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THE BETTERLEY REPORT

INTELLECTUAL PROPERTY AND MEDIA LIABILITY INSURANCE MARKET SURVEY—2016

Continuing Interest in Patent Infringement Coverage and Increase in Capacity

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Highlights of this Issue

- Few Insurers Offer Intellectual Property Coverage, but Demand Is Growing
- RPX Added for IP Patent Insurance
- Chubb and Ace Media Products Combined under the Chubb Name

Next Issue

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Cyber/Privacy Insurance Market Survey

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Editor's Note: This issue of The Betterley Report continues our 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.

Since many IP (but not IP Patent) coverages can be found in a Media Liability policy, our Report covers both IP insurance and Media Liability (Media) insurance. While Media insurance IP risks, it is not IP insurance as the term is commonly used.

We know of eight sources of Patent Infringement coverage, including RPX, which we include in our Report for the first time.

Our 2015 Media Liability coverage included 14 insurers; we have reduced that to 12 in this year's Report, removing ANV (which we understand has left the market) and combining Ace and Chubb under the Chubb name.

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.
- **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 insurers 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 insurers to review our tables, the conclusions are our own, and the insurers 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 insurers 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.

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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 IP isn't our only concern, though, as protecting against accusations that an organization violated the IP of another party is at least as important. US 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 isn't active in social media or doesn't have a website, encourage employees to be active on blogs (whether approved or not), or publish a newsletter? Who hasn't read that IP is one of the 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 media liabilities arising out of social media activities. As organizations increasingly seek to reach their existing audiences, build new audiences, and learn

about their marketplaces, 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, insurers agree as they extend their coverage offerings more widely into the marketplace.

Interestingly, we are seeing other types of insurance adding media liability coverages to their core product—Cyber and Tech Errors and Omissions (E&O) policies in particular. Will there be an ultimate convergence of IP, Media, and Cyberinsurance coverages into one big New Era Exposures product? Certainly, that is the trend, as insurers 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

Companies in this Survey

The full report includes a list of 20 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 \[IRMI.com\]\(#\).](#)

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the province of highly specialized sources, with two exceptions:

- AIG opportunistically provides patent infringement indemnity coverage for insureds domiciled in the United States. This is the only large insurer that we know of participating in the IP insurance market and represents a return of an insurer that was a major player in earlier versions of the coverage.
- ThinkRisk (Aspen) can extend coverage to include IP 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.

RPX offers an insurance product along with its patent acquisition capability. Originally offered *via* a risk retention group, it is now written on Lloyd's paper. RPX is a provider of patent risk management and discovery management solutions, which means it has access to a substantial amount of patent knowledge. This helps it in both underwriting and defense.

The challenges in underwriting IP insurance have made this coverage more difficult to acquire than in the early 2000s. Still, the need to protect against losses arising out of IP remains.

We have investigated the reasons why Patent Infringement insurance has such a low penetration rate. One explanation that strikes us is that buying Patent Infringement seems 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. (IPISC, 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.

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 insurers 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.

The American Intellectual Property Law Association (AIPLA) in Arlington, Virginia, produces a valuable report on the estimated cost of IP litigation (not just the cost for the defendant). A summary of its always-excellent report can be found here: <http://www.aipla.org/about/newsroom/PR/Pages/150728PressRelease.aspx>.

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. This is especially true for companies entering the initial public offering stage. 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 insurers generally are very supportive of their insured's choice of counsel. IP is an extremely specialized area of the law, and the insurers 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 insurer. 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 CGL insurer.

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 insurers, 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. 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 liability, and privacy liability, but on a claims-made basis.

Think Risk'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, assuming that Internet activity is the subject of Cyberinsurance 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 nontraditional media markets with coverages that are added onto policies already being sold to their insureds. Those insureds might well be less likely to incur a media liability claim than the traditional media.

Insurers 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

Insurers and Coverages—IP

In 2016, 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 US 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 US insureds (please see the "Product Description" and "Target Markets" tables for specifics, as some-

times a non-US company with US 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 higher limits 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 five markets—CFC, IPISC, OPUS (non-US), Safeonline, and Tokio Marine Kiln. Since Abatement coverage is only attractive to a limited market, most insurers 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 insurer 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 insurers are reluctant to tell us exactly how

much they write. In fact, insurers 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 and 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 are few 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 plus). We will try to gather additional information for future studies. The best source of information about losses (but not *insured* losses) is the AIPLA survey noted earlier.

Insurers and Coverages—Media

Media liability coverages are available from a number of leading insurers. 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

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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 million–500 million in the United States, perhaps another \$50 million non-US (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 nontraditional 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. The trend seems to be strongly toward the latter—adding Media Liability extensions to policies already in the insured's portfolio of coverages.

Claims Experience—Media

We have heard of some very large media liability claims, but generally 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.

The recent jury award of \$140 million (including \$25 million of punitive damages) in the *Hulk Hogan v. Gawker* trial is sure to send a chill through media underwriters, at least those that entertain new media insureds. The award is likely to be reduced and pos-

sibly overturned but is still a shocking example of the willingness of juries to lash out at perceived excesses by the media.

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 IP 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 (insurers 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 IP 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 United States. It does not sell insurance or related services.

Mr. Betterley 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.

Mr. Betterley created *The Betterley Report* in 1994 to be the objective source of information about specialty insurance products. Now published six 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, Mr. Betterley 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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