

# Insuring Your Intellectual Property



As intellectual property becomes a vital part of more firms' assets, businesses must consider the additional exposures they face. There are several types of intellectual property protected under federal law: trademarks, copyrights, patents, trade dress and trade secrets. To help protect your business, there are two types of intellectual property coverage available: the first protects a company sued for infringement by paying for legal defense, and the second helps pay the legal expenses of suing an alleged infringer.

If the threat exists that (1) your company could be sued by a competitor for infringement or intellectual property theft, or (2) you do not have the funds to cover legal fees associated with defending your patent or trademark, it is vital that you purchase this coverage. Defending infringement litigation can cost hundreds of thousands of dollars, not including the cost of damages and prejudgment interest. In patent infringement cases, attorney's fees can easily top \$1 million.

Budgeting and planning for the protection of intellectual property rights may not only save your company a significant amount of capital; it may also help keep your business viable when legal bills accumulate rapidly. There are several options to cover these exposures: the "advertising injury" provision in the standard Commercial General Liability policy; endorsements to Errors and Omissions policies; and specialized policies offered by certain insurers specifically designed for the protection of intellectual property rights.

## Commercial General Liability Policy - Advertising Injury

The Commercial General Liability Policy, or CGL, is a standard liability policy offering broad coverage. Coverage for an advertising injury often falls under Coverage B in a CGL. Any act by the insured that somehow violates or infringes on the rights of others (referred to in the policy as an offense) is the subject of personal and advertising injury liability coverage, although only those acts that are specifically listed in the policy are covered. The coverage under the "advertising injury" provision is limited to those injuries that are directly related to the advertisement. Therefore, the policy covers debts owed by the insured party due to claims filed against it.

Coverage B policyholders are sometimes covered in cases relating to trademark infringement; however, copyright claims are only successful where they are directly related to advertising, and patent claims are rarely covered under the "advertising injury" provision. The cases which allow for coverage in a patent infringement case are generally limited to instances in which a court finds contributory infringement or inducement to infringe through an advertising medium. Since the "advertising injury" provision in a standard CGL is rather limited, many businesses consider additional coverage.

## Special Endorsements and Policies

Beyond the CGL, specialized policies can be better suited to a business's unique exposures. These are Errors and

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Omissions liability policy endorsements that can vary in focus from media and communications to patent infringement. Note that these policies have not been the subject of much litigation, and therefore, judicial guidance on coverage determinations is comparatively limited. It is important to consider multiple carriers, since available coverage varies widely from carrier to carrier.

## Infringement Defense and Abatement Insurance

A third option relates primarily to patents, though riders for copyrights and trademarks may be available. Carriers have developed policies specific to intellectual property, generally with patents in mind. In relation to patents, there are three basic policy types: (1) defense and indemnity; (2) defense only; and (3) offensive, or infringement, abatement insurance.

A defense and indemnity policy would provide defense coverage in a patent infringement suit and, if the party in question is found liable, would pay for damages, including prejudgment interest. A defense only policy, much like it sounds, covers only the cost of defense and does not cover damages awarded to the successful party, while an offensive policy covers only the costs of pursuing an infringer. Certain carriers will amend some of the above-mentioned policies to include endorsements for trademark and copyright infringement for an additional premium.

## Exclusions to Coverage

In addition to special exclusions, there is a general exclusion to the CGL stating that there is no coverage “for an offense committed by an insured whose business is advertising, broadcasting, publishing or telecasting.” With the increase in claims, many carriers are drafting exclusions that specifically omit coverage for copyrights that falls outside of infringement of copyrighted advertising materials, patents, trademarks and the like.

It is important to be aware of the exclusions to any policy that you purchase. The most common exclusions specified in intellectual property policies are for willful infringement, anti-trust violations, infringement existing or known on the effective date of the policy and criminal acts

## Asserting Coverage

To maximize coverage, there are a number of steps that your company should follow. Failure to investigate the existence of coverage in a timely manner can absolve a carrier of liability and create grounds for a malpractice case against the intellectual property legal counsel. While courts have held outside intellectual property counsel liable for failure to pursue coverage determinations, companies should still proactively recognize and review the potential for insurance coverage for protection of their intellectual property assets.

1. If a claim has been asserted against your company, you have a duty to notify your carrier. In fact, notifying your carrier immediately is in your best interest because a delay could be grounds for denying coverage. In the case where a formal complaint has been served on the company, the following six steps are recommended.
2. The policy or policies should be analyzed by counsel to determine under which policies the claim may be covered. In this step, the complaint should be closely examined for types of issues raised and should be compared to the relevant policy clauses.
3. The company should promptly tender defense to the carrier. In the tender, all policies that may provide coverage should be identified, including the specific clauses.

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4. Demand a prompt response to the tender. If a sufficient extension of the time to answer is not granted, it is possible that a response to the complaint will be due prior to the issue of coverage being resolved. If that is the case, then defense counsel should be retained until the issue of coverage is determined.
5. Review the carrier's response to the company's tender. The carrier may accept defense; it may defend under a reservation of rights; the carrier or the policyholder may seek a declaratory judgment for a coverage determination; or it can reject tender.
6. If there is a conflict in the interests of the carrier and the policyholder, the policyholder should insist on the right to control the litigation and should further insist upon independent counsel.
7. Be diligent about which documents are shared with the carrier, especially in cases where the carrier has reserved its rights to deny coverage. While the policyholder has a duty to cooperate with the carrier, in a case where a reservation of rights to deny coverage has been tendered, the production of certain documents to the carrier could result in the waiver of the attorney-client privilege as to the subject matter of the produced documents.

coverage to the specifically named offenses in policies based upon enumerated risks and will examine any exclusions that may weaken the coverage you seek. We are skilled at identifying the perils associated with intellectual property and high-technology companies and can assist you in selecting the right policy for you. Let our experience help you to protect your most precious assets. Contact us today at (845) 454-0800 to assure that the coverage you buy meets your needs in today's marketplace.

### Comparing Policies

Insuring your company's intangible assets and its liability is a vital part of risk management. Insurance for both infringement of intellectual property and for an assertion of infringement against your company can provide financial security and peace of mind.

Marshall & Sterling, Inc. will compare your desired