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The Betterley Report

Intellectual Property and Media Liability Insurance Market Survey – 2013

A New Approach to Patent Infringement Coverage

Media Liability Products Continue to Attract Broader Attention

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Highlights of This Issue

- *No New Carriers Added to Intellectual Property Section, but We Comment on the RPX Approach*
- *Euclid Added to Our Media Liability Coverage*
- *An Interview with Bob Fletcher of Intellectual Property Insurance Services*

Next Issue

June 2013

Cyber and Privacy Insurance Market Survey

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Editor's Note: *This issue of The Betterley Report continues our 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 line in 2012, we found only four sources of Patent Infringement coverage, a decline from the peak of six in 2006. Most 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 is apparent, and we will continue writing about it. These four carriers continue to offer IP coverage, and a hybrid, ThinkRisk, could be considered a fifth market for limited Patent Infringement coverage.

There is a new product available for patent infringement liability using a Risk Retention Group model. More on this a bit later in the article.

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 now covers 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.

Our 2012 Media Liability coverage included ten carriers; we have added Euclid to our survey for 2013.

To try to keep things organized 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.

List of Tables

- 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 standard 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) is 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?

We continue to see a number of insureds and their insurance brokers looking at coverage for

Companies in This Survey

The full report includes a list of 17 markets for this coverage, along with underwriter contact information, and gives you a detailed analysis of distinctive features of each carrier's offerings. Learn more about *The Betterley Report*, and subscribe on IRMI.com.

media liabilities arising out of social media activities. As organizations increasingly seek to reach their existing audience, build a new audience, and learn about their marketplace, social media activities are becoming more and more of a source of risk.

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.

Interestingly, we are seeing other types of insurance adding media liability coverages to their core product - Cyber and Tech E&O policies in particular. Will there be an ultimate convergence of IP, Media, and Cyber insurance coverages into one big New Era Exposures product? Certainly that is the trend, as carriers extend their specialty lines capabilities to other industry verticals.

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 Liberty International, with two exceptions:

- AIG 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 (Aspen) can extend coverage to include intellectual property right claims arising out of the design of tangible products, including copyright and trademark infringement, as well as patent infringement tied solely to 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.

We did a quick survey of the reasons why Patent Infringement insurance has such a low penetration rate. One response that struck us was that buying Patent Infringement seemed complex, time consuming, and at the end, frustrating to potential insureds and their agents or brokers. Patent coverage and IP insurance in general, won't be widely bought until this hurdle is overcome. Despite the laudable marketing efforts of companies such as Intellectual Property Insurance Services Corp. (led by Bob Fletcher, IPISC's founder and the originator of the first ever Intellectual Property Infringement Abatement policy), IP insurance is still a challenge for agents and brokers.

Bob Fletcher has offered some insight into market demand in the interview that appears following this article.

But, there is huge potential in this market; we agree with Bob Parisi, the National Practice Leader for Tech/Telecom E&O and Network Risk at insurance broker Marsh 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.*"

The relatively low limits of IP insurance available are a continuing challenge for the market, as many potential insureds see these as not enough to really protect them against IP risk. 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).

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. Unfortunately it was not updated for 2012, but we think the information is still valuable.

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.

A novel approach is presented by RPX, the well-known patent aggregator. They have formed RPX Risk Retention Group, which offers patent infringement coverage. The RRG is managed by RPX Insurance Services, and is domiciled in Ha-

AIPLA 2011 Report of the Economic Survey

Litigation Type	Amount in Controversy	Costs Through End of Discovery	Costs Through End of Trial
Patent	Under $1 million $1-25 million Over $25 million	$490,000 $1.6M $3.6M	$916,000 $2.8M $6M
Trademark		$214,000 $607,000 $1.2M	$402,000 $1M $2.2M
Copyright		$216,000 $543,000 $1.22M	$384,000 $923,000 $2M
Trade Secret Misappropriation		$303,000 $877,000 $1.9M	$521,000 $1.6M $3.2M

This survey is available from the AIPLA at:
http://www.aipla.org/learningcenter/library/books/econsurvey/2011/Pages/default.aspx

waii.

Coverage is only offered to RPX client companies, and only on a direct basis, although Aon has a referral relationship with the RRG.

Coverage limits of up to $5 million are available, with self-insured retentions ranging from $50,000 to $500,000. It primarily covers defense costs, but can also cover costs associated with re-examinations and declaratory judgments.

Insureds are operating companies and coverage applies to patent infringement suits brought by Non-practicing Entities in U.S. federal district court.

Panel counsel is required.

Their website, which provides a thorough explanation of their approach, can be found here: http://www.rpxinsurance.com/.

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.

Media policies can be extended by adding coverages such as defined professional services and technology professional services, technology products, computer and information security lia-

bility, and privacy liability, but on a claims made basis.

ThinkRisk's 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.

Not many brokers have 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.

Social media risk has really caught the attention of employers, particularly as it pertains to employment liability (which we write about in our December issue on Employment Practices Liability Insurance). They are concerned that employees might post harmful remarks about their employer's customers, fellow employees, and the company itself. Or, they could use IP of another without authorization. The list goes on.

Insurance agents and brokers sometimes get confused that Internet activity is the subject of Cyber insurance products. While that assumption is faulty, Cyber (and other) products can be broadened to include social media exposures. Other examples include Tech E&O.

This expansion of Media Liability coverages into other products creates real opportunity for insurers to penetrate non-traditional media markets with coverages that are added onto coverages already being sold to their insureds. Those insureds might well be less likely to incur a media liability claim than the traditional media.

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 2013, 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 are similar to what we reported last year; 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 only two markets – IPISC and Samian. 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.

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 AIG 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 $300 - 500 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. What we haven't figured out is whether this growth will occur within the Media Liability coverage line or under something else, such as Cyber.

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 expansion of Media Liability products to Cyber, Tech E&O, Management Liability, and package policies presents a great opportunity to provide protection where it wasn't provided before.

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. Too, organizations can see that their employees are active in social media.

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

An Interview with Bob Fletcher, President of Intellectual Property Insurance Services

Q: Bob, please tell us how you became interested in Intellectual Property insurance?

A: Actually my interest in IP insurance happened by default. When I was with the investment banking firm of Hilliard Lyons in the late 1980's we were actively soliciting patents to license and were frequently denied because their owners felt the patents were too valuable to let go of, so we concluded, if they were so valuable they could be/should be insurable.

Early on I gained an appreciation for the considerable value of IP and realized how quickly, and frequently, companies are forced to go out of business or to accept disadvantageous licensing terms at great detriment to their long-term profitability because they were unable to afford to enforce their intellectual property (IP), or, to defend their products against charges of IP infringement. When we observed that patents were a "ticket to the courtroom" we created patent enforcement insurance to pay the litigation expenses. Defense insurance followed along later as the mirror image of enforcement insurance but with additional coverage for damages in the event of a loss.

Q: Can you tell us about the history of IP insurance?

A: The very first IP insurance in the U.S was written in the late 70's that paid the out - of - pocket costs for insureds that were working with contingent fee lawyers. It met with little success and was later replaced with IP enforcement policies that provided funds to enable IP owners to litigate to enforce their patent, copyright and/or trademark rights against infringers.

The second coverage was the result of successful litigation against general liability (GL) policy issuers, with the policy holder seeking indemnification under the advertising injury provisions for litigation expenses in an infringement allegation. As the GL policy issuers began to exclude IP defense insurance, standalone policies were developed.

The next policy was an unauthorized disclosure policy which protects trade secrets. Additionally, a first-party coverage was developed which paid the losing party its lost profits. This new IP insurance product, multi-peril, is a first-party coverage for monetary losses caused by various adverse happenings to IP or as a result of an IP lawsuit. The MPIP Insurance provides reimbursement of monetary losses:

1) Arising from Business Interruption caused by a Preliminary or permanent Injunction with respect to the Named Insured's Manufactured Products; or, Business Interruption caused by a Loss of Civil Proceeding, which validates a third party plaintiff's IP resulting in a Loss/Cost to the Named Insured.
2) Loss of Commercial Advantage caused by a Loss of a Civil Proceeding by a third party from whom the Named Insured is receiving compensation, resulting in a loss or increased cost to the Named Insured
3) Cost of Redesign, Remediation and Reparation caused by a Loss of a Civil Proceeding finding Infringement by the Named Insured's products resulting in a loss/cost to the Named Insured.

The latest introduction is an IP policy which covers commercial risk as well as legal risk. It originated because Intellectual property being an intangible asset is not thought of as being destructible in the conventional sense. Consequently, IP was not thought of as being the subject of gen-

erally known forms of insurance. Moreover, accountants have long been perplexed by the need to value IP for purposes of reflecting its worth on the corporate books, further frustrating attempts at traditional insurance coverage. Conventional thinking led to the conclusion that without knowing its value it was impossible, or at least impractical, to insure the absolute value of IP.

However with proper valuation techniques it is now possible to issue a policy (Asset Backed IP Insurance) which permits the use of IP as collateral for loans or other securitizations. The Asset Backed Intellectual Property Insurance policy reimburses the lender (as distinguished from IP owner) for the outstanding loan balance under circumstances where the lender has loaned against Intellectual Property as collateral, and a foreclosure sale results in a shortfall.

This coverage permits companies to borrow money against their Intellectual Property as opposed to being forced to go to the Venture Capital Market for mezzanine financing. A loan at this stage of a company's development is particularly attractive since early Venture Capital financing usually requires the divestiture of a very significant ownership position which later could be sold for a much greater amount of money. This new Intellectual Property Insurance permits Intellectual Property owners to work with insurance companies and financial institutions to truly use their Intellectual Property assets as financial tools.

Q: How has the coverage evolved over that time?

A: There has definitely has been an increase in demand and submissions for both enforcement and defense IP insurance. The increase is being driven by 2 important trends:

- The importance of Intellectual Property in the economy and
- The fact that the consumers, the insurance industry and IP law professionals are becoming better educated regarding the shortcomings of other insurance policies. Commercial general liability, professional liability and director's and officer's policies do not provide sufficient coverage for a very valuable asset, intellectual property.

Q: Which types of IP insurance attract the most interest – and from whom?

A: The enforcement-type policy tends to generate interest among those that focus on the plight of the small inventor. Many academics and politicians tend to covet the idea of enforcement insurance yet are somewhat skeptical of the insurance industry. The real consumers of enforcement insurance are of course small inventors that cannot afford the cost of litigation. They are very cost conscious and tend to summarily dismiss the insurance as too expensive before investigating it further.

Although the small inventor needs the policy the most he is ripe to be "ripped off" before he has proved the invention works, can be scaled up to production levels and can be sold. The perpetrators behind such a scenario have been labeled "grass-hoppers" (a term coined by Chief Judge Randall Rader of the U.S. CAFC), which refers to entities that leap in and practice an invention, knowing that the patent holder can do nothing about it. The Enforcement policy provides the means to enforce IP rights against such infringers.

The IP Defense policy has quickly become in high demand, and continues to be so. This demand is due in large part to the indemnification requirements for IP coverage in contracts and mergers and acquisitions as well as the soaring costs associated with defending against IP infringement

claims and the potential associated damages. In recent years, the infringement scenario has been worsened by a common problem, the much-publicized Non-Producing Entities (NPEs, a.k.a. "Patent Trolls,") who are notorious for suing companies for the sole purpose of extracting royalties, frequently irrespective of their lawsuit's merit. A Defense insurance policy specific to cover IP risk is the only viable solution.

Start-ups & small companies many times have a single or few issued patents that cover a product or a service constituting a major portion of their income. These companies need IP insurance to protect their market share and deter exuberant or frivolous infringement charges. An IP policy also enables them to fill contractual IP indemnification obligations and to ensure funds will be available in the event of IP litigation against their customers.

Mid-sized companies many times do not have issued patents on all of their products and services, but manufacture a multiplicity of products and/or perform several services. Generally, they use insurance as a means to transfer their insurable IP risks to avoid depleting working capital needed to support ever-expanding operations. These companies also need insurance to deter exuberant or frivolous infringement charges and fill contractual IP indemnification obligations. They are likely to purchase both enforcement and defense/damages policies. Large companies generally only purchase high-limit, high self-insured retention, damages coverage to thwart unforeseen large losses.

Q: What does the IP legal profession think of insurance for IP?

A: Over the past couple of years, we have seen a changing attitude regarding the promotion of IP insurance to attorney's clients, as they have begun to realize that it is in their best interest to advise their clients about the presence of IP insurance. We believe that IP attorneys are an important source of new business. IP attorneys not only see an adequate budget for litigation should their client need to file a claim to enforce or defend against accusations of infringement, but they also see potential business resulting from the need for patent validity studies, patent searches, etc.

Q: Many specialty insurance products become mainstream over time, with many carriers offering the product; why hasn't IP insurance been offered by more insurers?

A: These products are specialized and complex to underwrite. To be able to successfully underwrite the IP risk the carrier must have developed procedures and methods of underwriting which include application forms, policy endorsements, confidential rating manuals, copyrighted policy language and a myriad of other form letters and communications.

In addition, each carrier must develop its own rating manuals, which are particularly important because they facilitate evaluation of risk categories and risk factors within each category for each type of coverage based upon questions that have proven to be statistically significant. They need pricing models that benefit from historical loss experiences and which are adjusted for trend and moral hazard. Without these a carrier cannot comfortably offer coverage.

Also, to successfully maintain an IP insurance program, insurance companies need to have an understanding of the litigation management of IP claims, which is crucial to promoting efficient and effective claims resolution. Intellectual property infringement is quite unlike other casualties such as fire, life, auto and health, since it is very difficult to know when the named peril of infringement will occur. This is because it is an event that in some measure is controlled by human beings, therefore involving some level of intent which creates a significant moral hazard. The develop-

ment of claims management protocols and the associated methods and procedures are an important part of the successful management of an intellectual property program.

In short the mainstream carriers simply don't have the background knowledge and statistics to be able to competitively underwrite IP risks.

Q: What do you think are the biggest challenges for IP insurance?

A: There are three challenges to getting IP insurance to be a widespread means of risk transfer. The first is to get IP attorneys to acknowledge the existence of the IP insurance market and the value of the coverage to their clients. An important part of this challenge is to educate the market that prices, limits and restrictions are continuously becoming more favorable to the insureds.

The second challenge is to incentivize the insurance brokers and agents to learn about and actively become involved in selling IP insurance. It covers the most abundant and valuable products in our economy - "the products of the mind."

Lastly, the insurance companies need to take the time to recruit the talent needed by them to enable them to understand the risks rather than rely upon knee-jerk pricing which deters the affordable use of insurance as a risk transfer mechanism. However, prices have come down significantly and limits likewise have gone up dramatically but more capacity is needed in the marketplace.

Q: What does the future of IP insurance look like?

A: A March 2012 study by the Economic Security Administration reported that IP-intensive industries directly support at least 27.1 million jobs, and indirectly support an additional 12.9 million. These industries contribute more than $5 trillion to the U.S. GDP, comprising 35% of the U.S. economy, making IP an important part of the continuing U.S. prosperity. Companies plan on, and expect to pay for, experimentation, prototyping, product development, patent drafting and prosecution. Therefore, IP infringement insurance is quickly becoming the most logical and economical choice that a company can make to ensure that the means are available to fund the high cost and consequences of defending current operations and enforcing IP.

We will continue to see an increase in demand and submissions for both enforcement and defense IP insurance. The increase in demand for insurance is being driven by the fact that consumers, the insurance industry, and IP law professionals are becoming better educated regarding the shortcomings of other insurance policies, in that commercial general liability, professional liability and the director's and officer's policies do not provide sufficient coverage for a very valuable asset, intellectual property. Patent trolls have actually driven more entities toward patent insurance as the prospect of being sued for infringement, especially in regard to software, has become much more of a possibility. Other ill-fated attempts at IP risk transfer such as patent license pools and IP defense associations have served to underscore the need for IP insurance without creating serious competition for the industry.

Thank you, Bob. I've always admired your dedication to Intellectual Property insurance and enjoyed learning about your experiences.

* * *

Mr. Fletcher is the President and Founder of Intellectual Property Insurance Services Corporation (IPISC), the worldwide leading provider of Intellectual Property (IP) insurance. Under Mr.

Fletcher's direction, IPISC serves as the Program Manager for IP insurance risks.

In addition to founding IPISC, Mr. Fletcher has more than 40 years of experience as a patent attorney, and played a lead role in conceiving and developing IP infringement Abatement insurance.

He holds degrees in Chemical Engineering and Law from the University of Wisconsin and an MBA from the University of Louisville. He is a member of the State Bars of Wisconsin, Illinois and Kentucky, and is admitted to practice before the U.S. Patent and Trademark Office.

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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

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