

Introduction

The *IP Attorney's Handbook* came out of my past practice experience litigating these issues and writing frequently about them for a number of organizations, as well as my past work for the American Bar Association, Intellectual Property Law Section as the chair of Committee 654, which became Committee 611, the Special Committee on Insurance.

Intellectual property practitioners' natural focus is on the torts pled against their client, which must be analyzed to construct a defense. A distinct approach is called for in analyzing insurance coverage because the initial point of reference is the language of the insurance policy whose provisions might implicate a defense. This handbook will focus on policy language likely to be possessed by litigants in intellectual property disputes as well as those whose acquisition would enhance policyholders' opportunity to obtain policy benefits in intellectual property disputes. In discussing the pertinent policy language, it is critical to remember that it is the facts, not the labeled claims for relief that determine the potential for coverage.

Informed by fact summaries that suggest how courts address these issues in the pertinent forum, the intellectual property practitioner can then evaluate which insurers must be promptly notified and/or which brokers must be enlisted in this effort. This can be especially important when notice is a condition precedent to coverage as is true in some forums such as New York and Illinois, where a delay of as little as four months in providing notice can bar procurement of any policy benefits. When subsequent denials are issued, intellectual property counsel can then evaluate whether all facts necessary to evidence potential coverage have been provided to the insurer.

Intellectual property counsel, so armed, can determine whether its obligations to advise about the scope of potential coverage for settlement purposes under Federal Rule of Civil Procedure 26(a) require the assistance of coverage counsel for advice regarding the potentiality of coverage and/or the pursuit of claims to secure coverage, as well as to establish what rights the policyholder has to control counsel and secure appropriate reimbursement rates promptly to aid the ongoing defense effort.

My goal is to provide an informative resource to which busy intellectual property practitioners can turn for an overview of insurance coverage cases addressing intellectual property claims. I also wish to highlight issues that should be of particular concern to intellectual property attorneys who must weave in and out of the labyrinth of insurance coverage cases that march to a distinctive set of often counterintuitive rules.

This book is not designed to replace my more comprehensive treatise *Insurance Coverage for Intellectual Property Assets* (1999). Rather, it seeks to provide a pathway to the issues discussed in more depth in my detailed treatise, focusing principally on published cases.

When I first started writing in this arena, there was a dearth of case law. This made every unpublished case worthy of comment. Over the years this has become less necessary. Instead, the task is now to predict how courts may address any new fact scenario. Nevertheless, practitioners should be aware that a number of pro-policyholder cases are unpublished. These cases often better reveal how courts may address novel issues than published precedent.

Practitioners should also be aware that a smaller number of the published cases favor policyholders. This circumstance arose because insurers often elect not to pursue appellate review of unfavorable decisions to avoid creating unfavorable precedent that could prove detrimental to their long-term financial interests. Policyholders rarely are driven by the same consideration because they typically are not concerned about making law. Thus, coverage cases will often be pursued where the amount in controversy is significant and the coverage law is not fully developed.

Published cases must be read cautiously. Due to the pro-insurer selectivity principle noted above, published case law may not be predictive of how courts are likely to address fact scenarios that have only been discussed in unpublished orders. I have therefore chosen to expansively discuss and critique some published cases, especially when their logic has been questioned by subsequent cases. Cases employing problematic analysis may not offer the best evidence of how courts may address new fact scenarios.

When I believe it necessary to discuss unpublished cases, I typically do so in footnotes, especially where such decisions illustrate an emerging view or one that provides a sense of a balance, even though they are only of persuasive value. I have made an exception for cases discussing errors and omissions, directors and officers, and cyberspace liability because there are few; many are unpublished, and the analytic exercise the courts follow will be critical in analyzing how future cases may address these policy forms in analyzing intellectual property exposure.

In addressing insurance coverage, choice-of-law considerations are key. I have therefore included an extended discussion of this issue. I have also included a discussion of the process for procuring insurance viewed from the perspective of an advocate. In this role, I counsel policyholders in negotiating and writing insurance policies sensitive to how court decisions may affect the meaning of the policy language adopted. These thoughts may be of interest to risk managers and insurance brokers, as well as insurers.

I focus primarily on Insurance Services Office (ISO) policy language because the vast majority of cases to date focus on it as well. Nevertheless, intellectual property practitioners must always check the precise policy language at issue and not assume that the policy form tracks ISO language—many do not.

In addition to ISO policy forms and non-ISO commercial general liability (CGL) policies, other sources of coverage for intellectual property lawsuits include:

- stand-alone customized policy forms
- multimedia/cyberspace policies
- errors and omissions / professional liability policies
- directors and officers policies

As the number of courts addressing coverage issues for intellectual property claims grows, so too will the court's level of predictability. I hope that the *IP Attorney's Handbook for Insurance Coverage in Intellectual Property Disputes* will contribute to that effort.

The second edition does more than discuss cases since the 2010 release of the *IP Attorney's Handbook*. It addresses new policies, including intriguing new intellectual property policies from innovators like RPX, as well as an updated comparison of media liability policies, as well as cyber coverage policies. There are surprisingly few insurance coverage decisions addressing media liability. This is no doubt because these policies have generally fewer claims and are issued by insurers who underwrite intellectual property rights.¹ Nonetheless, CGL policies continue to offer significant coverage implicated in many intellectual property disputes.²

Policyholders who search for the broader policy forms will be rewarded with enhanced prospects for coverage for a number of intellectual property risks at a competitive price.³

1. Michelle Worrall-Tilton, *Insuring Intellectual Property*, BRIEF, Summer 2013 (available to ABA Members).

2. David A. Gauntlett, *Rumors of the Demise of CGL Policies as a Vehicle for Coverage of Intellectual Property Lawsuits Are Premature*, COMMITTEE NEWS (Tort Trial & Insurance Practice Section (TIPS), Insurance Coverage Litigation Committee, Am. Bar Ass'n), Winter 2013.

3. DAVID A. GAUNTLETT, *IP ATTORNEY'S HANDBOOK FOR INSURANCE COVERAGE IN INTELLECTUAL PROPERTY DISPUTES* (1st ed. 2010).