



Calculating Lost Profits in an Infringement Action: A CPA Can Help

Forget about, "Who moved my cheese?" In today's business world, a more likely refrain would be, "Who infringed on my recipe for cheese?"

If the Roquefort recipe in this case were considered intellectual property, the litigation could be extensive and the damages hefty.

Bricks and Mortar vs. Patents and Trademarks

There's good reason that trademarks, patents, copyrights and trade secrets are a huge area of litigation these days. Intellectual property — whether computer code or catchy trade dress — is truly where the value lies in American companies, not in the bricks and mortar. And when disputes arise over ownership or infringement, more and more attorneys are turning to experienced accounting professionals to help in the complex calculations needed to determine damages.

As the attorney in an intellectual property case, you have your work cut out for you: proving infringement — whether it's on a patent or trade secret — determining damages and sifting through mounds of complex financial documents (or learning which ones to request). In the end, you'll need to break down complex financial concepts into something a jury can understand.

As you'll see in the examples that follow, it may make good sense to add an accounting professional to your legal team.

“How Do We Determine Damages?”

Damages associated with a trademark infringement, for example, can vary widely, including:

- Lost profits from diverted sales
- Loss of price (price erosion)
- Injury to or loss of reputation
- Reasonable royalty
- Injury or loss of goodwill
- Cost of corrective advertising
- Disgorgement of infringer’s profits
- Additional costs to the trademark owner necessary to maintain its sales levels

In addition, damages can be trebled if bad faith is demonstrated. Likewise, willful misconduct or bad faith may result in payment of attorney’s fees and prejudgment interest (depending on the jurisdiction). A CPA can provide expert guidance on the damages to pursue.

“What Are the Rules?”

The rules for determining damages vary by circuit, and an experienced CPA can provide valuable guidance on which of the following is the proper approach:

- **Differential Cost/Marginal Cost Rule:** Deduction is only allowed for direct cost of production and no deduction is allowed for fixed costs or overhead.
- **Direct Assistance Rule:** All expenses that directly assisted the production and sale of a product can be deducted, including some items of overhead.
- **Fully Allocated Cost Rule:** All expenses properly allocable under generally accepted accounting principles are allowed.

“What Documents Do We Need?”

As you well know, the weather seldom varies during the discovery process: Your team is either buried under a blizzard of documents (and left to determine which, if any, are relevant to your case) or is left sorting through precious few documents in a drought of information.

Here, an experienced CPA can help ensure that you get the documents you need to calculate damages. A CPA knows what financial information should exist within a company and what should be provided during discovery. If opposing counsel is dragging its feet, your accountant can assist in

preparing affidavits to the court requesting the proper information.

“What Help Can I Expect?”

In addition to assisting in discovery and calculating damages, a qualified CPA can assist the legal team in a number of ways, including:

- Preparing computerized spreadsheets and models to calculate damages.
- Preparing a report with conclusions and a basis for those conclusions.
- Testifying both in depositions and in court.
- Attending depositions of opposing experts.
- Sitting through the other side’s testimony and providing cross-examination questions.
- Constructing exhibits that simplify complex financial issues for juries.

An accounting expert can play a critical role in proving damages, valuing business interests and supporting the liability argument. Please contact us for more information on how we can help.