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The Betterley Report

Intellectual Property and Media Liability

Insurance Market Survey – 2010

The Convergence of IP and Media Products

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Highlights of This Issue

- *The Convergence of Intellectual Property and Media Liability Coverage Creates New Market Opportunities*
- *ThinkRisk Takes a New Approach to IP and Media*
- *Intellectual Property Patent Cover from Chartis*
- *Media Liability Products for Non-Media Companies*

Next Issue
June 2010
Cyber Risk and Privacy Insurance Market Survey

Editor's Note: *This issue of The Betterley Report takes a new approach to our review of the insurance products available to protect against Intellectual Property (IP) loss, an interesting and highly-specialized type of coverage. While we find the product fascinating (and apparently so do many of our readers, who identify it as one of their most useful Reports), we have wondered about how effectively we can cover it, as there are just a handful of IP coverage sources worldwide.*

When we last covered the IP (2008) line, we found only four sources of coverage, a sharp decline from the seven only two years earlier. Mainstream carriers were no longer offering coverage, those sources that did offer coverage were not enthused about U.S.-based insureds, and there was little change in those products that remained.

Still, the interest in IP coverage was apparent, and we were reluctant to stop writing about it.

As I thought about the dilemma, I decided to broaden our approach to include other coverages that have an IP component. We have always thought about IP coverage as necessarily including patent infringement, and indeed the few sources of IP insurance tend to include patent. However, IP risk (and potential coverage) includes much more than patent; it can also include coverages such as trademark or copyright infringement, defamation, false light, product disparagement, Reps and Warranties, Asset Backed IP, and Consequential Damages.

Since many of these coverages can be found in a Media Liability policy, our Report will cover both Intellectual Property (IP) insurance and Media Liability (Media) insurance. While Media Liability insurance includes intellectual property risks, it is not Intellectual Property insurance as the term is commonly used.

To try to keep things straight in this Report, we will use the following terms:

- IP insurance to describe those coverages that protect an organization against a threat to its own IP (generally known as abatement or enforcement coverage) or an allegation that it infringed upon the rights of another.
- Media insurance to describe liability coverage against allegations arising out of communications activities of the organization.

This article is based on our review of leading carriers and their products. As with our other Market Surveys, we asked each of the participants to provide detailed information about their products and market interest. When we felt that their responses were incomplete or confusing, we followed up to clarify their response. While we have asked the carriers to review our tables, the conclusions are our own, and the carriers are not responsible for the information contained herein.

In the use of this material, the reader should understand that the information applies to the stan-

List of Tables

dard products of the carriers, and that special arrangements of coverage, cost, and other variables may be available on a negotiated basis. Professional counsel should be sought before any action or decision is made in the use of this information.

For updated information on this and other Betterley Report coverage of specialty insurance products, please see our blog, The Betterley Report on Specialty Insurance Products, which can be found at: **www.betterley.com/blog**.

Introduction

Intellectual property (IP) continues to be a prime asset of many organizations, not only corporations. IP is not just important for large companies; many smaller companies possess as their primary assets the knowledge and skills needed to make their product or provide their services. These companies can be particularly vulnerable to attacks on their IP, as larger, more established (read: deeper pockets) competitors seek to eliminate them. Protecting their company's IP may be their most important responsibility, and the difference between success and failure.

Protecting one's own Intellectual Property isn't our only concern, though, as protecting against accusations that an organization violated the IP of another party is at least as important. U.S. courts are busy hearing cases about alleged copyright or trademark infringement, misappropriation, and defamation or emotional distress.

We pose here the idea that media liability is no longer the concern of just traditional media companies. With the spread of the Web, social networking, and the need to stand out in a crowded and noisy economy, we are all media companies (or, more accurately, engage in activities once thought to be the exclusive presence of the traditional media).

After all, what organization doesn't have a Web presence, employees active on blogs (whether approved or not), or publish a newsletter? Who hasn't read that its intellectual property is one of its most valuable assets? Who hasn't been cautioned that borrowing the ideas or images of another is no longer permissible, and possibly the trigger for an expensive and embarrassing lawsuit?

Chubb asks the question: "If your organization isn't in the publishing or broadcasting business, why should it worry about its media risk?" then answers it by pointing that any organization that "…gathers and disseminates information…faces the same litany of media liability exposures as a publisher, broadcaster, or any other media organization." (source: Chubb MediaGuard promotional material for traditional organizations).

A good question – and a good answer.

We see this increasing risk arising from a media presence as creating more need for media liability coverages to be made available to the traditional insured that is not customarily thought of as needing media liability insurance. Apparently carriers agree, as they extend their coverage offering more widely into the marketplace.

The IP Insurance Market

Insurance against IP loss continues to be important for smaller and midsized companies with a limited ability to sustain loss. Coverage, if offered, is the province of highly specialized sources such as Lloyd's and Gotham Insurance (owned by NYMAGIC), with two exceptions:

- Chartis provides patent infringement indemnity coverage for insureds domiciled in the U.S. This is the only large carrier that we know of participating broadly in the IP insurance market, and represents a return of a carrier that was a major player in earlier versions of the coverage.

- ThinkRisk (Great American) offers coverage for infringement of design patent for the aesthetic design of products

The challenges in underwriting IP insurance have made this coverage more difficult to acquire than in the first half of the decade. Still, the need to protect against losses arising out of intellectual property remains.

Bob Parisi, the National Practice Leader for Tech/Telecom E&O and Network Risk at insurance broker Marsh showed real insight when he told us: *"Whoever figures out how to sell truly broad patent liability coverage at a reasonable price will have more business than they know what to do with."*

Most IP carriers are focused on smaller insureds; although the IP market has limited capacity, there are meaningful limits worth considering.

Improperly using the IP of another company can get expensive fast. A company that infringes, or is even alleged to have infringed, on the IP of a competitor is likely to be threatened with lawsuits that are at best expensive to defend. Data are hard to find about the costs of defending an allegation of patent infringement, but attorney's fees and related costs can easily reach seven figures (or more).

Attorney Richard Margiano of Cohen Pontani Liebrman & Pavane, LLP estimates on the Managing IP website that the average patent litigation lasts about two years and costs about $3 million. An appeal can add another year and $2 million to that amount.

(www.managingip.com/Article/2089405/Cost-and-duration-of-patent-litigation.html)

The American Intellectual Property Law Association in Arlington, VA produces a valuable report on the estimated total cost of patent infringement litigation. This total includes the estimate of the litigation costs (*i.e.*, attorneys, defense-related expenses, analytical testing) in three different bands of potential damages (*i.e.*, the claimed loss from the past infringement combined with the projected loss should the infringement continue).

This report does not indicate how much of the cost was incurred by the defendant, but it does give us a sense of the magnitude of the issues involved.

According to the most recent AIPLA *Report of the Economic Survey* 2009, the median cost of patent litigation was:

- For cases with estimated damages of less than $1 million, the median cost of litigation was $650,000

- For cases with estimated damages between $1 million and $25 million, $2.5 million

- For cases with estimated damages above $25 million, $5.5. million

Even if the defendant is "right," it can be put out of business just by the cost of litigation, and the fear of investors or customers that it may not win. The need to defend an alleged infringement can distract management's attention, and dissuade investors. Even a successful defense can result in business failure. Many well-entrenched companies will attempt to defeat new competitors by challenging their patents; rather than compete in the marketplace, they are competing in court.

An alleged infringer has few options:

- Abandon its IP rights
- Negotiate a license from a position of weakness

- Defend the suit

Patent holders are not the only potential targets of patent infringement lawsuits. Retailers, distributors, and others that contribute to the alleged infringement can be – and often are – sued as participants in the stream of commerce.

IP can be a tough sell for insurance brokers, as the perceived need for IP protection is often challenged by IP lawyers, who may view the involvement of insurance companies in a previously uninsured realm to be restrictive and possibly intrusive. This is unfortunate, since carriers generally are very supportive of their insured's choice of counsel. IP is an extremely specialized area of the law, and the carriers recognize that legal counsel will be expensive.

Need for Specialized IP Coverage

Typical commercial insurance programs (even sophisticated ones) do not cover IP claims. Although some would argue that Advertising Liability provides some coverage, insurance companies believe that they do not cover IP. Thus, an insured, at best, has a difficult time in settling a claim, which is especially damaging for smaller insureds.

Most court cases involving IP coverage in a Commercial General Liability (CGL) policy have ended in victory for the carrier. Most Advertising Liability coverages are written to narrowly focus coverage on actual advertising activity; even piracy coverage only applies when it is committed in the course of advertising products or services.

Since alleged infringement can occur in many situations not involving advertising, it is apparent that a CGL policy, even with advertising liability coverage, is an ineffective source of coverage.

Another problem with commercial liability coverage is that an infringement can be construed as an intentional act, quickly denied by the GL carrier. Look for intentional acts coverage in an IP policy, with coverage provided at least until the intent is established in fact.

The Media Liability Insurance Market

In contrast to the IP insurance market, media coverage can be bought from numerous carriers, some of which offer products attuned to non-media organizations.

Media Liability coverage is typically written on specialized forms for various industry segments (such as producers, advertising agencies, publishers, and the like) but coverage for 'the rest of us' is also offered.

For example, Chubb offers its MediaGuard[sm] product to traditional organizations, as well as video and film producers, broadcasters, publishers, and advertising organizations and advertisers.

Most products are written on an occurrence basis, which surprises us, as most specialty liability products are claims made.

Media policies can be extended by adding coverages such as defined professional services and technology professional services, technology products, computer and information security liability, and privacy liability, but on a claims made basis.

ThinkRisk's new Converging Risk Liability product is a melding of IP coverage and media liability protection, offering a modular form, with coverage for media and advertising content, tech and miscellaneous E&O, and network security and privacy (first and third party). The content module covers IP claims, such as copyright and trademark infringement and misappropriation of ideas, but excludes infringement of utility patent. Infringement of design patent is available for the aesthetic design of products. Software is treated as media content.

Many brokers have not had an opportunity to develop expertise in media coverages, as the type of insureds may be few and far between in their community. However, as the media business (both traditional and new media) grows beyond the traditional media hubs, we expect to see more local and regional brokers needing to develop expertise in this line.

Carriers active in the media market are supporting the growth of this segment expertise, augmenting the efforts of those brokers to service their existing insureds that have new media risks.

STATE OF THE MARKETS

CARRIERS AND COVERAGES - IP

In 2010, we see that IP coverage continues to be a challenge to underwrite profitably. Significant losses have occurred, we understand. Losses are primarily a severity problem, rather than frequency driven.

The U.S. market is particularly difficult for IP insurers, because of the high frequency and cost of litigation. Note that not all products can be written for U.S. insureds (please see the Product Description and Target Markets tables for specifics, as sometimes a non-U.S. company with U.S. exposure can still be underwritten).

Real limits available have grown somewhat since our last Report; defense policy limits of up to $25 million are reported, and First-party limits of $40 million have been placed. Not easily, though.

The IP insurance market currently offers three basic types of IP policies:

- First-party IP coverage, which can protect the value of an insured's direct loss sustained when its revenue streams are diminished from a direct and resultant impact upon its IP rights. Similar to a Business Interruption cover.
- IP Defense Cost (so-called "Defense" coverage), which protects a company against allegations that it improperly used the IP of another.
- IP Abatement Coverage (so-called "Offense" or "Enforcement" coverage), which funds an attack on a party that improperly uses the insured's IP.

IP Abatement coverage is available from three of the five markets (not Chartis or Kiln). Since Abatement coverage is only attractive to a limited market, most carriers may view it as a niche product line and outside their interest. It strikes us that this is a product that requires very specialized underwriting, and will always be a niche product, but a useful one nevertheless.

When considering which carrier to use, keep in mind that each product is unique, so coverage terms should be the deciding point. However, also keep in mind that IP is a very complex product to underwrite, requiring great skill and knowledge of IP law and business.

VOLUME - IP

The amount of IP premium written is still small, although carriers are reluctant to tell us exactly how much they write. In fact, carriers will not even tell us about changes in their volume; we suspect that the market is growing somewhat, as the fear of litigation encourages additional coverage purchases (despite the severe recession).

To the extent there is growth, it continues to be in Defense products. This coverage is likely to be more familiar, and thus easier to underwrite, than Enforcement and First-party coverage. Certainly, legal counsel is generally more concerned with defending against major claims, less interested in funding a pursuit of infringers.

However, First Party can be a very valuable coverage that could be extremely attractive to many companies. If Kiln can continue to grow this product, especially adding to its capacity, we predict good things for both them and their prospective insureds.

One reason for the growth in Defense coverage is the perception by senior management and investors that smaller companies are very vulnerable to larger competitors that use the legal system to defeat (or cripple) them. Without adequate financial and management resources, court battles over IP rights can tie up and destroy a company. Wise investors, particularly in technology startups, make sure that their companies have the wherewithal to defend against IP attacks. Defense IP coverage is a good way to fund a defense against such attacks.

Having said this, there is still interest in Enforcement coverage, and we expect it will continue to grow.

CLAIMS EXPERIENCE - IP

There is little data in the public domain about claims experience, and with relatively small amounts of premium being written, loss ratios are not meaningful.

Most of our claims information is anecdotal; there have been a number of insured claims, and some of them are significant ($1 million +). We will try to gather additional information for future studies.

In the Enforcement coverage side, there has been some limited claims activity. Since this is a very specialized product, we would not expect many claims.

CARRIERS AND COVERAGES - MEDIA

Media liability coverages are available from a number of leading carriers. As noted, it is generally written on an occurrence basis, but claims made is also found. The following general areas of coverage are common (this paraphrased from the Chartis product description):

For **producers** of multimedia content:

- Defense costs, settlements and judgments in the broad range of E&O and media liability claims arising out of professional film and production services.
- Preparation, publication, advertising, release, broadcast, telecast, exhibition, sale, licensing or distribution of named productions.
- Protection for numerous perils, including trademark infringement; copyright infringement, defamation; false light; product disparagement; infliction of emotional distress; and invasion of privacy.
- Damages include punitive, exemplary and multiple damages to the extent permitted by law.

For **content distributors**:

- Responds to claims arising out of all media distributed by the Insured, including advertising materials. No list of covered media is required.
- Protection for numerous perils, including trademark infringement; copyright infringement, defamation; false light; false imprisonment; product disparagement; infliction of emotional distress; negligence in the quality of material; loss based on the reliance on material; outrageous conduct; and invasion of privacy.
- Damages include punitive, exemplary and multiple damages to the extent permitted by law.

For **publishers and broadcasters**:

In addition to the above coverages:

- Coverage for the media exposures of publishing and broadcasting companies, from risks related to news reports and podcasts to content fed via wireless devices.

VOLUME – MEDIA

Unlike IP, there is a fair amount of media liability insurance sold, although far less than in some other specialty lines. We have heard estimates of $200 million in the U.S., perhaps another $50 million non-U.S. (which we understand is mostly in the United Kingdom).

We suspect that much of the media market is untapped risk, self-assumed by large organizations that can afford to self-insure, or ignored by small organizations that don't think they are exposed.

The market opportunity would seem to be in selling to those non-traditional publishers that are active on the Web. The Hartford, as an example, promotes their products heavily toward the Web 2.0 and related Social Media/Blogging Exposures.

CLAIMS EXPERIENCE - MEDIA

We have heard of some very large media liability claims, but generally that there is not a lot of frequency in this area. The big risk is a media battle over a reporter's confidential sources or a dispute over inappropriate use of content alleged to be owned by another.

POLICY CONSIDERATIONS - IP

Unless noted, the balance of our comments relate to Defense or Enforcement products (that is, not First Party) for IP products.

WHO IS COVERED

Keeping in mind that there are two types of coverage (Enforcement and Defense), most policies cover the usual insureds:

- Corporate Entity
- Directors
- Officers
- Stockholders
- Employees

Other parties, such as distributors, can be named in suits, so it is important to identify them if you wish to extend Defense coverage.

WHAT IS COVERED

Enforcement Coverage

Enforcement policies typically cover the cost of attacking a third-party infringer, including:

- IP infringement suits brought by the insured against third parties for infringement initiated during the policy period
- The cost to defend against countersuits alleging that the insured's patent is invalid
- Costs to reexamine the insured's patent in the Patent Office, if the defendant tries to invalidate the patent
- Costs to reissue the patent, if required to strengthen the claim

Defense Coverage

This more traditional coverage protects the insured against allegations that it has infringed upon the IP of another. Coverage usually includes:

- Defense costs

- Settlements, judgments and other expenses, including prejudgment interest

Judgments and settlements might include compensation for a claimant's lost profits or royalties, and arise out of manufacture, use, distribution, advertising, or sale of an infringing product or process.

Summary

Why isn't more Intellectual Property insurance bought? Frankly, we are puzzled. The business press is full of stories about IP litigation, and there are enough big cases and awards that surely senior management, directors, and investors must be concerned. And they are – but this concern often does not extend to buying insurance protection.

Is it because the limits of coverage available aren't high enough to protect large companies against a catastrophic loss? Because negotiating coverage is cumbersome (carriers are understandably cautious about insuring IP risk)? Because IP counsel does not think insurance is necessary (or does not want to lose control over litigation to an insurance company? Coverage isn't seen as necessary because our IP rights are strong? Or is the coverage just not well known?

We're not sure, but we think it may be a combination of all five. Hopefully IP insurance will become more regularly considered a part of an insured's basic insurance protection, leading to a market that is broad, reasonably priced, and able to withstand an occasional large hit. It may take a while for this to come about; we continue to watch with anticipation.

Media Liability products have a much more certain future, perhaps because the insurance industry has a deeper underwriting and claims experience. The IP liability world is much newer and the rules of engagement are still being defined. The value of the issues being litigated is much greater, even compared with the very big cases we sometimes see in media litigation.

We'll keep an eye on Intellectual Property and Media Liability insurance as both coverages become more commonly purchased.

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About The Author

Richard S. Betterley, CMC, is the President of Betterley Risk Consultants, an independent insurance and alternative risk management consulting firm. BRC, founded in 1932, provides independent advice and counsel on insurable risk, coverage, alternatives to traditional insurance, and related services to corporations, educational institutions, and other organizations throughout the U.S. It does not sell insurance or related services.

Rick is a frequent speaker, author, and expert witness on specialty insurance products and related services. He is a member of the Professional Liability Underwriting Society and the Institute of Management Consultants. He joined the firm in 1975.

Rick created The Betterley Report in 1994 to be the objective source of information about specialty insurance products. Now published 6 times annually, The Betterley Report is known for its in-depth coverage of Management Liability, Cyber Risk, Privacy, and Intellectual Property and Media insurance products.

More recently, Rick created The Betterley Report Blog on Specialty Insurance Products, which offers readers updates on and insight into insurance products such as those covered in The Betterley Report. It provides him with a platform to more frequently and informally comment on product updates and newly announced products, as well as trends in the specialty insurance industry. www.betterley.com/blog

The Betterley Report

The Betterley Report, your independent guide to specialty insurance products, is a series of six comprehensive Reports published annually. Each Report exhaustively reviews a single hot specialty insurance product, providing essential information such as:

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