

Jim's Perspective...

Intellectual Property Insurance

Two weeks ago, I wrote about Big Data, Machine Learning and AI. There is an insurance coverage aspect to all of this that I want to visit about today. It seems to me that there are just so many small companies out there now with an intellectual property portfolio, that the chances are good that aspects of that portfolio might well also be developed by another small technology company, and thus there could be a claim asserted for patent infringement or perhaps copyright infringement. An example is a case filed in Texas federal district court in August of 2017. iLife Technologies, Inc. sued Nintendo asserting that Nintendo infringed upon a patent owned by iLife. iLife, in part, designs products that can save babies' lives in the case of sudden infant death syndrome. Its products are also used to treat sleep apnea and issues related to falls by elderly persons. So how did iLife get to a point where it wanted to sue a company that has nothing to do with medical technology involving young children, sleep disorders or the elderly? It was not because of the iLife product, but because of the *idea*, or, in other words, the company's intellectual property.

iLife sued Nintendo for allegedly stealing their motion-sensing accelerometer which they claimed was used by Nintendo in the creation of its Wii Remote. The accelerometer is a motion detection system that evaluates relative movement of a body based on both dynamic acceleration (e.g., vibration, body movement) and static acceleration (i.e., the position of a body relative to earth). iLife held rights to this technology through its patent. Ultimately, a jury awarded iLife \$10 million, but in January, 2021, a federal court of appeals overturned this verdict.

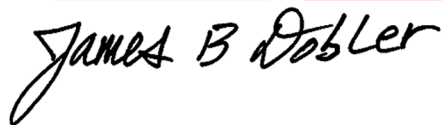
Intellectual property insurance is the primary insurance product to cover losses similar to the iLife litigation. There are five types of IP insurance products. These insurance products, years ago, were mostly manuscript policies, but I think today there are insurers that have some standard products on file with the department of insurance. According to Marsh USA, Inc., IP insurance provides the following types of coverage:

- Defensive IP which covers the cost of defense of an intellectual property infringement suit against the policyholder, and any resulting settlement or judgment.
- Offensive IP which covers the cost of IP enforcement matters such as the insured filing suit against a third party asserting that the third party has infringed on the insured's IP.
- Collateral protection insurance that can backstop the value of an IP asset when that asset is pledged as collateral to obtain a loan.
- Trade secret value insurance that can protect an insured from loss due to the misappropriation (theft) or unauthorized disclosure of its own trade secrets.
- Specific contingency insurance to cover a known risk. This is a rather unusual form of insurance. An example of how it works would be in litigation involving a company that has won an IP infringement lawsuit at the trial court level. It might then purchase this coverage to cover the possible contingency that the company might lose the case on appeal. The policy would cover the damages awarded at the trial court level.

Years ago, the intellectual property risk exposure was sometimes covered under the “advertising injury” of a CGL. The “advertising injury” coverage was defined to include “misappropriation of advertising ideas or style of doing business” and “infringement of copyright, title or slogan.” In 2021, ISO’s standard CGL form included new exclusionary language in the advertising coverage that states: There is no coverage for advertising injury arising out of “copyright, patent, trademark, trade secret, or other intellectual property rights.”

The International Risk Management Institute (IRMI) reported that in 1999, there were a little over 300,000 patent applications filed in the U.S. Patent and Trademark Office. In 2001, the number of actual issued patents, in total, exceeded 6.2 million. Amazing how much of this type of intellectual property is out there.

It just seems to me that there is a very significant risk exposure related to IP. According to Insurance Business Magazine, in March, 2019, Marsh announced the launch of a new IP product called IP Project. In 2018, Tokio Marine established an IP facility with AON which operates as a syndicate in Lloyds of London. I am pretty sure there are plenty of other IT insurance products out there. Given what’s going on in the IP market, it sure makes sense to have a conversation with clients involved with IP, about the cost and availability of IP insurance.

A handwritten signature in black ink that reads "James B. Dobler". The signature is fluid and cursive, with the first name "James" being more prominent than the last name "Dobler".

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Questions or Comments? Please email jbdobler@outlook.com