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Business Torts Section
The Nuts and Bolts of Business Torts
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Business Tort:

Harm is done to an intangible asset such as economic interests or business relationships through:

1. Fraudulent Misrepresentation- a false or misleading statement of fact with the intent to deceive
2. Interference with Contractual Relations-Permits a plaintiff to recover damages based upon a claim that a defendant interfered with the plaintiff's contractual relations.
3. Interference with Prospective Business Advantage-Protects economic interests that have not yet been formalized into contract.

Intangible Asset Analysis:

Identification and quantification of economic damages related to breach of contract or intellectual property infringement

Economic analysis includes:

Estimation of the value of the intangible;
Estimation of the decrement in value of the intangible;
Amount of lost profits suffered by the owner of the intangible; and
Appropriate royalty rate or other fee associated with the continued use of the intangible.

Two methods for quantifying damages: 1. before and after; and 2. "but for" method.

1. Market value of a business or asset prior to the alleged damaging event
less Market value of the same business or asset after the alleged damaging event
= Economic damage to the business or asset due to the event.
2. Lost profits-Projection of *but for* profits compared to past and projected actual profits.

FOUR TYPES OF INTELLECTUAL ASSETS:

1. *Patents*
2. *Copyrights*
3. *Trademarks*
4. *Trade Secrets*

1. *Patents* - Grant of a property right by the Patent and Trademarks Office of the U.S. Department of Commerce - the right to exclude others from using it without permission from the patent holder. Patent holder has the right to sue in federal district court.

Damages-two categories: lost profits or royalties.

Lost profits due to:

- Price effects; and/or
- Loss of economies of scale.

Royalties – reasonable royalty (may be higher than commercially acceptable royalty).

2. *Copyrights* - Protect the expression of an idea. Registered with the Copyright Office of the Library of Congress. Applies to:
 - Literary works;
 - Musical works and sound recordings;
 - Artistic/pictorial works;
 - Pantomimes and choreographic works; and
 - Motion pictures.

Damages - Copyright Owner's lost profits and defendant's profits.

3. *Trademarks/Service marks* - Protect names associated with major brands. Registered with the Patent and Trademark Office.

Damages - Trademark Owner's lost profits or royalties and defendant's profits.

Damages due to lost sales, diminished future sales due to damage to reputation, costs of corrective advertising

The Lanham Act is a federal statute which governs trademark law. The Lanham Act can be found in Title 15 of the United States Code. The Act prohibits a number of activities, including trademark infringement, trademark dilution, and false advertising.

4. *Trade Secrets* - Have economic value and the owner has taken some measure to keep it secret. Cannot be used when acquired through improper means/misappropriation.
 - A. Compilations of data-customer lists;
 - B. Product of Experience-machine settings, drawings and manuals;
 - C. Formulas and Recipes; and
 - D. Research Findings and test results.

Damages - Trade secret owner's lost profits OR violator's gain.

COMPONENTS OF VALUE OR ECONOMIC DAMAGE:

1. *Life*
2. *Rate of Return*
3. *Economic Income*

1. *Life Estimates:*

Statutory
Contract
Judicial
Economic
Technological
Analytical

2. *Discount/Capitalization Rates:*

Current risk free rate
Current market risk
Size
Asset specific

3. *Economic Income:*

Revenue
Costs

ECONOMIC ANALYSIS EXAMPLES

Trademark -

Market approach

Assess the quality and nature of the trademark

Legal attributes - life

External Commercialization opportunities - expand geography, industry, product line

Active value - higher price, market share or profits

Passive value - protect price, market share or profits

TRADEMARK INFRINGEMENT:

MARKET APPROACH

ACTUAL REVENUE	100,000,000
REVENUE "BUT FOR" THE INFRINGEMENT	<u>120,000,000</u>
LOST REVENUE	20,000,000
MARKET DERIVED ROYALTY RATE	2%
ANNUAL ROYALTY	400,000
CAPITALIZATION RATE	15%
ECONOMIC DAMAGES	2,666,667

Trade Secret:

Cost approach.

MISAPPROPRIATION OF TRADE SECRET
COST APPROACH

HOURS	DRAFTSMEN	ENGINEERS	MANAGEMENT	
DRAWINGS	50,000	20,000	5,000	
DOCUMENTATION	10,000	5,000	1,000	
COST BASED ON HOURLY RATES				
DRAWINGS	1,000,000	1,000,000	500,000	2,500,000
DOCUMENTATION	200,000	250,000	100,000	550,000
	20	50	100	
TOTAL COST TO RECREATE				3,050,000

Patent -

Income approach.

Year	1	2	3	4	5	6
SALES						
VOLUME	10,000	50,000	100,000	100,000	100,000	100,000
PRICE	100	110	120	130	140	150
REVENUE	1,000,000	5,500,000	12,000,000	13,000,000	14,000,000	15,000,000
COST OF GOODS SOLD @30%	300,000	1,650,000	3,600,000	3,900,000	4,200,000	4,500,000
GROSS PROFIT	700,000	3,850,000	8,400,000	9,100,000	9,800,000	10,500,000
OVERHEAD	1,000,000	1,050,000	1,102,500	1,157,625	1,215,506	1,276,282
PRETAX INCOME	(300,000)	2,800,000	7,297,500	7,942,375	8,584,494	9,223,718
INCOME TAX	(120,000)	1,120,000	2,919,000	3,176,950	3,433,798	3,689,487
NET INCOME	(180,000)	1,680,000	4,378,500	4,765,425	5,150,696	5,534,231
NONCASH ITEMS	500,000	500,000	500,000	500,000	500,000	500,000
CAPITAL EXPENDITURES	(5,000,000)					
CAPITAL CHARGE ON TANGIBLE ASSI	(1,000,000)	(1,000,000)	(1,000,000)	(1,000,000)	(1,000,000)	(1,000,000)
ECONOMIC INCOME	(5,680,000)	1,180,000	3,878,500	4,265,425	4,650,696	5,034,231
PRESENT VALUE FACTOR @ 30%	(0.77)	(0.59)	(0.46)	(0.35)	(0.27)	(0.21)
ECONOMIC DAMAGE	(4,369,231)	698,225	1,765,362	1,493,444	1,252,568	1,042,973
TOTAL	1,883,340					

Reference Sources:

Insights, Willamette Management Associates, Oregon, “Special Issue 2004,” “Special Issue 2003,” and “Summer 2002.”

Gaughan, Patrick A. *Measuring Business Interruption Losses*. New Jersey, John Wiley & Sons, Inc., 2004.

Smith, Gordon V. and Parr, Russell L. *Valuation of Intellectual Property and Intangible Assets*. Third Edition. New Jersey, John Wiley & Sons, Inc., 2004.

Smith, Gordon V. and Parr, Russell L. *Valuation of Intellectual Property and Intangible Assets*. Third Edition. 2004 Cumulative Supplement. New Jersey, John Wiley & Sons, Inc., 2004, paperback.

Reilly, Robert F. and Schweihs, Robert P. *Valuing Intangible Assets*. New York, McGraw-Hill, 1999.

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