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THE BETTERLEY REPORT

INTELLECTUAL PROPERTY AND MEDIA LIABILITY INSURANCE MARKET SURVEY—2024

Still Stable, but Potential for Growth Is Solid

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Highlights of this Issue

- 8 Insurers Offering Intellectual Property (IP) Patent Infringement and Related Products
- 15 Insurers Offering Media Liability Products
- QBE Returned for Media Liability

Next Issue

June
Cyber/Privacy Insurance Market Survey

The Betterley Report

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 so do many of our readers, who identify it as one of their most useful reports), we have wondered how effectively we can cover it, as there are just a handful of IP coverage sources worldwide.*

And we've been saying that since we first researched IP coverage in 1996!

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 insurance. While media liability insures IP risks, it is not IP insurance as the term is commonly used.

We know of only eight sources of patent infringement coverage, and all are included in this report.

IP insurance has tremendous potential for growth as market penetration remains low. We remain optimistic that the growth will be realized as the product designs improve, especially regarding limits (higher) and control of defense and settlement.

Our 2024 media liability section includes 15 insurers, and we are pleased to welcome QBE back to this report.

We will use the following terms to keep things organized in this report.

- **IP insurance** describes 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 liability insurance** describes liability coverage against allegations arising out of the organization's communication activities.

This article is based on our review of leading insurers and their products. As with our other market surveys, we asked each participant 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 them. 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 using 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 to use this information.

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Introduction

IP is a prime asset of many organizations, not only corporations. IP is not just crucial 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.

Media liability concerns should not be limited to 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 on social media or doesn't have a website, encourages employees to be active on blogs (whether approved or not), or publishes 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 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 have extended their coverage offerings more widely into the marketplace.

It is a rare specialty lines product that doesn't offer at least the option of including media liability coverages to the core product—cyber and tech errors and omissions (E&O) policies in particular. Will there be an ultimate convergence of IP, media liability, and cyber-insurance coverages into one big new era of exposures product? Certainly, that is the trend as insurers extend their specialty lines capabilities to other industry verticals.

The IP Insurance Market

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, in 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 IPISC and RPX,

IP insurance is still a challenge for agents and brokers. As we went to press, we learned that RPX has recently dropped out of the market.

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 about the costs of defending an allegation of patent infringement is hard to find, but attorneys' fees and related costs can easily reach seven figures.

Even if the defendant is "right," it can be put out of business 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 a few of the following 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 who 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. 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 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, at best, an insured has difficulty settling a claim, which is especially damaging for smaller insureds.

Companies in this Survey

The full report includes a list of 8 insurers offering intellectual property patent infringement insurance and 15 insurers offering media liability insurance, along with underwriter contact information, and gives you a detailed analysis of distinctive features of each insurer's offerings.

Learn more about *The Betterley Report—Intellectual Property and Media Liability Insurance*.

Most court cases involving IP coverage in a commercial general liability (CGL) policy have ended in victory for the insurer, and 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, which the CGL insurer quickly denies. 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 liability coverage can be bought from numerous insurers. Some of these insurers offer products attuned to nonmedia organizations.

Media liability coverage is typically written on specialized forms for various industry segments (such as producers, advertising agencies, publishers, and the like). However, coverage for “the rest of us” is also offered, and most products are written on an occurrence basis.

Media liability 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.

EmergIn 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 a utility patent. Infringement of a 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 liability 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 the IP of another without authorization. The list goes on.

Insurance agents and brokers sometimes get confused, assuming 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 a real opportunity for

insurers to penetrate nontraditional media markets with coverages that are added to policies already being sold to their insureds. Those insureds may be less likely to incur a media liability claim than the traditional media.

Insurers active in the media liability 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

IP coverage continues to be a challenge to underwrite profitably. We understand that significant losses have occurred. 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 “[Market Information](#)” tables for specifics,

as sometimes 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. Even a \$25 million capacity from a single insurer is getting hard to find.

The IP insurance market currently offers the following three basic types of IP policies.

- First-party IP coverage 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. It is similar to a business interruption cover.
- IP defense cost (so-called “defense” coverage) protects a company against allegations that it improperly used the IP of another.
- IP abatement coverage (so-called “offense” or “enforcement” coverage) funds an attack on a party that improperly uses the insured’s IP.

Like what you see in this executive summary?

By purchasing the full report, you can learn more about how 8 insurers address the changing intellectual property markets and 15 insurers address the changing media liability insurance markets.

Learn more about [The Betterley Report—Intellectual Property and Media Liability](#).