

The Patent Lawyer

GLOBAL REACH, LOCAL KNOWLEDGE

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A new dawn for patent law in Europe – can the UPC place European patent litigation on par with US patent litigation?



Rachel Fetches, Partner & Head of Law at HGF, provides a first glimpse into the new UPC system, with summary of the unfolding patent actions that will influence the development of case law, to predict the success of the new system.



IPISC: IP infringement insurance

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An interview with Dexcom

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Lexicography: the ultimate superpower

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LANDSCAPE**

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The benefits of intellectual property infringement insurance

David Stitzel, M.S., Esq., Director of IP Insurance Solutions Consultants, details the available coverage and related advantages of having IP infringement insurance to protect and promote growth in your company.

There are many benefits to having IPISC Intellectual Property (IP) Infringement Defense and Enforcement Insurance coverage for your clients' products and related IP assets.

For example, our IP Infringement Defense/Enforcement Insurance policies:

- Provide insureds with the financial means necessary to defend against unexpected lawsuits alleging infringement on the IP rights of others (Defense);
- Provide insureds with the financial means necessary to pursue those who infringe on their IP rights (Enforcement);
- Make companies more attractive to potential investors (Defense/Enforcement);
- Increase company value by strengthening its product portfolio (Defense);
- Increase company value by strengthening its IP portfolio (Enforcement);
- Protect/increase market share (Defense/Enforcement);
- Level the playing field and deter what may be construed as weak or meritless/frivolous claims of IP infringement from competitors attempting to regain lost market share (Defense);
- Level the playing field and deter what may be construed as weak or meritless/frivolous claims of IP infringement from Non-Practicing Entities (NPEs or Trolls)



David Stitzel

attempting to monetize their IP assets (Defense);

- Facilitate more equitable/favorable settlement/licensing agreements (Defense/Enforcement);
- Avoid the negative financial impacts/ramifications associated with an adverse judgment of IP infringement including litigation expenses (court costs, attorney fees, expert witness fees) and potential damage awards (reasonable royalties, lost profits), business interruptions (temporary/permanent injunctions, lost product/service revenue streams, design around time/cost), and bankruptcy (Defense);
- Cover IP litigation risk exposures that are excluded from Commercial General Liability (CGL), Errors and Omissions (E&O), Directors and Officers (D&O), Professional

Résumé

David Stitzel, M.S., Esq., Director of IP Insurance Solutions Consultants

David Stitzel is the Director of Intellectual Property Insurance Solutions Consultants and a Producer at Intellectual Property Insurance Services Corporation (IPISC) headquartered in Louisville, Kentucky, a surplus lines licensed property and casualty insurance agent, a licensed patent attorney with many years of patent preparation and prosecution experience, a former patent examiner with the United States Patent and Trademark Office (USPTO), an organic/polymer chemist, and a molecular geneticist.

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Liability (PL), Professional Indemnity (PI), Media, and Cyber Insurance Policies (Defense/Enforcement).

Include optional additional insured coverages for:

- Additional Named Insureds (e.g., coverage for scheduled related companies, such as parent, subsidiaries, and sister companies, with or without a contractual duty to indemnify);
- Additional Insureds (e.g., coverage for scheduled, unrelated third-parties, such as manufacturers, suppliers, distributors, retailers, and publishers, with a contractual duty to indemnify);
- UCC (e.g., coverage for unscheduled bona fide customers without a contractual obligation to indemnify); and/or
- Additional Insured Indemnification (e.g., coverage for unscheduled and/or scheduled Additional Named Insureds, Additional Insureds, and UCC coverage, with and without a contractual duty to indemnify) (Defense).
- Include optional licensee coverage whereby parties who are or who become licensees (e.g., foreign product manufacturers) on or after the effective date of licensee coverage may be sued by the Licensor/Insured for IP infringement due to a breach of the license agreement by the licensee, as long as the licensee has not yet breached the license agreement at the time coverage under the IP Infringement Enforcement Insurance policy is bound (Enforcement).
- Obtain a comprehensive search and underwriting analysis of the IP infringement litigation risk exposures of the products sought to be covered under the Defense Insurance policy, whereby the underwriter provides a written or verbal Risk Summary Analysis Report to the applicant, upon request. This includes: defining the scope of coverage sought under the policy if bound; identifying competitors and providing a competitive overview thereof; determining the level of litigation activity in the applicant's technological space; evaluating/summarizing the overall IP infringement litigation risk; and providing an insurability assessment of the products sought to be covered (Defense).

The mean/average costs for IP infringement litigation

As published by the AIPLA 2021 Report of the Economic Survey, the following sets forth the mean/average costs (*excluding damages/settlements and based on a single IP asset*) for:

Patent infringement litigation:	
less than \$1 million at risk:	\$771,000
\$1-\$10 million at risk:	\$1,910,000
\$10-\$25 million at risk:	\$3,728,000
greater than \$25 million at risk:	\$5,768,000

Trademark infringement litigation:	
Less than \$1 million at risk:	\$415,000
\$1-\$10 million at risk:	\$892,000
\$10-\$25 million at risk:	\$1,592,000
Greater than \$25 million at risk:	\$3,381,000

Copyright infringement litigation:	
Less than \$1 million at risk:	\$1,143,000
\$1-\$10 million at risk:	\$1,421,000
\$10-\$25 million at risk:	\$2,358,000
Greater than \$25 million at risk:	\$5,778,000

Trade secret misappropriation litigation:	
Less than \$1 million at risk:	\$776,000
\$1-\$10 million at risk:	\$1,717,000
\$10-\$25 million at risk:	\$3,309,000
Greater than \$25 million at risk:	\$4,582,000

Please note during your review that the foregoing "\$X million at risk" means the estimated financial impact of an adverse judgment for intellectual property infringement.

The financial impacts associated with an adverse judgment include *court costs, attorney's fees, and expert witness fees* based on IP litigation of a *single IP asset*.

Please note however that the above mean/average IP infringement litigation costs do NOT include the costs associated with *damage awards (reasonable royalties, lost profits), settlements, and business interruptions* (e.g., temporary/permanent injunctions, lost product/service revenue streams, design around time/cost).

While the figures above represent the mean/average costs, including court costs, attorney's fees, and expert witness fees for IP infringement litigation based on a single IP asset, the actual litigation costs could be *substantially higher*, especially when taking into consideration allegations of infringement of *multiple IP assets*.



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and the costs associated with *damage awards*, *settlements*, and *business interruptions*, which are NOT included in the above mean/average costs for IP infringement litigation.

IP Infringement Defense Insurance

IPISC IP Infringement Defense Insurance provides our Insureds with the financial means necessary to defend against unexpected lawsuits alleging infringement on the IP rights of others in order to protect/increase market share, strengthen their product portfolio, and facilitate more equitable/favorable settlement agreements.

Our IP Infringement Defense Insurance policy covers IP infringement litigation expenses (e.g., court costs, attorney fees, expert witness fees, potential damages, and settlements) associated with the Insured defending itself against a claim of infringement on another's intellectual property rights.

Our IP Infringement Defense Insurance policy also covers patent validity challenges, including the costs and expenses incurred in initiating and prosecuting a post-grant proceeding (*Inter Partes* Review (IPR), Post Grant Review (PGR), and Covered Business Method (CBM)) brought by the Defendant/Insured against the Plaintiff at the USPTO Patent Trial and Appeal Board (PTAB) as a direct consequence of covered litigation.

IP Infringement Defense Insurance is critical to the continued growth and success of high-technology companies as larger entities with greater financial resources will oftentimes assert what may be construed as weak or meritless/frivolous claims of IP infringement against smaller competitors with limited financial resources to regain lost market share.

Larger entities outspend/outlast smaller entities due to the exorbitant litigation costs associated with defending against claims of IP infringement.

Smaller entities unable to go the distance and withstand the financial burden/storm will fold by either going bankrupt or being forced to enter

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into one-sided licensing agreements having exceptionally high royalty rates.

An IP Infringement Defense Insurance policy will help not only deter weak or meritless/frivolous claims of IP infringement, but also avoid bankruptcy or being forced to pay exceptionally high royalty rates, by leveling the playing field and providing the financial means necessary to defend against unexpected lawsuits alleging IP infringement.

Once IP Infringement Defense Insurance coverage is bound, we provide our Insureds with “Products Insured Through IPISC” Official Seals for display on their website, products, and/or packaging, which serve as a great deterrent against weak or meritless/frivolous claims of alleged IP infringement from Non-Practicing Entities (NPEs or Trolls) attempting to monetize their patent assets, and competitors with greater financial resources attempting to regain lost market share.

IP Infringement Enforcement Insurance

IPISC IP Infringement Enforcement Insurance provides our Insureds with the financial means necessary to pursue those who infringe on their IP rights in order to protect/increase market share, strengthen their IP portfolio, and facilitate more equitable/favorable licensing agreements.

Our IP Infringement Enforcement Insurance policy covers IP infringement litigation expenses (e.g., court costs, attorney fees, and expert witness fees) associated with the Insured pursuing a claim of infringement against those who infringe on the intellectual property rights of the Insured.

Our IP Infringement Enforcement Insurance policy also covers patent invalidity counter-claims, including the costs and expenses incurred in responding to a post-grant proceeding (*Inter Partes* Review (IPR), Post Grant Review (PGR), and Covered Business Method (CBM)) brought by the Defendant against the Plaintiff/Insured at the USPTO Patent Trial and Appeal Board (PTAB) as a direct consequence of authorized

litigation, wherein the patent invalidity counterclaim seeks re-examination and invalidation of one or more rights/claims of a patent under the insured/scheduled Intellectual Property which is the subject of the authorized litigation.

Ancillary Post-Grant Patent Protection coverage is now available as a rider to our IP Infringement Enforcement Insurance policy which covers the costs and expenses incurred by the insured/patentee in responding to a post-grant proceeding brought by a third-party petitioner challenging the validity of an insured patent scheduled under the policy at the USPTO PTAB, whereby the insured/patentee was previously unable to bring a patent infringement claim under the policy against said third-party because infringing activities (e.g., making, using, selling, offering for sale, and/or importing into the United States) had not yet commenced.

Before filing a lawsuit alleging IP infringement against a suspected infringer, IPISC offers Early Intervention Letter Services for IP Enforcement Insurance policyholders whereby the IPISC IP litigation claims management department sends, at the Insured's request, a non-threatening letter to a suspected infringer advising them of the existence of the policyholder's Intellectual Property rights and the fact that said IP rights are insured through IPISC. In IPISC's extensive experience, the Insured's prompt response to newly discovered IP infringement oftentimes results in a quick resolution in favor of the IP Enforcement Insurance policyholder.

Once IP Infringement Enforcement Insurance coverage is bound, we provide our Insureds with "Intellectual Property Insured Through IPISC" Official Seals for display on their website, products, and/or packaging, which serve as a great deterrent against infringing activities of competitors.

Consultative client meeting

We would greatly appreciate the opportunity to speak with you and your client to discuss our product offerings, address any questions that you and/or your client may have, obtain additional information about your client's company, products/processes and corresponding IP assets needed to provide premium estimates, and gain an understanding of any concerns, licensing agreements, and/or contractual indemnification requirements that your client may have so that we can better manage/mitigate their IP litigation risk exposures and custom-tailor an Intellectual Property Infringement Defense and/or Enforcement Insurance Policy that meets your client's specific needs.

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IPISC IP Infringement Defense Insurance provides our Insureds with the financial means necessary to defend against unexpected lawsuits alleging infringement on the IP rights of others.
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About IPISC

Intellectual Property Insurance Services Corporation (IPISC) was founded in 1990 by Robert W. Fletcher. IPISC is the pioneer and worldwide industry leader in intellectual property insurance. IPISC partners with IP attorneys, insurance brokers, insurance agents, and clients to provide intellectual property litigation risk management solutions and services that protect Insureds' products and intellectual property (i.e., patents, trademarks, copyrights, and trade secrets) rights by providing the financial resources necessary to cover the exorbitant litigation expenses associated with defending against allegations of infringement on the intellectual property rights of others, as well as pursuing those who infringe on their intellectual property rights. IPISC is a managing general agent/underwriter (MGA/MGU) for multiple carriers having an A (Excellent) rating from A.M. Best, AA- (Very Strong) rating from Fitch, and A+ (Strong) rating from S&P. The MGA/MGU functions of IPISC include sales, marketing, application processing, searching, underwriting, pricing, financing, binding coverage, accounting, compliance, claims management, and customer service. IPISC is an all-encompassing IP litigation risk management team serving prestigious boutique, midsize and large intellectual property law firms, top insurance brokerages and insurance agencies, high-technology companies ranging from start-ups to Fortune 500 companies, and individuals, such as business owners, executives, entrepreneurs, inventors, scientists, authors, artists, and musicians. With our corporate headquarters located in Louisville, Kentucky, IPISC serves IP lawyers, brokers, agents, companies, and individuals with IP litigation risk management solutions on a worldwide (US and foreign) basis.

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