

# INTELLECTUAL PROPERTY RISK AND INSURANCE PROTECTING KEY ASSETS

## THE IMPORTANCE OF INTELLECTUAL PROPERTY

In today's economy more than ever, the significance of intellectual property (IP) is unsurpassed. Whilst the 1980's and 1990's saw a shift away from "bricks and mortar" economies to knowledge and service economies, the intellectual property that is generated today unlocks key revenue streams and is reflected in shareholder value. Such is the importance of these rights that valuing, managing and protecting these assets are demanded by shareholders and regulators alike.

IP provides unique margins to companies and therefore these creations of the mind should be maintained as differentiators to their product offering or service. Some intangible assets can be protected as trade secrets and confidential information, but when concepts are more easily reverse-engineered or copied, such as inventions, brands, media content or designs, the use of an Intellectual Property Rights (IPR) system is utilised to create proprietary legal assets that can be

valued, traded, licensed and generally exploited for revenue creation.

Intellectual Property Rights include patents, copyrights, trademarks and design rights.

## INHERENT IP RISKS

However disputes over the ownership or scope of intellectual property are frequent, with a much higher percentage of disputes heading to litigation compared with other civil disagreements. The grant of an IP right, by a government agency, can be challenged in court or a lawsuit from an IPR owner seeking damages and/or injunctive relief alleging infringement or misappropriation can be brought. To make matters more complicated, there is neither one global agency granting such rights, nor one global court that interprets the scope of the IP right or its likely infringement. When added to the complexity of regional business environments, understanding or predicting intellectual property disputes can be difficult if not impossible, with significant first and third party impacts upon the business.

It was summed up perfectly when Mark Getty proclaimed that "Intellectual Property is the oil of the 21st century"\* . Whilst man's ability to create and innovate is in contrast drawn from a bottomless well, that which is truly valuable is of a limited supply. Yet intellectual property is the fuel of the modern business, creates incredible risk and reward but will drive many to fight over its distribution and ownership.

\* *The Economist, March 2000*



## INSURANCE

Traditional insurance policies designed to protect physical assets against perils are unlikely to protect information or reputation assets. However, examples where traditional liability policies can provide some cover for IP include:

- Multimedia liability, providing copyright and trademark liability cover for a media company or through content-related activities;
- Tech E&O/Professional Indemnity insurance, designed to pick up certain IP rights but generally not patent risks;
- Advertiser's liability, covering you for copyright and trademark infringement liability arising out of advertising activities;
- Combined lines and integrated programmes that include some Intellectual Property risks.

With over 50,000 patents granted worldwide in just the Communications, Media and Technology (CMT) industries, for example, and average legal expenses alone reaching over \$2.5 million in the US, tailored insurance cover should be sought. The largest legal expense bill for litigation is anticipated to be around \$20 million. There are hundreds of awards and settlements under \$10m for IP cases and around 50 cases having exceeded \$100m. Therefore, traditional policies are inappropriate for some industries and can be inadequate in terms of the extent of cover provided for example providing defense costs only, small limits or excluding patents.

Such policies are also only responsive to liability risk, and do not provide protection from the significant first party losses that can arise when a business is required to litigate against an infringer or has lost revenue or some other value associated with a challenged IP right.

### **A brief summary of the IP insurance available is included below:**

#### IP INFRINGEMENT INSURANCE

- Defence coverage – insuring infringement/misappropriation liability, including reimbursement for defence expenses and/or legal damages or settlements;
- Covers infringement of IPR, e.g. patents, trademarks, copyrights;
- Available to companies domiciled and operating anywhere in the world;
- Claims made and reported policy;
- Optional extension for Contractual Indemnities to customers and distributors;
- Optional extension for Directors and Officers;
- Optional extension for Extended Reporting Period;
- Optional extension for Trade Secrets.

#### IP REPRESENTATIONS AND WARRANTIES INSURANCE

- Defence coverage as described for IP Infringement Insurance, but designed to specifically capture IP liabilities arising from the sale or purchase of a product or IP asset, or from a corporate merger or acquisition;
- Optional extension for Trade Secrets.

#### IP INFRINGEMENT INSURANCE FOR OPEN SOURCE

- Defence coverage as described for IP Infringement Insurance, but designed to respond solely to IP liabilities arising from the creation, distribution or use of recognised Open Source software;
- Optional extension for Contractual Indemnities to customers and distributors

#### IP ENFORCEMENT INSURANCE

- Enforcement indemnification – to cover the substantial litigation expenses incurred in enforcing an organisation's own IP rights against infringers;
- Covers actions of most IP Rights, including patents;
- Claims made and reported policy;
- Optional extension for contractual Indemnities to enforce agreement



## IP VALUE INSURANCE

- Insurance to indemnify for loss of revenue or value associated with invalidated IPR, ownership issues, other legal claims or discriminatory Governmental action against IP rights;
- Operates along a similar reasoning to that of property or business interruption insurance, but for intangible assets;
- Value or revenue insured could be associated with:
  - IP-rich products’ future revenue streams;
  - Licensing revenue;
  - Valuation by IP experts of patent portfolio;
  - Inherent Research and Development (R&D) expenditure;
  - Financial arrangements: IP loans, securitisation, monetisation, investments in IP-rich companies.

## OPEN SOURCE COMPLIANCE INSURANCE

- Indemnifies for financial loss and costs associated with non-compliance with the General Public License (GPL) or over 50 other open source licenses. Non-compliance can lead to settlements or injunctions which require the removal or public distribution of open source code and proprietary code deemed to form part of a “derivative” work of the original licensed code;
- The Open Source Licenses can involve transferring patents and copyrights associated with the code;
- Can insure representations and warranties associated with Open Source in M&A or licensing/service agreements, or on an annual renewable basis;
- Covers:
  - Repairing or replacing of infringing code;

- Loss of profits resulting from withdrawing an infringing product from the market;
- Loss of profits resulting from releasing source code for a non-compliant product;
- Impaired value in an acquisition agreement involving open source.

## BENEFITS OF INSURANCE COVER

A specialised programme has considerable advantages:

- Allows a company to free-up cash reserves formerly earmarked for litigation costs and damages and use them more productively;
- Protects the financial statement and shareholder value against the impact of large uninsured Intellectual Property losses;
- A specialist policy also helps to initiate better risk control and mitigation by focusing attention on the Intellectual Property Risk.

## FURTHER INFORMATION

**There are a number of insurance markets globally that underwrite IP risks. Each carrier has slightly different underwriting information requirements, as does each IP product. Please speak to your local Marsh contact or:**

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