

IP Law News

IP Insurers See Their Time as Now With Covid-19 In Background

By Matthew Bultman

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- IP insurance has been a difficult market
 - Firms building their IP expertise
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Intellectual property insurance has been a tough sell: prices were high, limits were low, and the policies didn't cover everything many companies wanted.

Now, though, insurers led by Aon PLC and other brokers are seeing untapped opportunities to protect companies against patent infringement allegations and trade secret theft. They have been building their IP expertise as well as advanced data and analytics they think will lead to cheaper and more accurate pricing.

Some insurance executives also see the coronavirus pandemic powering a revived market, as the economic fallout is expected to lead to an increase in IP disputes. Companies with policies could be emboldened to take more innovation risks and aggressively fight infringement claims, including those from non-practicing entities (NPEs), attorneys say.

"We think this will become an insurance market over the next few years," said Lewis Lee, head of Aon's Intellectual Property Solutions group. "It's just going to flip."

Aon last month launched a platform to underwrite insurance policies that provide up to \$100 million in primary coverage for IP liability. The coverage includes suits from competitors and NPEs. There is also coverage available for trade secret misappropriation.

Marsh & McLennan Co. unit Marsh last year unveiled a similar defensive policy called IP Protect that protects against defense costs and damages.

There are "more products, pricing is becoming more competitive," said Micah Skidmore, a partner at Haynes and Boone LLP in Dallas. "It's slow going but I think it's headed in a direction that means more of this is coming."

'Game Changer'

Standalone IP policies have been available for decades to fill gaps in companies' general liability coverage, which often doesn't cover things like patent infringement. Some companies also offer offensive policies to help companies sue for infringement. Others provide policies specifically for NPE defense.

Defensive policies helped propel at least one patent case to the U.S. Supreme Court. Backed by Louisville, Kentucky-based Intellectual Property Insurance Services Corp., elliptical maker Octane Fitness LLC in 2014 won a ruling that made it easier to get attorneys' fees in patent cases.

Greg Henson said a \$5 million policy from IPISC helped him sleep at night after his Missouri tanning lotion and equipment company was sued over a patent on automated spray tanning booths. The case settled after his company asked a patent office tribunal to review the patent's validity, court records show.

"For us, it saved a project at a critical time," Henson said of the policy.

Still, IP insurance hasn't been widely used. Just 7% of companies surveyed in 2018 by insurance broker Willis Towers Watson PLC had a separate policy that covered IP infringement liability exposure. One of the biggest barriers has been cost, attorneys said.

Many policies also have low coverage limits, limiting their appeal. It's not uncommon for insurers to cap policies under \$10 million, a fraction of what some verdicts can be. Offering up to \$100 million, like Aon, is "absolutely a game changer" in terms of market opportunity, insurance consultant Rick Betterley said.

"It all of a sudden makes the most likely buyer see that there is benefit in this insurance, that it's not just going to be a small company buy only," said Betterley, who is the author of the Intellectual Property and Media Liability Insurance Market Survey 2020.

Market Potential

Insurers believe that improved data and analytics, including the use of natural language processing and artificial intelligence, will allow them to better quantify a company's IP risk and price policies more accurately. Large brokers and underwriters have also worked to strengthen their intellectual property expertise.

Aon in 2018 brought on Lee, who previously co-founded the IP firm Lee & Hayes PLLC, along with Brian Hinman, the former chief IP officer at Philips. Ambridge Partners LLC, which underwrites Marsh's IP Protect policies, has hired IP lawyers from firms like Gibbons PC.

"That's also true of a lot of other players in this space, who are really deep into this particular type of insurance," said Jason Sandler, a vice president at Marsh. He joined the broker from Cravath Swaine & Moore LLP, where he was also an IP lawyer.

Several insurance companies have also expanded their offerings in the past couple years. Liberty Specialty Markets, a unit of Liberty Mutual Insurance Co., launched a product that covers businesses against IP disputes that arise under contract and licensing agreements.

International General Insurance Holdings Ltd. has also expanded into IP insurance, while Great American Insurance Co. announced a partnership with RPX Insurance Services LLC, a unit of San Francisco-based RPX Corp.

The market for IP insurance has drawn comparisons to cyber insurance, which has become a must have for many companies. The global market for cyber insurance was valued at \$4.8 billion in 2018, according to Allied Market Research, and is projected to top \$28 billion by 2026.

"Intellectual property ought to present similar opportunities," Betterley said. "That's true of insurance companies and insurance brokers."

Evaluating Success

Many businesses still aren't aware that IP coverage exists, while others may not fully appreciate the value of their intangible assets, insurance executives say.

It can also be difficult for businesses to evaluate the success of the policies, according to Christian Helmers, an economics professor at Santa Clara University. A company might spend tens of thousands of dollars on a policy, then not be sued.

"Does that mean that you made the right call, that purchasing the insurance was the right decision?" he said. "Or was it a waste of money?"

But once lawsuits are filed, litigating them can cost as much as many years of premiums. Median litigation costs in patent infringement cases with \$1 to \$10 million at risk is \$1.5 million, according to a 2019 report from the American Intellectual Property Law Association.

The median cost jumped to \$4 million in patent disputes with more than \$25 million at risk. Litigation costs in trade secrets cases with similarly high stakes was \$7.5 million, the AIPLA reported.

"If I had a business that dealt in technology, I would very seriously look into" insurance, said Robert Manley, a trial lawyer at McKool Smith PC in Dallas who handles IP cases.

Litigation Strategies

Widespread adoption of IP insurance could impact how certain cases are litigated.

Backed by insurers, businesses might be more willing to fight infringement allegations in court. A study co-authored by Helmers, the Santa Clara professor, found insurance policies can deter NPEs that want to extract quick settlements from companies without a lengthy court battle.

“Our study suggests that defensive litigation insurance may be a viable market-based solution to complement, or supplant, other reforms that aim to reduce NPE activity,” the report concluded.

David Prange, a partner at Robins Kaplan LLP in Minneapolis, said companies with IP liability insurance that covers defense costs and judgments might also take more chances when creating products.

“A company having a liability cost (through premiums paid) that is a set amount may be emboldened in the marketplace to further innovate and take more risky action,” Prange said.

To contact the reporter on this story: Matthew Bultman in New York at mbultman@correspondent.bloomberglaw.com

To contact the editors responsible for this story: Bernard Kohn at bkohn@bloomberglaw.com; Keith Perine at kperine@bloomberglaw.com

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