

THE POLICYHOLDER ADVOCATE/IP COUNSELOR

NEWSLETTER

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HAPPY 10TH ANNIVERSARY TO GAUNTLETT & ASSOCIATES

On April 1, 2005, Gauntlett & Associates Celebrated 10 Years of Service to the Policyholder Community.
We Thank All Our Clients for Their Continued Trust in Our Firm.

POLICYHOLDER ALERT!

This year, a number of insurers who previously offered “advertising injury”/“personal injury” (“AI/PI”) as part of their Commercial General Liability (“CGL”) package are adding express AI/PI exclusions. These exclusions are typically a single page buried in a number of endorsements. Where adopted, the declarations page should reflect that no coverage is available for AI/PI pursuant to these endorsements. Insurers must call express attention to any reduction in coverage. Thus, where such endorsements are added, excluding AI/PI coverage that was previously in place, this reduction in coverage should be called to the policyholder’s attention.

Many insurance brokers will not provide sample policy forms upon renewal. Others fail to expressly advise policyholders that the coverage afforded is less generous than that previously offered. To protect against this scenario, policyholders should advise their brokers in writing:

“This will confirm that my CGL/Umbrella coverage as well as policy limits are the same as that previously in effect, even where offered by a new insurer. I am relying on this representation and warranty by you in renewing my new insurance policy. Please advise me immediately if my understanding is incorrect in any manner.”

Policyholders should also be alert to a new ISO endorsement, effective March 2005, which limits coverage for forms of invasion of privacy based on use of e-mails and websites: *CG 00 67 0305 – Exclusion – Violation of Statutes That Govern E-Mails, Fax, Phone Calls or Other Methods of Sending Material or Information*. A variant form of this endorsement is also being added to cyberspace/multi-media policies. It provides that the *Exclusion is amended to include: for or arising out of the transmission of unsolicited commercial e-mail messages and faxes.*

These endorsements should be resisted as this can significantly limit potential coverage for TCPA (“blast fax”) or CAN-SPAM (“misguided e-mail”) claims.

This is a critical year to be especially conscious of what form of policy your company will obtain that can respond to intellectual property/business torts and e-commerce risks. It is critical to review any new endorsements that limit this coverage and either negotiate the elimination/modification of these endorsements or procure broader coverage from another primary or umbrella insurer. **For a list of CGL insurers that still offer reasonably broad coverage, contact ntk@gauntlettlaw.com.**

NEW INSURANCE PRODUCTS THAT RESPOND TO INTELLECTUAL PROPERTY RISKS

I. INSURANCE TYPE COVERING FORMS OF INTELLECTUAL PROPERTY LIABILITY

General Insurance Policies That Might Offer Limited Protection

- Commercial General Liability (CGL) policies
- Property insurance with business interruption and extra expense policies
- Errors & omissions (E&O/Professional Liability) policies
- Umbrella and excess insurance policies
- Directors & Officers (D&O) policies

Internet-Specific Policies

- Cyberspace/multimedia policies (third party – libel, slander and defamation claims, and IP right infringement coverage)
- Internet security policies (unauthorized entry, viruses or employee error; theft of credit data; first- and third-party virus cleanup; and some IP claims)

Intellectual Property Policies

- IP coverage (offensive and defensive)

II. SOURCES FOR INSURANCE POLICIES

IP Defensive Policies

- XL – General Managing Agent IPISC (www.ipisc.com). IPISC, for patent infringement coverage, will write only single products for up to \$2 million in limits (with some exceptions). **Patent defense policies exclude prior knowledge of loss.**
- Swiss Re (www.swissre.com) and AIG (www.accessaig.com) (catastrophic patent infringement coverage above a \$25M retention; Swiss Re requires other lines of insurance).
- Ambridge Partners (www.ambidgepartners.com) and The Hartford Specialty (www.thehartford.com) – deal-specific patent infringement coverage and excess patent enforcement coverage. AIG and The Hartford Specialty offer patent litigation buyout coverage.

IP Offensive Policies

- Homestead Insurance Company – general managing agent IPISC (www.ipisc.com).
- For patent enforcement coverage, IPISC will write only known enforcement policies for up to \$2 million (with some exceptions).

Cyberspace/E-Business/Multimedia Policies

- AIG – AIG netAdvantage Complete policies (www.aignationalunion.com)
- The Hartford – FailSafe Technology Liability Policies (www.hfpinsurance.com/tech/tech.htm)
- Media/Professional Insurance Agency – Cyberliability Plus Policy (www.mediaprof.com)
- ACE USA – Integrates Cyber & E&O coverages (www.aceprofessionalrisk.com)
- INSUREtrust.COM – Multimedia/Cyberspace/Ebusiness insurance policies (www.insuretrust.com)
- Marsh – “CyberLiability Plus insurance policy” (www.marsh.com)
- Steadfast Insurance Brokerage – information technology, professional liability (www.steadfast.com.au)
- St. Paul – Internet Liability/E-Commerce (www.stpaultravelers.com/business_insurance/specialty/products/internet_liability/)
- ZC Specialty Insurance – E-risk (www.zurichna.com/SaFE/erisk.nsf)

Internet Security Insurance Policies

- **AIG** – American International Specialty Lines Insurance (Internet security liability policy (ISL)) (www.accessaig.com)
- **Chubb Insurance** – Safety Net Internet liability policy (www.chubb.com)

Significant exclusions: Cybernet/ multimedia policies exclude patent infringement and antitrust violations, as well as various forms of unfair competition.

Asset Policies

- **Kiln** (www.kilnplc.com) – first-party patent coverage to insure the value of the patent asset and/or licensing income stream; some first-party coverage also available from Swiss Re.

III. FEATURES OF E-BUSINESS/CYBER-LIABILITY POLICIES

AIG netAdvantage Complete - Provides Seven Distinct Coverages:

- **Internet Media Liability** – provides coverage for third-party liability arising out of content on the insured's website, including copyright and trademark infringement and invasion of privacy.
- **Internet Professional Liability** – comprehensive claims-made errors and omission coverage for Internet and managed security professional liability.
- **Network Security Liability** – provides third-party liability coverage for claims out of failure of the insured's network security caused by a computer attack.
- **Information Asset Coverage** – Provides coverage for the restoration or recreation of electronic data, computer systems resources and information assets that are damaged as a result of a failure of network security caused by a computer attack.
- **Network Business Interruption** – Provides protection for business interruption losses arising from the interruption or suspension of an insured's computer network, due to a failure of security.
- **Cyber Extortion** – Provides coverage for both investigation and settlement of extortion threats against the insured related to intentional computer attacks.
- **Cyber Terrorism** – Provides a broad form coverage for computer attacks that are acts of terrorism.

Media/Professional Insurance – CyberLiability Plus Policy

- designed for entities whose primary business focus is the dissemination of information and/or the performance of services utilizing on-line technology.

The Hartford - FailSafe Technology Liability Policies:

- **FailSafe MEGA** – ideal for small technology companies with less than \$5 million in revenues and provides E&O coverage in case someone claims:
 - You were negligent in fulfilling your duties because of something you allegedly did wrong or failed to do.
 - Your technology services did not perform as intended.
- **FailSafe GIGA** – is a monoline E&O policy including breach of warranty coverage.
- **FailSafe TERA** – technology liability policy that includes specified E&O as well as:
 - Specified content - covers copyright, trademark infringement and plagiarism.
 - Specified security - encompasses failure to prevent unauthorized access, and denial of service.
 - Specific personal injury - protects you against claims of libel, slander and invasion of privacy.

ACE USA – Integrates Cyber and E&O Coverages. Including Provision for:

Technology E&O Liability; Internet Media; Network Operations Security; Cyber Extortion; Miscellaneous Professional Liability.

IV. CAVEATS TO CONSIDER:

Insurance products responsive to intellectual property risks are in flux; they change frequently. **Five caveats to consider:**

- **First**, a number of carriers who previously offered such a policy can be approached. With the right due diligence and risk management review, they may re-enter the market.
- **Second**, all forms of this kind of coverage, which is not widely written, are negotiable. The more comprehensive the company's approach to minimizing intellectual property risks, the better chance the company stands of procuring a reasonable quote for such insurance.
- **Third**, insurers are particularly concerned that clients who insist upon prompt delivery of an intellectual property defense policy know they are likely to be sued. The least lead time imaginable for these products will be 90 days. Some may take as much as six months. This time can be lessened for companies who deal with carriers that presently insure their other business operations. Unlike CGL insurance, these products are not sold with minimal underwriting. A serious commitment by an insured to working with underwriters to procure such policies is essential.
- **Fourth**, there is presently an absence of a middle market, \$5 million to \$25 million in limits, for blanket patent infringement coverage. However, a number of prior providers may be approached once appropriate due diligence and a risk management IP survey are conducted.
- **Fifth**, it is critical that policyholders approach brokers knowledgeable about procuring intellectual property insurance. Many have little or no experience with this process. **Relationships with wholesale brokers who regularly negotiate with underwriters who provide this coverage are also key.** You may contact Paul Palkovic at Bolton & Company, Tel: (805) 988-1455; Ronald Wanglin at Bolton & Company, Tel: (626) 535-1420; or John Tallarida at Heffernan Ins. Brokers, Tel: (650) 842-5200.

PUBLICATIONS BY DAVID A. GAUNTLETT

David A. Gauntlett is the author of *Insurance Coverage of Intellectual Property Assets* published by Aspen Law & Business. The book and supplements are available for \$160.00 plus tax where applicable; shipping and handling are free when full payment is enclosed with the order. To order, call Aspen Law & Business at 1-800-638-8437.

UPCOMING SEMINARS ON INSURANCE COVERAGE AND INTELLECTUAL PROPERTY WHERE DAVID A. GAUNTLETT IS SPEAKING OR ATTENDING

- **April 14-16, 2005** – 20TH ANNUAL IPL CONFERENCE – Crystal Gateway Marriott Hotel, Arlington, VA. David A. Gauntlett is a featured speaker. His presentation is entitled: *THE PARTY IS NOT OVER: Intellectual Property Exclusions in CGL Policies May Not Limit Coverage As Drastically As Insurers Contend.*
- **April 17-21, 2005** - RISK AND INSURANCE MANAGEMENT SOCIETY, INC.'S ANNUAL CONFERENCE AND EXHIBITION – Philadelphia, PA - David A. Gauntlett is a featured speaker. His presentation is entitled: *The Defense Obligation of Excess/Umbrella Policies.*
- **May 12-13, 2005** – SPRING 2005 INTERNATIONAL ANTI-COUNTERFEITING CONFERENCE - San Diego, CA. David A. Gauntlett is a featured speaker.

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- **June 22-24, 2005** – 2005 SUMMER IPL CONFERENCE – San Francisco, CA. David A. Gauntlett attending.
- **August 4 -9, 2005** – 2005 ABA ANNUAL MEETING – Chicago, Illinois – David A. Gauntlett is a featured speaker. His presentation is entitled: *Insurance and patent litigation: learn from experts on how to get insurance coverage for your patent litigation expenses and what policies are appropriate.*

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NEWSLETTER FACTS

The Policyholder Advocate/IP Counselor is published quarterly to inform clients, friends and other professionals of developments in insurance coverage and IP law. This newsletter is available free of charge to interested parties.

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To be added to our newsletter circulation list, or to be removed from that list, please email us at marketing@gauntlettlaw.com.

GAUNTLETT & ASSOCIATES – THE POLICYHOLDER ADVOCATE

Gauntlett & Associates specializes in policyholder insurance coverage and litigation re copyright, antitrust, patent, trademark, trade secret, business and general coverage disputes.

Specific services offered include:

1. *Insurance coverage litigation focusing on IP and Antitrust Claims*
2. *IP litigation*
3. *Expert witness on insurance coverage issues, including fee disputes*
4. *Counsel to IP case-in-chief counsel for insurance coverage, including:*
 - *Choice of forum, and*
 - *Negotiation*
5. *Consultant to corporations regarding what type of policies to purchase to protect against IP litigation*
6. *Representation in arbitrations and mediations*
7. *Legal malpractice defense – as expert and percipient witness*

If you have a topic you would like to see addressed in future issues, please feel free to contact us with your suggestions.

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