

# *Intellectual Property Attorney's Checklist*

## **A. Commercial General Liability/Umbrella/Excess Insurance Policies**

### **1. Insurance Services Office (ISO) Commercial General Liability (CGL) Policy Forms “Advertising Injury” Coverage**

#### ***a. 1976 ISO Policy “Advertising Injury” Coverage***

“Advertising injury” means injury arising out of an offense committed during the policy period occurring in the course of the named insured’s advertising activities if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan.

#### ***b. 1986 ISO Policy “Advertising Injury” Coverage***

C. This insurance applies to “advertising injury” only if caused by an offense committed:

....

(2) In the course of advertising your goods, products or services.

....

1. “Advertising injury” means injury arising out of one or more of the following offenses:

....

c. Misappropriation of advertising ideas or style of doing business; or

d. Infringement of copyright, title or slogan

#### ***c. 1998 ISO CGL Form “Advertising Injury” Coverage***

a. Infringement upon another’s copyright, trade dress or slogan in your “advertisement”

b. Use of another’s advertising idea in your “advertisement”

“Advertisement” means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.

**d. 2001 ISO CGL Form “Advertising Injury” Coverage**

Exclusions:

(2) . . .

- i. . . . intellectual property rights. . . . However, this exclusion does not apply to infringement, in your “advertisement,” of copyright, trade dress or slogan.

**e. 2003/2007/2014 ISO CGL Form “Advertising Injury” Coverage**

- 2003 ISO CGL Form “Personal and Advertising Injury” Coverage (Form CG 00 01 12 04):

(f) The use of another’s advertising idea in your “advertisement”

(g) Infringing upon another’s copyright, trade dress or slogan in your advertisement

Exclusions:

(2) . . .

- i. . . . intellectual property rights. . . . However, this exclusion does not apply to infringement, in your “advertisement,” of copyright, trade dress or slogan.

- 2007 ISO CGL Form “Personal and Advertising Injury” Coverage (Form CG 00 01 12 07):

Exclusions:

. . . .

(i) Infringement of copyright, patent, trademark or trade secret

“Personal and advertising injury” arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights.

Under this exclusion, such other intellectual property rights do not include the use of another’s advertising idea in your “advertisement.” However, this exclusion does not apply to infringement in your “advertisement” of copyright, trademark, or slogan.

- 2014 ISO CGL Form “Personal and Advertising Injury” Coverage (Form CG 00 01 12 14):

[No changes]

**2. Non-ISO CGL “Advertising Injury” Coverage**

**a. AIG**

- Form: 69874 (2/98):

“Advertising injury” means injury arising out of one or more of the following offenses:

- a. Oral or written publication of material that slanders or libels any person or organization or disparages a person’s or organization’s goods, products or services;
- b. Oral or written publication of material that violates a person’s right of privacy;
- c. Misappropriation of advertising ideas or style of doing business; or infringement of copyright, title or slogan.

**b. Chubb**

- Form: 80-02-2000 (Rev. 4-01):

“Advertisement” means an electronic, oral, written or other notice, about goods, products or services, designed for the specific purpose of attracting the general public or a specific market segment to use such goods, products or services.

“Advertisement” does not include any e-mail address, Internet domain name or other electronic address or metalanguage.

“Advertising injury” means injury other than bodily injury, property damage or personal injury, sustained by a person or organization and caused by an offense of infringing, in that particular part of your advertisement about your goods, products, or services, upon their:

- copyrighted advertisement, or
- registered collective mark, registered service mark or other registered trademarked name, slogan, symbol or title.

- Form: 80-02-2000 (Ed. 4-94):

“Advertising” means any advertisement, publicity article, broadcast or telecast.

“Advertising injury” means injury other than bodily injury or personal injury, arising solely out of one or more of the following offenses committed in the course of advertising of your goods, products or services:

Oral or written publication of advertising material that slanders or libels a person or organization;

Oral or written publication of advertising material that violates a person’s right of privacy; or

Infringement of copyrighted advertising materials or infringement of trademarked or service marked titles or slogans.

**c. Hartford**

- Form: SS 00 08 04 01 (2001) (Form HG 00 01 06 05 (2005) has identical language):

“Advertisement” means the widespread public dissemination of information or images that has the purpose of inducing the sale of goods, products or services through:

- a. (1) Radio; (2) Television; (3) Billboard; (4) Magazine; (5) Newspaper;
- b. The Internet, but only that part of a website that is about goods, products or services for the purposes of inducing the sale of goods, products or services; or
- c. Any other publication that is given widespread public distribution.

However, “advertisement” does not include:

- a. The design, printed material, information or images contained in, on or upon the packaging or labeling of any goods products; or
- b. An interactive conversation between or among persons through a computer network.

“Advertising idea” means any idea for an “advertisement.”

“Personal and advertising injury” means injury, including consequential “bodily injury,” arising out of one or more of the following offenses:

. . . .

- d. Oral, written or electronic publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
- e. Oral, written or electronic publication of material that violates a person’s right of privacy;
- f. Copying, in your “advertisement,” a person’s or organization’s “advertising idea” or style of “advertisement”;
- g. Infringement of copyright, slogan, or title of any literary or artistic work, in your “advertisement” . . . .

#### ***d. St. Paul***

- Form: G0151 (Rev. 7–01) (similar language can be found in Form 47150 (Ed. 1–96) but without the “Advertising material,” “Slogan,” and “Title” definitions):

“Advertising injury offense” means any of the following offenses:

- Libel, or slander, in or with covered material.
- Making known to any person or organization covered material that disparages the business, premises, products, services, work, or completed work of others.
- Making known to any person or organization covered material that violates a person’s right of privacy.
- Unauthorized use of any advertising material, or any slogan or title, of others in your advertising.

“Advertising” means attracting the attention of others by any means for the purpose of: seeking customers or supporters; or increasing sales or business.

“Advertising material” means any covered material that:

is subject to copyright law; and

others use and intend to attract attention in their advertising.

“Slogan” means a phrase that others use and intend to attract attention in their advertising.

But we won’t consider slogan to include a phrase used as, or in, the name of:

any person or organization, other than you; or any business, or any of the premises, products, services, work, or completed work, of any person or organization, other than you.

“Title” means a name of a literary or artistic work.

We explain the terms “covered material” in the personal injury liability section; and

“your products, your work, and your completed work” in the products and completed work total limit section.

### **3. Best Prospects for Intellectual Property Insurance Coverage under Personal and Advertising Injury Coverage in ISO CGL/Umbrella/ Excess Policies [1976, 1986, 1998, 2001, 2003, 2007]**

- **Antitrust violations** conjoined with claims for unfair competition or interference where injury to competitors is evidence of injury to competition (“personal injury” (discrimination, disparagement, defamation, malicious prosecution) / “advertising injury” (“misappropriation of advertising ideas,” “use of another’s advertising idea in your ‘advertisement’”)).
- **Business method patents** where the method is an advertising technique (“misappropriation of advertising ideas,” “use of another’s advertising idea in your ‘advertisement’”).
- **Copyright infringement** accompanied by Internet dissemination or widespread e-mails (“infringement in your ‘advertisement,’” “invasion of a person’s right to privacy”).
- **False advertising claims** nested within antitrust or securities fraud allegations, whether asserted in class action lawsuits or not (“misappropriation of advertising ideas,” “use of another’s advertising idea in your ‘advertisement’”).
- **Telephone Consumer Protection Act (TCPA) violations** based on fax-blasting or unsolicited e-mail advertisements (“invasion of a person’s right of privacy”).
- **Trademark infringement** where an attention-getting phrase or moniker is used to promote products or services that are likewise used by the claimant (“infringement of trademarked slogan”).
- **Trade secret misappropriation** where proprietary information is made public in a manner harmful to the claimant (“invasion of a person’s right of privacy”).
- **Unfair competition claims** alleging conduct arising before the 2001 ISO policy form was issued or in variant policy forms for “infringement of title” and “infringement of slogan.”

#### **4. Broad View of Coverage Opportunities Based on Business Interests in Accord with Principles of Enterprise Risk Management**

##### ***a. IPOs as Beneficiaries of Coverage Available to Their Co-venturers or Those of Acquired Companies***

##### **(1) Coverage Opportunities under Policies Issued to Affiliated Companies May Be Broader than Those Available to the Company**

Many significant corporations may find that access to insurance is limited by their self-insured retention. There are nevertheless many situations in which a large corporation, having acquired a smaller corporation and otherwise succeeded to its legal rights, including those to pursue insurance under its policies, may acquire broader coverage and lower attachment points for insurance coverage through access to the smaller corporation's policies than it obtained through its own policies. The following scenarios should be reviewed to assess whether such an opportunity exists where a corporation is sued along with its recently acquired subsidiary as a codefendant.

- Umbrella policies that define a policy term (such as “joint venturer”) so as to include the acquiring company in a suit where both parties are named as a defendant.
- “Occurrence” coverage under policies of acquired companies that may be broader than that available to the acquiring company.
- International insurance policies that may permit coverage where the alleged offense occurred, in part, outside the United States, but the lawsuit nonetheless is pursued in the United States. Indeed, a number of insurers, including Cigna and Chubb, issued policies through the mid-1990s that define the scope of coverage in a way that would render these policies as broad as a domestic policy providing CGL coverage.

##### **(2) Case Study: How Cigna's International Coverage Required It to Defend Antitrust Counterclaims in a U.S. Lawsuit**

In *Hewlett-Packard Co. v. CIGNA Property and Casualty Insurance Co.*, the court analyzed an international policy wherein “territory” was defined as “worldwide for claim or suit resulting from an occurrence outside the United States of America . . . .”<sup>1</sup> The court found that a claim for damages emanating from conduct outside the United States for an action pending within the United States triggers a defense.

HP argues that the Nu-kote Counterclaim alleges activities that fall within the territorial limitations of the Policy because HP distributed in foreign markets package inserts intimating that the HP cartridges are not refillable . . . .

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1. No. 99-20207 SW, 1999 U.S. Dist. LEXIS 20655, at \*2 (N.D. Cal. Aug. 24, 1999).

....

Cigna contends that any [fear, uncertainty and doubt] allegedly suffered by consumers and distributors in foreign markets is irrelevant because there is no allegation or evidence that Nu-kote sold inkjet refill products outside of the United States during the Policy period. . . .

. . . However, in the realm of advertising injury, the locus of the misrepresentation and the site of the resulting injury could easily be disjointed. For example, it is conceivable that a false statement in Maine could diminish a competitor's sales in Florida.

....

. . . The territorial limitation in the Cigna Policy emphasizes the location of the occurrence, not the location of the resulting damages.

. . . Because Nu-kote could possibly claim damages to domestic business based, at least in part, on HP's extraterritorial acts, the Court finds that the Policy Territory requirement is satisfied.<sup>2</sup>

So long as an advertising activity that could create liability occurs outside the United States, it matters not whether the lawsuit itself was within the United States. It takes little imagination to conceive of a number of intellectual property (IP) litigation matters in which advertising conduct that may be identical to conduct occurring within the United States but takes place in a number of foreign countries, often in translated versions of the same advertisements emanating from U.S. sources, creates potential coverage.

***b. Intellectual Property Owners as Licensors—Opportunities to Enhance Value***

Key questions that an intellectual property owner (IPO), as licensor, must ask are the following:

1. Is the licensee insured?
2. Is the licensee's insurance adequate?
3. Is the company named as an additional insured under the licensee's policy?
4. Does the license agreement require the licensee's insurance to step up to the plate before the indemnification provisions are triggered?
5. Are indemnification issues covered under the patent owner's policies?

In assessing the answers to each of these questions, it is evident that consideration of insurance is significant not merely for the licensor. Assuring that potential licensees have adequate insurance to fulfill their contract obligations is critical. For example, when

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2. *Id.* at \*10, \*12–14.

entering into any form of software licensing agreement where the character of the software could create exposure for the company, it is important to know what indemnification rights exist against the licensee for making use of a product outside the scope of its intended use that would offer any practical recourse where the licensee is impecunious. In such circumstances, a licensee that has adequate insurance coverage, which names the licensor as an additional insured, can be a significant asset.

## 5. Insurance Coverage for Corporate Counsel

### *a. Corporate Counsel May Be Defendants in IP Litigation and Fall under Express Provisions of the Corporation's D&O and E&O Coverage*

Many IP litigation matters create direct exposure for directors and officers of a company under theories of inducement of infringement, whether under applicable patent, copyright, or trademark law. Similarly, trade secret misappropriation claims may implicate either current or former employees. If the alleged wrongful conduct occurred while the director or officer was an employee of the company, its policies may be implicated.

It is therefore essential in evaluating the company's assets to assess under what circumstances its errors and omissions (E&O) and/or directors and officers (D&O) coverage may include intellectual property. In many cases, the capacity in which an employee or officer acts in rendering services for the company may dovetail with its professional activities, thereby implicating coverage under an E&O policy.<sup>3</sup>

Similarly, a D&O policy, typically implicated in a securities fraud / shareholder derivative suit, may come into play for intellectual property or antitrust claims.<sup>4</sup> A recent survey reveals that some policies still do not include express exclusions for IP or antitrust claims. These policies are written on a claims-made basis.

So long as the claim is asserted in a year that no exclusion arises, potential coverage may be implicated. Such exclusions, however, may be readily included in policy forms. To guard

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3. *Research Corp. v. Westport Ins. Co.*, 289 F. App'x 989, 991, 992 (9th Cir. (Ariz.) 2008) (claims of conversion of technical information in connection with negotiation of patent rights were "wrongful acts" within the meaning of the policy where "wrongful acts" means "any actual or alleged error or omission, negligent act, misleading statement, or breach of duty committed by an 'insured'"; "allegations of conversion, fraudulent concealment, and breach of fiduciary duties raised claims of 'wrongful acts' that were 'potentially covered within the policy's coverage' . . ."); *Transcore, LP v. CaliberOne Indem. Co.*, No. 02657, 2008 LEXIS 188 (Phila. Ct. Com. Pl. July 28, 2008) (alleged installation of a toll collection device was "an act in rendering transportation information management systems" and fell within professional liability's coverage so as to require a defense of a patent infringement lawsuit as the "installation" was the insured's unique "professional service"; insurer could not have avoided the meaning of the term "any act" by suggesting that the policy only covered certain types of acts. The plain and unambiguous language of the policy did not contain an exclusion for patent infringement claims).

4. *Acacia Research Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. SACV 05-501 PSG (MLGx), 2008 WL 4179206, at \*13 (C.D. Cal. Feb. 8, 2008) (court awarded plaintiff \$31,070,981.62 plus \$310,492.99, the present value of future royalty payments under a D&O policy; "[w]rongful acts" were implicated because "the underlying Nanogen action centered on Nanogen's accusations that Montgomery stole Nanogen's technology and brought it to Combimatrix").



against such a likelihood, a longer-term (e.g., three- to five-year form) policy written on a claims-made basis, which may not be subject to limiting endorsements, should be obtained.

When the officer named is also corporate counsel, specific insurance for counsel's activity should be reviewed to assure that it will encompass IP lawsuits, at least to the same extent that it is offered by the corporation's coverage.

***b. Tracking Corporate Counsel Fee Expenses in IP  
Litigation in Coverage for Defense Costs***

When corporate counsel is not named as a party but its energies are devoted to tracking and overseeing the litigation, recapture of those fees as if they had been rendered by outside counsel is an option in some jurisdictions. Ironically, this potential flows out of the *PLCM Group v. Drexler* case, in which an insurance company's corporate counsel sought and successfully obtained reimbursement for its fees.<sup>5</sup> Thus, the insurance industry has established precedent that can be best used by its own corporate policyholder clients to seek reimbursement for the fees their inside counsel incur.

A key problem in this respect is that many corporate counsel do not record time the same way as outside counsel. Reconstruction of the time expended by such counsel or creation of other mechanisms for tracking reimbursement of such expenses after the fact can be time-consuming.<sup>6</sup> Adoption of proactive mechanisms to record time spent interacting on matters in which potential coverage may arise will help maximize recapture of litigation fees.

## **B. Intellectual Property Insurance Policies**

### **1. Insurance Policy Providers**

***a. IP First-Party Insurance (IP Assets)***

Innovative first-party insurance coverage offers a fresh approach to using insurance to protect intellectual property assets. It offers coverage for the diminution in value of intellectual property rights whether a loss arises from litigation or other legal challenges to the scope and value of intellectual property rights. Key resources to research in this area include:

- **Kiln**, [www.kilnplc.com](http://www.kilnplc.com) (insures the value of the patent asset and/or licensing income stream)  
Matthew R. Hogg, LL.B. (Hons), LL.M., ACII  
Vice President

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5. *PLCM Grp., Inc. v. Drexler*, 22 Cal. 4th 1084, 1093–94 (2000) (court found that the reasonable value of in-house counsel's legal services is recoverable by the prevailing party when counsel is actively engaged in preparing for trial (citing *Garfield Bank v. Folb*, 25 Cal. App. 4th 1804, 1807 (1994))).

6. *Id.* at 1096 (declaration of attorney as to number of hours spent on the case is sufficient evidence to support a fee award); *Martino v. Denevi*, 182 Cal. App. 3d 553, 559 (1986) (contemporaneous time records are not required for recovery of attorney's fees); *Melnyk v. Robledo*, 64 Cal. App. 3d 618, 624 (1976).

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IP Value Insurance: Liberty International Underwriters
<ul style="list-style-type: none"> <li>• Insurance to indemnify for loss of revenue or value associated with invalidated intellectual property rights, ownership issues, other legal claims, or discriminatory governmental action against IP rights;</li> <li>• Operates along a similar reasoning to that of property or business interruption insurance, but for intangible assets;</li> <li>• Value or revenue insured could be associated with:             <ul style="list-style-type: none"> <li>• IP-rich products' future revenue streams</li> <li>• licensing revenue</li> <li>• valuation by IP experts of patent portfolio</li> <li>• inherent research and development expenditure</li> <li>• financial arrangements: IP loans, securitization, monetization, investments in IP-rich companies</li> </ul> </li> </ul>
IP Infringement Insurance: IPISC
<ul style="list-style-type: none"> <li>• defense coverage insures infringement/misappropriation liability, including reimbursement for defense expenses and/or legal damages or settlements</li> <li>• covers infringement of IPR, but not trade secrets, e.g., patents, trademarks, copyrights</li> <li>• available to companies domiciled and operating anywhere in the world</li> <li>• claims made and reported policy</li> <li>• optional extension for contractual indemnities to customers and distributors</li> <li>• optional extension for directors and officers</li> <li>• optional extension for extended reporting period</li> <li>• optional extension for trade secrets</li> </ul>
IP Enforcement Insurance: IPISC
<ul style="list-style-type: none"> <li>• enforcement indemnification—to cover the substantial litigation expenses incurred in enforcing an organization's own IP rights against infringers</li> <li>• covers actions of most IP rights, including patents</li> <li>• claims made and reported policy</li> <li>• optional extension for contractual indemnities to enforce agreement</li> </ul>

<b>IP Infringement Insurance for Open Source: Kiln</b>
<ul style="list-style-type: none"> <li>• defense coverage as described for IP infringement insurance but designed to respond solely to IP liabilities arising from the creation, distribution, or use of recognized open-source software</li> <li>• optional extension for contractual indemnities to customers and distributors</li> </ul>
<b>Open-Source Compliance Insurance: Kiln</b>
<ul style="list-style-type: none"> <li>• indemnifies for financial loss and costs associated with noncompliance with the General Public License (GPL) or over 50 other open-source licenses; noncompliance can lead to settlements or injunctions that 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</li> <li>• addresses the transfer of patents and copyrights associated with the code</li> <li>• insures representations and warranties associated with open-source licenses in mergers and acquisitions or licensing/service agreements, on an annual renewable basis</li> <li>• 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 noncompliant product; impaired value in an acquisition agreement involving open source licenses</li> </ul>
<b>Benefits of Insurance Coverage</b>
<ul style="list-style-type: none"> <li>• A specialized program has considerable advantages: <ul style="list-style-type: none"> <li>• allows a company to free up cash reserves formerly earmarked for litigation costs and damages and use them more productively</li> <li>• protects the financial statement and shareholder value against the impact of large uninsured IP losses</li> <li>• helps to initiate better risk control and mitigation by focusing attention on the intellectual property risk</li> </ul> </li> </ul>

***b. IP Coverage (Defense/Prosecution)***

- **RPX Insurance Services**, [www.rpxinsurance.com](http://www.rpxinsurance.com)  
Kimberly Klein Cauthorn  
Senior Director, Insurance Operations  
One Market Plaza, Steuart Tower  
Suite 800  
San Francisco, CA 94105  
Phone: (866) 779-7641  
[info@rpxinsurance.com](mailto:info@rpxinsurance.com)
- **Intellectual Property Insurance Services Corporation (IPISC)**  
Robert H. Fletcher  
President  
9720 Bunsen Parkway  
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Phone: (502) 491-1144  
[bfletcher@patentinsurance.com](mailto:bfletcher@patentinsurance.com)

<b>Primary Product Offerings for North American Companies: RPX</b>
<ul style="list-style-type: none"> <li>• Patent Infringement Liability insurance reimburses legal costs and some settlement costs incurred by operating companies in litigations initiated by most nonpracticing entities. The policy can also cover costs associated with declaratory judgments and reexaminations. The base policy provides limits of up to \$5 million annually, with a self-insured retention of between \$50,000 and \$500,000.</li> </ul>
<b>RPX Defense Insurance: Benefits</b>
<ul style="list-style-type: none"> <li>• <i>Panel Counsel</i> program provides access to high-quality patent infringement legal defense with pre-negotiated discounts for litigation services.</li> <li>• <i>Collaborative Defense</i> service provides turnkey coordination and management of the legal defense for patent litigation against multiple RPX clients.</li> <li>• RPX's defensive patent acquisition strategy allows it to provide its insureds with technical analysis, historical litigation data, and statistics.</li> <li>• Every RPX member receives a license to every patent and patent right owned by RPX and RPX never asserts or litigates the patents in its portfolio.</li> </ul>
<b>Primary Product Offerings for North American Companies: IPISC</b>
<ul style="list-style-type: none"> <li>• IP insurance policies reimburse clients for expenses resulting from accusations and litigation of IP infringement. They are written to cover risk from patent, trademark, trade dress, trade secret, and copyright infringement and include litigation management and early intervention (with abatement) services. These policies are designed to provide coverage for insurable risk, as opposed to standard business risk, and are restricted by a self-insured retention (similar to a deductible) and coinsurance provisions, among other limitations.</li> </ul>
<b>IPISC's Defense Insurance: Benefits</b>
<ul style="list-style-type: none"> <li>• enables the mitigation of the risk of unexpected infringement litigation</li> <li>• provides the funds and expertise for a powerful defense, increasing the likelihood of a favorable decision</li> <li>• relieves the pressure to settle a winning suit because of a lack of financial resources</li> <li>• discourages frivolous infringement suits and prevents loss of market share by demonstrating the ability to financially protect business practices</li> <li>• increases the attractiveness of a business's technology and decreases the risk to potential investors</li> <li>• includes IPISC's litigation management services</li> </ul>

### ***c. Origin of First-Party Product***

The original Kiln product came out of the relationship between Open Source Risk Management (OSRM) ([www.osriskmanagement.com](http://www.osriskmanagement.com)) and Kiln. According to marketing materials generated by Kiln, this policy offers a way to evaluate whether a particular software is using open source.

OSRM has proprietary software which it applies in rendering consulting services. The Kiln product is first party and designed to address the risk that the GPL will pursue a claim that is not in compliance with its licensing requirements. Unless certain action is taken, it will pursue claims for the improper use of "open source material" in purportedly proprietary software.

Major corporations such as Microsoft use software such as Black Duck to evaluate whether a particular software offering for use with Microsoft operating systems is free of open source material before permitting its integration and marketing.

***d. First-Party Kiln Insurance Product***

OSRM's website advises that it continues to be the exclusive risk assessor on the "world's first insurance facility to cover the specialized risks faced by enterprises that include or rely upon elements of Linux or other open source software in their commercial products or IT infrastructure."<sup>7</sup> Designed to deal with the unique but substantial business risks that arise in mergers and acquisitions or other corporate transactions, OSRM insurance provides up to \$10 million in coverage for:

- loss of profits resulting from a legal settlement preventing the use or sale of the insured's product(s) or resulting from the requirement to distribute certain code or products in compliance with an open source software license
- the impaired valuation of an acquisition agreement for adjusted sale price thereof, resulting from the requirement to distribute code or products exchanging open source software in compliance with an open source software license
- costs to repair or replace code so that it complies

The insurance is underwritten through Kiln, an international insurance and reinsurance underwriting group that specializes in complex, unusual risk.

***e. Representations and Warranty Insurance***

Another opportunity to guard against open source issues is representations and warranties insurance offered through Kiln in association with OSRM. Open source insurance is directly promoted on the OSRM website, available through Matthew Hogg at Marsh Lloyds and through Kiln, based in London.

Representation and warranty insurance deals with the risks associated with mergers and acquisitions or other corporate transactions and is designed to address issues faced by companies that rely upon Linux or other open source software. There have been a number of disputes arising out of alleged improper use or infringement of open source licenses, and, when litigated, plaintiffs have prevailed to date.

Any company that builds software systems, whether for commercial distribution or for its own internal use, may find itself in violation of the terms and conditions under which Linux and other open source software is made available. A company dependent upon

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7. <http://www.osriskmanagement.com/insurance.html>

open source components for its own proprietary software runs the risk that its proprietary software must be made publicly available under comparable licenses to that offered through open source.

## C. Cyberspace/Multimedia Coverage

### 1. Selecting the Coverage That Suits the Company

#### a. Opportunities in Procuring Cyberspace Coverage

How can a policyholder best protect itself from intellectual property risks, including those in cyberspace? How can a policyholder ensure that it has the coverage it needs to negotiate confidently in e-commerce? In order to select the coverage that best suits a policyholder, the policyholder must consider its stage of growth and its potential for experiencing dangers unique to the e-commerce landscape. Once it makes this assessment, it should weigh some basic practical factors before making a final decision.

#### b. Stage of Growth

The type of coverage a policyholder obtains depends on its stage of growth. Insurance consultants vary in their recommendations. For example, some suggest that companies should wait until a mature phase before purchasing IP defense coverage. They advise acquisition of multimedia/cyberspace liability; professional liability/E&O insurance, including coverage for software and hardware errors and omissions; and D&O and umbrella liability during a company's growth phase.<sup>8</sup>

After factoring in price point, most policyholders planning to emphasize e-commerce procure cyberspace, net secure, and D&O policies to supplement their CGL coverage and postpone acquisition of E&O / professional liability coverage until their growth or even mature phase. A policyholder may decide to rely on the courts to read offenses—such as piracy, idea misappropriation, and unfair competition—broadly enough to encompass the cyberspace tort of trade secret misappropriation, as they have done with CGL policies using the same language. Before making that decision, however, policyholders should carefully consider the law of the forum that will be applied to their policy.<sup>9</sup> Indeed, choosing an insurer may also mean choosing the jurisdiction.<sup>10</sup>

In general, a policyholder should obtain IP defense coverage as quickly as possible. Express IP defense insurance tends to be more expensive than either cyberspace or net

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8. Consultants suggest IP, infringement, and E&O coverage in the start-up phase, deferring computer software and media property coverage and D&O liability insurance to the growth phase. See [www.insurenwmedia.com](http://www.insurenwmedia.com).

9. *Am. Nat'l Fire Ins. Co. v. Methods Research Corp.*, No. 99 C 7484, 2000 WL 1785519, at \*3 (N.D. Ill. Dec. 5, 2000) (New Jersey law); *W. Am. Ins. Co. v. Moonlight Design, Inc.*, 95 F. Supp. 2d 838, 842 (N.D. Ill. 2000) (New York law); *Zurich Ins. Co. v. Sunclipse, Inc.*, 85 F. Supp. 2d 842, 850 (N.D. Ill. 2000) (California law).

10. *Lumbermens Mut. Cas. Co. v. Dillon Co.*, No. 3:98-cv-2013(EBB), 2000 WL 1336498, at \*2 (D. Conn. Aug. 31, 2000) (law of forum, Connecticut).

secure coverage. Sometimes it can procure the benefits of such policies by endorsing a cyberspace policy to include express coverage for trade-secret or patent lawsuits. IP prosecution coverage may make sense for a start-up if select intellectual property assets (patent or copyright) are key to the successful launch of the company's products.

More mature companies may find that cyberspace and net secure coverage is more significant than traditional forms of E&O / professional liability coverage.

### ***c. Dangers of E-commerce Landscape***

E-commerce activities create a potential for liability that blends traditional exposure to privacy, defamation/disparagement, and IP claims with exposure to a distinct variety of Internet-specific claims, such as computer crimes, advertising error on websites, and trade-secret misappropriation facilitated by e-mail.

Before shopping for a cyberspace policy, policyholders should assess a series of hypothetical e-commerce risks and require insurers to opine about whether their proposed policies would provide coverage for resulting claims. The more specific the hypothetical, the more valuable the prospective insurer's coverage analysis will prove.

The following hypotheticals illustrate some of the exposure problems faced by policyholders in e-commerce. Imagine the following two scenarios, for example:

- Company A's marketing vice president leaves Company A to join a start-up competitor, Company B, that seeks to duplicate and offer for sale Company A's entire line of products on Company B's website by shipping directly from the same vendors with whom Company A has been doing business. Company B plans to charge 15 percent less than Company A charges for each product. To complicate matters, the competitor, Company B, employs an innovative click-and-tab order system for which the policyholder just received a business method patent.
- A customer's satellite connection for streamed, online product advertisements goes down for more than a week because of cyberterrorist activity, just as its competitor gets the competing website with interactive order placement access up and running.

What do you do? Can your existing insurance coverage help? What additional insurance could you have procured that might have softened the blow from these risks?

### ***d. Protocol for Coverage Assessment at Time of Litigation***

#### **(1) Insurance Coverage Questionnaire**

1. Is the company a defendant/counterdefendant in litigation?
2. Are any claims for damages, including mere quests for attorneys' fees or such other and further relief, sought against it?
3. In what jurisdiction is the lawsuit filed?

4. What is the principal place of business and state of incorporation of the insurers who issue policies that might respond to such risk?
5. Where is the principal place of business and place of incorporation of the corporate entity that issued the insurance policy that might respond to these claims?
6. What representations have insurers made regarding the scope of coverage, either in advertisements rendered in connection with solicitation of their products or in express representations to the company, to its brokers or directly to the company at the time of policy issuance?
7. What representations regarding the scope of coverage have been made in any materials provided to the broker and/or company?
8. What causes of action are asserted under what theories of recovery?
9. What past experience has the company had with this or other insurers under similar policy language involving similar claims for relief?
10. Under the law most favorable to the company of those potentially available to it, what reasonable meanings does its policy language have that may be compared to the fact allegations against the company?
11. What potential for amendment may exist in the underlying lawsuit consistent with the theories of recovery and the character of relief sought that might trigger coverage under the policy?
12. What is the likely exposure to the company in light of the damage claims available and anticipated costs of litigation to defend the lawsuit?
13. At what point does first-dollar coverage attach in light of the company's self-insured retention (SIR)?
14. Is the amount of the SIR to accept change in light of the policies issued to the company's subsidiaries or acquired entities that may be implicated as a result of who is joined as defendants in the suit or the character of the relief sought and the conduct at issue?
15. Assessing all these factors, what is the potential coverage available to respond to such claims, and what, if any, further action is appropriate in light of this analysis with respect to pursuit of coverage?

## **(2) Creation of Insurance Coverage Protocol**

Whatever you can measure you can control. The Accounting Standards Board now includes the value of IP rights on a company's balance sheet in recognition of the value of intangible assets to a company's bottom line. Critically, what you can value you can also insure. The risk created by not having an intake system to assess the potential coverage posed by claims for damages in intellectual property and antitrust lawsuits is threefold:



1. Attorneys' fees and costs incurred prior to giving notice to the insurer are not covered in most jurisdictions.
2. In some jurisdictions, such as New York and Illinois, a delay of less than one year in providing notice will deprive a company of realizing any benefits from its insurance coverage.
3. Even when notice is provided, unless pertinent facts from the underlying action that supplement the information available from the complaints are provided to the insurers, such facts may not be used to establish coverage in some jurisdictions because they were not "known" to the insurer.

Creation of an effective protocol requires integrating coverage available, including hypotheticals that the insurers who issued policies concede will trigger coverage. Once created, customized software can be developed to systematically assess whether a new claim should be reported and, if so, when, to whom, and what facts to secure coverage.

### (3) Checklist of Other Factors

Engaging in e-commerce activity without the protection of cyberspace or net secure coverage could be like trying to hack your way through the jungle with a pocketknife instead of a machete. The instrument works, but is simply not long enough, strong enough, or hard enough to go the distance. If, after evaluating the company's risk, the policyholder decides that it will obtain nontraditional coverage, it should assume that all problematic exclusions are negotiable. The stronger a showing the policyholder can make of its internal risk management activities and its lack of problematic exposure in the past, the more likely insurers are to extend broader coverage.

Finally, when deciding which cyberspace or net secure policy to procure to supplement the company's coverage portfolio, keep the following pointers in mind:

- Avoid policies that seek to override statutory cancellation procedures that most jurisdictions have in place to protect insureds.
- Ensure that the policy covers sublicensees, subsidiaries, affiliates, joint venturers, subcontractors, and distributors.
- Avoid policies that automatically cancel coverage in the event of a merger or acquisition.
- Procure policies with *worldwide* territorial coverage.
- Obtain a policy with no security screening as a prerequisite for coverage.
- Avoid policies with a breach of contract exclusion.
- Obtain insurance policies with limits high enough to address the legal fees and/or settlement exposure that the referenced risks warrant.
- Ensure that the definition of a claim encompasses as broad a set of factual scenarios as possible.

- Ensure that the underwriting requirements are reasonable and may be properly addressed by personnel within your company in a timely, cost-effective manner.
- Procure coverage for all risks that your company wishes to insure as part of its portfolio.

Also, be cautious of risk-management recommendations that the policyholder accept a significant self-insured retention. The most important benefit that liability coverage provides is a first-dollar defense. A co-payment and/or minimum deductible that requires the policyholder to share the cost of litigation, when negotiated in tandem with a provision that assures its control of counsel, may lessen premium expense in a manner that still preserves effective policyholder options. Forfeiting the right to an insurer-funded defense in cyberspace litigation can be penny-wise and dollar foolish.

## **2. Insurance Product Offerings: Analyzing Their Applicability to Exposure**

### **a. *Net Secure***

#### **(1) Fraud and Extortion**

- Hypothetical scenario: Eight banking websites in the United States, Canada, Great Britain, and Thailand were attacked, resulting in 23,000 stolen credit card numbers. The hackers proceeded to publish 6,500 of the cards online, causing third-party damages in excess of \$3 million. Policy: AIG NETADVANTAGE PROFESSIONAL: INTERNET PROFESSIONAL LIABILITY INSURANCE
- Hypothetical scenario: A hacker stole approximately 300,000 customer credit card numbers from an online retailer. The hacker then attempted to use the stolen information to extort \$100,000 from the company. Upon the firm's refusal to cooperate, the hacker posted 23,000 card numbers online. As a result of the charge denials, credit card cancellations, and reissuance, the online retailer suffered approximately \$2 million in lost income and third-party damages. Policy: AIG NETADVANTAGE SECURITY: INTERNET AND COMPUTER NETWORK SECURITY INSURANCE
- Hypothetical scenario: Two hackers cracked the computer systems of a major market-research firm and subsequently obtained confidential corporate records. The stolen files included employee photographs, network passwords, and personal credit card numbers of numerous senior managers. The hackers threatened to reveal the security breach to the company's clients unless the board of directors paid them a "consulting fee" of \$200,000. Upon retaining expert cybercrime investigators, the hackers were apprehended and prosecuted. The research firm spent approximately \$1 million in investigative and public relations fees. Policy: AIG NETADVANTAGE SECURITY: INTERNET AND COMPUTER NETWORK SECURITY INSURANCE

## (2) Denial-of-Service Attacks, Sabotage, and Business Interruptions

- Hypothetical scenario: A hacker overwhelmed several large websites through multiple distributed denial of service (DDOS) attacks. The culprit hijacked various computers throughout the world to bombard target servers with seemingly legitimate requests for data. It is estimated that the DDOS attacks, which interrupted the ability of the sites to efficiently conduct business, caused over \$1.2 billion in lost business income. Policy: AIG NETADVANTAGE COMPLETE: INTERNET INSURANCE
- Hypothetical scenario: A disgruntled employee of a major consulting firm downloaded malicious code onto the networks of the firm, its clients, and its vendors. The code launched confidential information into the public domain and destroyed some critical corporate applications, resulting in more than \$10 million in third-party claims. Policy: AIG NETADVANTAGE LIABILITY: INTERNET PROFESSIONAL AND SECURITY LIABILITY INSURANCE

## (3) Viruses

- In 1999, the Melissa e-mail virus overwhelmed the systems of thousands of companies around the world. The operations of at least 60 U.S.-based Fortune 500 companies were brought to a halt because of the inability to handle the massive amounts of incoming and outgoing messages generated by the virus. The virus collectively caused millions of dollars in lost business income. Policy: AIG NETADVANTAGE COMPLETE
- The Love Bug virus (also known as the “I Love You” virus) spread rapidly through corporate e-mail systems, infecting the networks of hundreds of companies around the world. This attack was followed a few days later by as many as 11 copycat versions of the virus. It is estimated that the series of attacks collectively cost billions of dollars in lost business income and extra programming time. Policy: AIG NETADVANTAGE COMPLETE

## (4) Negligent Security

- On June 21, 2000, hackers penetrated a U.S. sporting apparel’s computer network and redirected its online traffic to a rogue site via servers domiciled at an overseas Web-hosting facility. The traffic swamped the overseas servers and subsequently impaired service to its real customers. The Web host is suing the apparel firm for negligence in adequately securing its Internet domain. Policy: AIG NETADVANTAGE SECURITY: INTERNET AND COMPUTER NETWORK SECURITY INSURANCE

### *b. Cyberspace Litigation*

#### (1) Privacy Invasion

- One of the nation’s largest health insurers inadvertently sent e-mail messages to 19 members containing confidential medical and personal information of 858 other

members. Although the company immediately took steps to correct the problem, the company is now exposed to lawsuits alleging invasion of privacy. Policy: AIG NETADVANTAGE LIABILITY

- A utility admitted to a massive security breach that left debit card details of thousands of customers open to public scrutiny. A customer discovered the security hole when he went to pay his bill online—he discovered three files on the Web server containing the names, addresses, and card details of more than 5,000 home and business users, including his own. Policy: AIG NETADVANTAGE LIABILITY
- An e-tailer brought suit against a Web designer for damages the e-tailer sustained as the result of the unauthorized access of its private data files by a hacker. The suit alleges that the Web designer negligently designed the e-tailer's website by not providing adequate safeguards to prevent such type of intrusion. Policy: AIG NETADVANTAGE PROFESSIONAL: INTERNET PROFESSIONAL LIABILITY INSURANCE

### **(2) Online Trespass**

- An online direct marketing company e-mailed solicitations on behalf of its clients to all users of a commercial Internet service provider (ISP). The ISP sued the marketing company for online trespassing. The court found that the marketing company was liable for trespass and damage to the ISP's reputation. Policy: AIG NETADVANTAGE PROFESSIONAL

### **(3) Intellectual Property**

- An online service allowed a famous author to advertise a book in one of its forums. The online service was sued for copyright infringement by an artist who claimed that the author used certain artwork on the cover of his book without getting the artist's permission. Policy: AIG NETADVANTAGE PROFESSIONAL
- An online news service created a website inclusive of hyperlinks to alternate sites that were maintained by traditional print and broadcast media companies. When users clicked the links, they were linked to a framed copy of the site, rather than the site itself. The traditional media firms sued the host site for copyright and trademark infringement on the basis that the firm was a parasitic site that republished the news and editorial content in order to attract both advertisers and users. Policy: AIG NETADVANTAGE PROFESSIONAL
- An online insurance brokerage created a hyperlink that seemingly transferred its clients to additional pages on the site. It was later discovered that the brokerage "deep-linked" its users to the Web pages of various insurance companies, creating a seamless navigational experience. The insurance companies sued the online brokerage for copyright and trademark infringement. Policy: AIG NETADVANTAGE: INTERNET MEDIA LIABILITY INSURANCE

- In an effort to drive additional users to its site, an e-tailer registered metatags that identified its firm with the names of its competitors. Upon discovery of the incident, competitors sued the retailer for copyright infringement. Policy: AIG NETADVANTAGE: INTERNET MEDIA LIABILITY INSURANCE

### ***c. Different Scenarios***

#### **(1) Scenario One: Competitor's Offer for Sale**

An employee that contemplates engaging in unfair competition against his present employer by departing the company and seeking to mirror its product line in the marketplace without differentiating himself from the employer's company (i.e., palming off) might astutely orchestrate the company's purchase of a cyberspace policy that could arguably benefit the employee if the alleged wrongful conduct occurred at such time as the employee remained technically an employee of the company that purchased the cyberspace policy. Such an employee would seek to compete with the employer while retaining employment and purporting to otherwise engage in tasks for the benefit of the present employer. In such circumstances the insurer could be compelled to defend the employee in the suit filed against it by the employer absent an employer/employee exclusion, which not all cyberspace policies maintain and few CGL policies have in force. The latter coverage could be implicated where the employee used the employer's advertising idea to promote his own goods and services, using a distinct website to promote his products, while continuing employment for the present employer. The pirate's liability would be based on his theft of a list of customers that includes detailed information about their needs and wants, as well as the identity of pricing and delivery models of the company's products, vendors, or components suitable for assembly into products.

Receiving coverage for a new competitor's activities under a traditional CGL policy would be problematic. Under the 2007 ISO policy form, such conduct may not be deemed "the use of another's advertising idea in your 'advertisement.'" A court could view the lawsuit as one for theft of product information rather than for the content of the advertisement of those products. Disputes over these issues have led to numerous coverage cases, many of which have favored insurers.

Although the logic of some of these cases is questionable, their existence should embolden insurers to deny indemnity for such claims. Thus, a federal district court in Nevada<sup>11</sup> found no causal nexus between the insured's advertising and the alleged injury and, thus, no defense where the insured allegedly funneled confidential trade secrets, including business strategy, pricing information, and client lists that were used to take away the plaintiff's present and future customer base. The company, as the prosecuting claimant, could choose

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11. *Associated Aviation Underwriters, Inc. v. Vegas Jet, LLC*, 106 F. Supp. 2d 1051, 1055–56 (D. Nev. 2000).

to highlight the elements of its lawsuit that might trigger coverage and thereby improve its prospects for obtaining an insurer-funded settlement or damage award.

Infringement claims for violation of the click-and-tab patent would require acquisition of an IP defense policy or litigation under a CGL policy that predates the inclusion of an express intellectual property exclusion—2001 for ISO-drafted policy provisions. If the claim implicates a CGL policy form, the more recent the policy form, the less likely a court would be to find that a defense arose for your competitor's offer for sale infringement. Again, this is a result of the more restrictive coverage for intellectual property claims in recent policies.

Clearly, cost considerations are key in this area. Given the significant costs of IP litigation—patent lawsuits typically run more than \$1 million per year to litigate—procurement of enforcement/abatement coverage through resources such as IPISC or Samian Underwriting Agencies Limited could be essential. Short-term pricing sensitivity may not be the best focus.

Claims for trade secret and patent infringement are less likely to fall within the scope of cyberspace or CGL policies than other intellectual property claims. The safest bet is to procure express intellectual property defense coverage to avoid litigation with insurers.

## **(2) Scenario Two: Satellite Connection Loss**

This scenario is a classic case in which traditional property damage and crime policies will not be responsive, even with extended business interruption coverage. Net secure policies like the one issued by Marsh USA, however, fit the scenario perfectly. They are most likely to address the new range of risks posed by e-commerce in a first-party context—that is, in cases in which the insured looks to its own carrier for reimbursement of damages rather than seeking defense and indemnity for claims asserted against it.

The Marsh policy's property coverage applies to a direct loss resulting from deleting, disrupting, or destroying Electronic Data or Electronic Information Assets, caused by an attack, unauthorized access, or unauthorized use. Cyberterrorism could constitute all three. A policyholder could recover for loss of business income, which would be determined by a number of factors, including the probable net income if no covered loss had occurred. Although this policy has an exclusion for satellite failure, it should not apply in cases in which the problem is interference with a functioning satellite.

### 3. Policy Provisions

#### a. Insurance Policy Providers for Cybernet Coverage

Carrier	Product	Website
ACE	ACE Digital DNA Network Risk Insurance Program (first party); ACE Privacy Protection Privacy and Network Liability Insurance Program (third party)	www.acegroup.com
AIG	AIG CyberEdge	www.aiginsurance.com
Allied World	Professional Liability Privacy/403v2	www.awac.com
Arch Insurance Group	Arch NetSafe; Standalone Network Security, Privacy and Media Liability, providing First and Third Party Cyber Coverage Professional Liability added by endorsement	www.archinsurance.com
Argo Pro	iPRP—Information and Professional Playbook	www.argolimited.com
Ascent Underwriting	CyberPro	www.ascentunderwriting.com
Axis—Axis Pro	AXIS PRO PrivaSure Insurance Policy and AXIS PRO PrivaSure Breach Response	www.axisproinsurance.com
Beazley	Beazley Breach Response and Beazley Information Security and Privacy Insurance with Electronic Media Liability Coverage; First Party available by endorsement	www.beazley.com
Brit Insurance	Brit Privacy Protection	www.britinsurance.com
CFC Underwriting	CPM—combined cyber, privacy and media (including first and third party)	www.cfcunderwriting.com
Chubb	CyberSecurity by Chubb	www.chubb.com
CNA	NetProtect 360—combined property and liability; NetProtect Essential Liability Coverage; ePack Extra Liability Coverage	www.cna.com
Crum & Forster	Technology and Privacy Professional Liability Policy, Third-party coverage and costs for breach and expenses / cyber extortion costs	www.cfins.com
Safehold Special Risk	WebNet Protection and WebNet SB (small business)	www.safehold.com
The Hartford	The Hartford Data Privacy—Network Security Liability Insurance Policy; The Hartford CyberChoice 2.09	www.thehartford.com
Hiscox	Hiscox Technology, Privacy and Cyber Protection Portfolio	www.hiscoxusa.com
Ironshore	Enterprise PrivaProtector 9.0	www.ironshore.com
Liberty International Underwriters	LIU Data Insure (first and third party)	www.liu-usa.com

Carrier	Product	Website
Markel (Evanston)	DataBreach	www.markelcorp.com
NAS Insurance	NetGuard Plus/e-MD Broad First- and Third-Party Form	www.nasinsurance.com
OneBeacon Professional	OneBeacon Professional Insurance Network Security and Privacy Liability Policy	www.onebeaconpro.com
OneBeacon Technology Insurance	Technology Errors or Omissions Coverage Form (APR001); Data Privacy Protection Coverage Form (APR012); Communications Liability Coverage Form (APR010)	www.onebeacontech.com
Philadelphia Insurance Companies	Cyber Security Liability	www.phly.com
RSUI	CY Tech Confidential (combined first- and third-party form)	www.rsui.com
Travelers Global Technology	CyberFirst	www.travelers.com
Travelers Bond and Financial Products	Wrap and CyberRisk (for private and nonprofit entities); Executive Choice and CyberRisk (for publicly traded companies); Select One and CyberRisk (for financial institutions)	www.travelers.com
XL Insurance	XL Eclipse PRO 2.0	www.xlgroup.com
Zurich	Zurich Security and Privacy Protection Policy (Z-SAPP) (combines first and third party on one form)	www.zurichna.com

***b. Insurance Policy Providers for Media Liability***

Carrier	Product	Website
ACE	ACE Advantage Multimedia Liability Policy	www.acegroup.com
AIG	Multimedia Producer Liability; Patent Infringement Indemnity Insurance; Specialty Risk Protector®	www.aiginsurance.com
Allied World	Media Liability Insurance Coverage (claims-made policy and occurrence policy)	www.awac.com
Axis—Axis Pro	Media Liability Program—Multimedia Liability Policy and Film and Entertainment Liability Policy	www.axiscapital.com
Beazley/Lloyd's Syndicate	Beazley Media Including Professional and Technology Services, Computer Network Security and Privacy Liability Insurance	www.beazley.com



Carrier	Product	Website
Chubb	MediaGuard (United States / Canada / Latin America); Masterpro (United Kingdom / Ireland)	www.chubb.com
CNA	Enterprise Media Solutions	www.cna.com
Euclid Managers	The Disseminator Content Liability	www.thehartford.com
Hiscox	U.S. TMT Multimedia Liability; U.S. TMT Marketing, Advertising and Communication Liability; U.S. TMT Video, Film and Television Producers Liability	www.hiscoxusa.com
Intellectual Property Insurance Services (Lloyd's)	Intellectual Property Infringement Abatement InventPro Abatement Insurance; Intellectual Property Defense Cost & Damages Reimbursement Multi-Peril Insurance Policy; Unauthorized Disclosure of Confidential Information Defense Policy	www.patentinsurance.com
Liberty International Underwriters	Intellectual Property Infringement Insurance; Intellectual Property Value Insurance	www.libertyiu.com
OneBeacon Professional	Media Advantage Newspaper Advantage Advertising Agency Liability Policy; Music Liability Policy	www.onebeaconpro.com
ThinkRisk Underwriting Agency	Converging Risk Liability Policy	www.thinkriskins.com

### ***c. Best Practices Internet Media Liability and Cyberspace Policy***

The international insurance market is grappling with the challenge of creating a policy that adequately addresses the number of risks posed by new technologies and Internet activities in particular. Currently, there is no industry-standard policy form. A recent panel of brokers and insurance coverage counsel seeking to evaluate policies offered in the marketplace failed to identify a single best policy form, given the wide variance in the coverage that applies. The group recommended that each business examine its particular needs and determine which companies' products best address such needs.

There is, however, another solution: craft a "best practices" policy form from which the majority of businesses may benefit. The concept is much like that which inspired the creation of the CGL policy, which was itself a response to the number of variant policy forms issued by carriers—some broker influenced, others not. Other custom-crafted policies are available through direct contact of the London market through indemnitors such as Samian.

The particular kind of coverage at issue shares features of property damage policies, general liability forms, and errors and omissions coverage. For business litigators, however, especially those working in the IP domain outside the patent context (because patent claims typically are excluded from nearly all of these policy forms), knowing which policies are available to best address these risks is of great value.