



FINPRO

IP Protect: Addressing the Intellectual Property Coverage Gap

Traditionally, intellectual property (IP) insurance policies have offered policyholders inadequate coverage and insufficient limits in exchange for high premiums, large retentions, and/or coinsurance. Unsurprisingly, most businesses have been dissatisfied with existing options, which could leave them exposed to litigation and other potential threats.

To fill this IP coverage gap, Marsh has worked with Ambridge Partners, a managing general underwriter with particular IP expertise, to develop *IP Protect*, a proprietary Marsh defensive IP insurance policy that offers more comprehensive and cost-effective coverage.

Policies specifically tailored to address these issues and to cover a broad range of IP risks have historically been difficult to come by. Commercial insurers have historically not had much interest in underwriting such risks, and the limited offerings they have developed have been beset with coverage gaps and low limits.

IP Exclusions Under CGL and D&O Policies

Commercial general liability (CGL) policies and directors and officers liability (D&O) policies often exclude coverage for the defense of some or all intellectual property infringement claims. For example, policyholders have found recovery difficult when seeking such coverage under traditional CGL policies' advertising injury provisions. CGL and D&O insurers have also declined to provide coverage if an IP infringement allegation includes claims of intentional actions — which most allegations do.

The Five Types of IP Insurance

Generally, there are five types of IP insurance products:

- 1. Defensive** IP insurance policies can protect an insured's IP, products, and services from external attack and can backstop an insured's outbound indemnity obligations.
- 2. Specific contingency** insurance covers known risks and is appropriate for businesses seeking litigation buyout insurance or catastrophic loss protection for a known ongoing matter, including IP litigation. For example, a company that has won an inbound IP infringement suit at trial might want to purchase a contingency policy to mitigate the risk of a loss on appeal.

3. Offensive IP insurance covers the costs of IP enforcement matters such as an insured filing suit against a third party asserting that the third party has infringed the insured's IP.

4. Collateral protection insurance can secure the value of an IP asset when that asset is pledged as collateral to obtain a loan.

5. Trade secret value insurance can protect an insured from loss due to the misappropriation (theft) or disclosure of its trade secrets.

A Proprietary Defensive IP Policy

Historically, IP defense policies have been either cost-prohibitive, with some priced at a double-digit RoL, or overly limited in coverage — for example, providing coverage only for suits brought by nonpracticing entities or patent assertion entities (often referred to as patent trolls). Additionally, some IP defense policies cover only patents and do not provide coverage for losses relating to copyrights, trademarks, trade dress, or trade secrets.

Marsh's proprietary defensive IP insurance policy, *IP Protect*, expressly covers not only patent matters but also losses relating to trademark rights (including trade dress); copyrights;

and, by optional endorsement, trade secrets. The policy provides protection — for companies of all sizes, across several industries — from:

1. Defense costs and damages (including both settlements and judgments) arising from a third party's allegation that an insured has violated the third party's IP rights.
2. Defense costs arising from a third party's attempt to invalidate an insured's patent, trademark, and/or copyright registration(s).
3. Contractual liability (including both defense costs and damages) from obligations to indemnify customers or manufacturers if they are sued for IP infringement.

Limit and Premium

Generally, limits of \$3 million to \$80 million are available. Businesses can typically obtain premiums priced between 1% and 4% of the policy limit. Indications of higher risk include, for example, a history of frequent inbound IP infringement allegations. Companies in all industries are eligible for coverage; however, pharmaceutical, semiconductor, and GPS/infotainment companies are considered high risk.



IP Insurance Coverage Comparison

	IP Protect	Other IP Insurance Products	Commercial General Liability (Advertising Injury)	Media Liability
COVERAGE				
Coverage of IP asset classes	● Protects from patent, trademark (including trade dress), and copyright risks by default; trade secret risks by endorsement	● All four IP asset classes not typically covered	● Generally limited to copyright and trademark risks	● Generally limited to copyright and trademark risks
Third-party claims that an insured's product(s) or service(s) infringe a third party's IP	● Includes this protection by default	● Generally covered but may be subject to exclusions (for example, as to identity of third party)	● Only with respect to the Insured's <i>advertisements</i> and copyright and trademark only	● Only with respect to the Insured's <i>publications</i> and copyright and trademark only
Third-party attempts to cancel or invalidate an insured's IP	● Includes this protection by default	● Often not available	● Generally excluded	● Generally excluded
Third-party claims that an insured's customer's products or services infringe a third party's IP due to the incorporation of an insured's product(s) or service(s) therein	● Includes this protection by default	● Often not available	● Generally excluded	● Generally excluded
CHARACTERISTICS				
Insured's choice of counsel	● Insured has choice of counsel (no rate caps)	● Generally not granted	● Insured has choice of counsel, but may be subject to rate caps	● Insured has choice of counsel, but may be subject to rate caps
Breadth of coverage	● Broad coverage, including for third parties; narrowed exclusions (for example, with respect to willful infringement allegations)	● Often significantly narrower coverage (for example, actions by competitors are excluded)	● Generally expressly limited to "advertising activities"; intentional acts are not covered	● Generally has exclusions for certain third parties (for example, music licensing associations) and for trademark infringement for companies advertising their own products or services
Cost of insurance	● Low premiums enabled by underwriters with particular IP expertise (1% to 4% RoL)	● Equivalent coverage difficult to obtain	● Reasonable premiums obtainable	● Reasonable premiums obtainable
Proprietary policy language	● Proprietary policy language negotiated by Marsh	● Not available	● Not available	● Not available



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Marsh is one of the Marsh & McLennan Companies, together with Guy Carpenter, Mercer, and Oliver Wyman.

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