffman, Litigation Services Handbook, Fifth Edition, John Wiley & Sons, Inc., 2012.

(2) Tenn. Code Ann. §§ 47-25-1701 through 47-25-1709.

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