



IPAN Meeting 26 September 2018

Insuring IP Risk
in trade marks and brands

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Overview

- The IP Insurance Market, and the role of Sybaris
- The different types of Before-the-Event (“BTE”) IP insurance
- How we arrange and structure the cover
- After-the-Event (“ATE”) Insurance and Litigation Funding
- Why? The benefits of insuring your brand-related IP before-the-event
- How to Contact Us

The IP Insurance Market

- Few Participants, and most are concentrated in the Lloyd's and London Market.
- Market consists of Insurers and Brokers.
- Insurers only deal through Brokers, there is no direct dealing.
- There are very few brokers with any real expertise. Regional brokers usually access insurers through one of the London brokers on a "wholesale" basis.
- IP Insurance has been available for many years, but due to a previous lack of understanding the Market has had issues in the past.
- The Market now, whilst still small, does have more experience and the solutions being offered are suitable for Clients, or "fit for purpose" and claims are paid.
- In view of the last point above, the IPO, CIPA and ITMA are now all actively promoting the availability and benefits of IP insurance.
- Much of the business emanates from UK domiciled Clients, with majority of the remaining business emanating from the US, although other territories are being more proactive now. Most of the global business is underwritten in London.
- The client base covers everything from new start-up businesses, to large multi-national corporations, though the method of structuring the cover will vary.
- Sybaris Legal & IP is a specialist intermediary in this Market, with direct access to Lloyd's of London Syndicates, and London Market insurers. Sybaris has its own solution, and wording, and rating, and access to exclusive insurers, whilst dealing with all the major participants in the Market depending on the risk and requirements.

Before the Event (“BTE”) IP Insurance

- Covers Clients for claims made during the policy period (usually 12 months), and excludes any pre-existing disputes or circumstances which could give rise to a dispute.
- Covers declared IP Rights only, generally. However, usually provisions to add IPR’s to the policies
- Nearly all types of IPR’s can be insured now. Insurers have different “appetites”, however.
- Brand-related IP – registered and unregistered marks can be insured, and the other brand-related rights can also be included.
- Types of cover (1) - Pursuit / Enforcement costs.
- Types of cover (2) - Defence costs, with or without damages cover.
- Types of cover (3) – Contractual Indemnities, purchased as optional extension to defence cover.
- Types of cover (4) – 1st Party cover for loss of profits and/or revenue streams following IP-related trigger events (IP Business Interruption Insurance).

How we arrange and structure the cover

- The client identifies what IP rights they wish to insure
- A risk assessment is undertaken. If any issues are identified then cover can be structured to take these into consideration. We try not to exclude rights altogether, though there may be higher excess provisions where the risk is deemed high.
- Limits range from £100K to £10M, although higher limit options available through excess layers or co-insurer provisions. A simple £100K limit should be adequate to protect your costs exposures to protect your brand in IPEC for a UK company only concerned about UK exposures.
- Excesses start at around £1K, but often larger clients will have much higher excesses eg £100K or £250K, or may have an aggregate excess for the annual period eg £1m or £2m
- There are often higher excesses required for US exposures, and sometimes co-insurance provisions as well.
- Usually available for UK only, Europe, Worldwide excl USA / Canada and Worldwide incl USA / Canada.
- Ultimately, whilst we have standard policy wordings to start with, the cover is ultimately bespoke for each client and their needs.

After the Event (“ATE”) Insurance

- Arranged for a specific pre-existing dispute by a claimant.
- Very expensive compared to Before the Event Insurance.
- Few ATE insurers will insure IP litigation, although a few do.
- What ATE insurance covers – adverse costs exposures minimum, with optional extensions for own disbursements (including own Counsel’s costs and expert fees).
- Very occasionally insurers will cover a part of own representation costs, perhaps 50%, but this is very rare.
- Whilst the premiums are high, the premium can be staged, or part upfront and part contingent. It is most unusual to have fully deferred or fully contingent premiums Post-Jackson, but sometimes available again for lower limit risks.
- Jackson significantly changed the ATE insurance market, since the recoverability of ATE premiums from a losing opponent was abolished for nearly all types of litigation.
- Since Jackson, Clients and their representation must calculate whether ATE cover is viable. If there is little in the way of damages recoverable, then often ATE is simply not a commercially feasible option. As this is often the case with IP disputes, purchasing BTE is a better form of risk management.
- ATE insurers do not have to offer cover, though at a minimum to consider will require a prospects of success of at least 60% stated by either a barrister or representation with the appropriate rights of audience for the forum.
- ATE premiums typically range from 25-40% of the limit of indemnity required. This can be staged, or part contingent, or occasionally fully contingent and deferred, however.

Litigation Funding

- Litigation funding is contingent funding of a legal case.
- As per ATE insurance, funders also require prospects of success expressly stated in an opinion and being in excess of 60%.
- Funding arrangements can provide funds for own representation costs (incl disbursements and Counsel costs), and ATE insurance premiums.
- Funders require ATE insurance as case law has held that a funder could be held liable for any adverse costs up to the amount they have funded. The ATE insurance therefore protects both their own exposures, and the adverse costs exposures of the Client.
- Funding provides a mechanism for Clients to pursue litigation that they could not normally afford, and also allow representation to undertake work without having to agree to full CFA or DBA arrangements. Experts cannot work on any type of contingent remuneration, and Counsel still rarely does so.
- Funding is generally provided on the basis of a share of damages, or there are now options for lower level funding where interest on the funded amount can be payable instead.
- Funding is expensive, although there is an argument that an award of some nature is better than no award, and if non-financial remedies can be obtained where they would not normally be possible then there may also be wider implications to consider too for a Client.
- Funding will rarely be worth considering unless the damages to costs ratio is in excess of 3:1
- Funders can charge between 25-40% of a damages award
- Lower-level funding can now be obtained, and interest is charged for example 75% of the sum funded per annum for a maximum of 3 years.
- Sybaris Legal & IP has funding panel partners which can consider funding disbursements only. ATE insurance may not be required for funding the smallest requirements, but would be for any £100K+ funding arrangements.

Benefits of Insuring Your IP and Brand Before the Event

- ATE insurance and/or litigation funding may not be available. These options should not be relied upon as any form of prudent risk management, they are effectively a “hope and pray” approach.
- IP litigation is widely recognised as being very expensive. Whilst large Clients can afford to “self-insure” against such risks, few SME’s, micro-businesses and new start-ups can afford IP litigation. Unfortunately, larger competitors will know this as well and use it to their advantage.
- Many of these clients cannot realistically afford to run, let alone lose, IP litigation even in IPEC.
- The mere existence of BTE IP insurance can act as a deterrent to potential infringers of Clients.
- Clients can provide confirmation to business partners that they have the resources to cover disputes. Key partners can have concerns, and sometimes even ask for evidence of insurance.
- It is now not uncommon for US business partners to require that IP insurance is in place under contractual provisions, and in addition to other types of more standard insurance requirements.
- Clients can give comfort to investors that their main (intangible) assets are protected, and that seed capital for business development will never have to be spent on IP litigation. Some investors are now making this a requirement.
- Client company directors may wish to consider their own personal exposures should they have external shareholders – if IP insurance is available, and yet the directors choose not to insure, then it is foreseeable that the company may not have adequate resources to handle such claims, and also has not utilised risk transfer / risk management mechanisms that are available to protect the potentially largest exposures they may have, and failed to protect its most valuable assets.
- For a Client’s representatives they have the comfort of knowing that they cannot be criticised for not letting the Client know the cover exists when applying to register their rights, and thus allowing the Client to make an informed decision whether to protect themselves or not at the earliest stage. Any solicitors should be mindful of their express Code of Conduct requirements to discuss insurance availability and funding.
- Also beneficial for Client representation is that the Sybaris IP product allows Clients to use their own representatives should there be litigation.

Contact Us

- We are always happy to answer any questions, and to explain available options.
- We can meet Clients and their representatives when it is beneficial or may assist.
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