

By Steve Schoenberger, VP & Technology Liability Practice Leader

Know Your Intellectual Property Insurance Options

If the entire value of your investment is riding on IP rights, can you afford not to consider every alternative to protect those rights? How does an emerging technology company with a limited amount of committed capital manage to defend its value in a competitive marketplace?

Insurance can be an invaluable asset when disputes over IP arise, funding litigation, paying damages and settlements, and even mounting offensive charges to preserve the value of certain assets. The mere presence of insurance may also be a deterrent to some would-be opponents who might otherwise target a thinly-capitalized company.

Do I have any IP coverage in my current insurance program?

Although there are specialty insurance products that are branded as “Intellectual Property” policies, coverage for Intellectual Property may be woven between multiple policies in a portfolio of insurance products such as a General Liability, Network Liability, Errors and Omissions or Management Liability Program.

Don't assume that you need to pay for a specific “Intellectual Property” policy to cover intellectual property risks—and don't assume your current insurance is adequate.

Intellectual Property Coverage in Standard Insurance Policies

Every company's General Liability policy is designed to protect the company from lawsuits alleging *bodily injury* and *tangible property damage*. Damage to another's intangible Intellectual Property is not covered. Although most General Liability policies also include coverage for “Personal and Advertising Injury,” don't count on this coverage to provide much more than trademark and copyright infringement arising from the company's *own* advertising materials.

Insurance for IP is more likely to be found in a program covering “financial injury,” such as a Management Liability, Professional Liability or Internet Liability policy. These policies are highly variable and subject to considerable negotiation, so coverage will vary widely. In any event, before considering a stand-alone IP policy, take a careful inventory of the IP coverage afforded by your current insurance program.

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Patents

Some myths about Patent coverage:

- It's not available: Not true.
- It's covered already: Forget it. Unless you and your broker have specifically addressed the issue, it's not covered, with one exception: A well-designed management liability program will protect the individual director or officer if named in a patent suit.
- It's expensive: That's relative...but with some companies offering minimum premiums under \$10,000, it may be worth considering; and rarely do insurance buyers complain about cost if they actually use it.
- It's restrictive: Every policy has restrictions, and no insurer will write a burning building, but have your broker do the analytics so you can determine if it's worth the price. Informed companies are electing this coverage.

Patent Liability Insurance can be used to fund the legal defense, settlements, damages and invalidity counterclaims against the plaintiff. But, pay close attention to the terms and know what you are getting for the premium. The coverage may require the insured company to obtain an opinion letter of non-infringement from a qualified attorney prior to agreeing to fund the defense. The policy may also contain a provision for the insurer's recovery of any awards up to the cost of the funded litigation.

First Party Patent Insurance can be used to fund an offensive campaign against a company infringing your company's patents. Sometimes called Patent Abatement Insurance, this coverage may also include the defense of an invalidity counterclaim and patent re-examination and reissue costs associated with the covered litigation. Coverage is likely to exclude any preexisting infringement, whether known or not. Terms may require a favorable opinion of infringement by outside IP counsel before the underwriters will agree to fund an offensive attack. Underwriters may have the right to share in the economic benefit of an award.

Patent Insurance can also be used to take the anxiety away from either a seller or a buyer by insuring the IP representations and warranties associated with a sale.

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Copyright

Copyright infringement arising from the company's own products or services is not covered under a standard General Liability policy. For example, copyright infringement arising from a software developer's application would not be covered.

All software assets are exposed to costly copyright infringement litigation. Applications incorporating Open Source Software may be at greater risk due to commercialization limitations in their terms of use. Software developers and application service providers often buy E&O to cover the liability arising from a failure of their software or services.

A well-crafted E&O policy may cover claims arising from software copyright infringement and indemnifications afforded to customers and clients.

Trade Secret

The value of a Trade Secret can be enormous, and the ease in which it can be shared (or stolen) via the Internet or a mobile hardware device is scary. The value of a thumbnail-sized flash drive in someone's pocket could far exceed that of a fully-loaded Brinks Truck. For a company working with the information of others, the biggest concern is often a wrongful release of Trade Secrets belonging to partners, clients or other third parties. An E&O, Internet Liability or D&O policy may be negotiated to include certain elements of Trade Secret infringement coverage.

The first party risks associated with the loss of value when a company's own trade secrets are released are typically uninsured. However, certain underwriters are willing to consider insuring Trade Secret assets on a predetermined value basis.

Final Advice

With so much riding on the value and integrity of a firm's intellectual property, emerging technology companies need to consider every angle of protection. Once you know of a problem, the insurance option will be off the table. There are no standard insurance solutions for IP risk and coverage can be woven through a multitude of policy forms. Find a broker who understands your IP risk and can outline the cost and benefit of any additional insurance.

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