

Meeting News...

LES Scotland Meeting (29th November 2012, Brodies LLP)

“IP insurance – too complicated and too expensive – why bother?”

The Licensing Executives Society (LES) November event was held at Brodies LLP’s office in Glasgow and provided professional and first-hand insight into the oft-overlooked and undervalued world of IP insurance. The speakers focused on the benefits of IP insurance to innovators, attorneys and the insurance industry alike, and offered some tips for getting an affordable, tailored and appropriate policy for SMEs. The event was hosted by Brodies LLP and LES Scotland Committee Chair Stephen Robertson who welcomed the audience and the speakers.

James Kirk is a Director of Rocep Lusol Holdings Limited and Gizmo Packaging Limited, companies known for their pressure pack delivery system and innovation in the widget field, and which have benefited first-hand from a well-tailored IP insurance policy.

James started out the evening by delving right into the innovation perspective, delighting the audience with a demonstration of the patented Gizmo closure which preserves characteristics of drinks from degradation until the moment they’re opened – with the added benefit of turning them a rainbow of colours! Things turned even more colourful for James’ company when they realised that a rival firm was potentially infringing on their patent in the United States, a particularly antagonistic and costly arena for IP litigation.

James explained how his company had benefitted from having had a firm IP insurance strategy in place; it afforded them the opportunity to take a professional approach, to retain Scottish counsel who could also represent them in the US and, crucially, to appeal the decision of the US district court, which initially ruled against them. Knowing that their insurance policy would cover the cost of the appeal, the company was ultimately able to come to a resolution with the rival firm, something which may not have otherwise been possible if they had to front the cost of litigation themselves.

John Keen is the Director of Global Professions at Aon, and has had many years’ experience in IP insurance, focusing specifically on risk management and indemnity.

Though John described himself as Erik’s “opening act,” he provided a fascinating account of why IP insurance is an important evolutionary step in an industry which has historically been reticent to insure intangible assets due to the difficulty in valuing them. John opened with an impressive statistic about the growth in IP value: in 1975, 17% of the value of S&P 500 companies resided in intangible assets, whereas in 2010, that figure rose to 80%. He noted that this was problematic for insurers, who had previously been key to keeping businesses afloat, due to their struggle to adapt to a commercial environment that is full of IP-rich companies.

John refuted the notion that “the best insurance is a well-drafted patent,” because patents don’t pay claims; and what is the value of a policy that cannot provide that essential service? John further noted that the number of patents being filed in the UK has diminished by 25%, due to what he saw as a decreasing confidence in the system’s ability to protect IP interests. He emphasised that IP insurance becomes relevant as it facilitates the realisation of that value, and helps in the defence of infringement litigation, which becomes a very real possibility the moment a new product enters the market. A well-drafted policy will respond to much and more, including pursued claims, defence, counterclaims and claims for invalidity.

Erik Alsegard is the Senior IP Underwriter at Munich Re, and specialises in IP infringement insurance for SMEs.

Erik began his presentation by stressing that when we talk about “IP Insurance,” what we are actually referring to is IP *Infringement* Insurance, as it is not actually the intellectual property assets which are being insured. Erik explained that this is because it is difficult to value IP before and after an event, and it is usually only possible upon actual infringement. And, according to Erik, if a company cannot afford to defend or pursue IP infringement claims, then the value on the balance sheet is not even worth talking about.

Erik also raised an interesting point in relation to competition, noting that the lack of IP insurance can often prove to be an easy solution for companies who are looking to bar their competitors from the market: merely sue the competition, and hope they don't have enough money to defend their position. Erik explained that it is not a commercially viable solution to enter the market without a form of IP infringement insurance, as the rapid pace of patent filing makes it difficult to know what exactly is being patented, leading to increased company vulnerability.

Erik went on to state that a lack of insurance can also be problematic in relation to contractual indemnities, e.g. with customers or licensees, as a lack of money to respond to IP litigation can also lead to a breach of contract. Companies may then be forced to use venture capital for litigation or indemnification purposes rather than for research and development, which can damage relationships with current and potential future investors. IP infringement insurance, therefore, gives a company freedom to operate, and provides for situations in which they may have to recall products, continue selling them at a risk, or defend infringement claims.

Erik noted that his business predominantly deals with SMEs, since larger corporate bodies – as we very well know – can generally fund their own pursuit of claims. Erik finished his presentation with a brief summary of what insurers look at when insuring IP assets, including the management of IP, the turnover of the product in each territory, likely royalty rates for the product and whether they have a reasonable risk management strategy in place.

The presentations were followed by a lively Q&A session and some friendly debate.

Thanks to Brodies LLP who kindly hosted the event and provided great hospitality.

Michelle Korman

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