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PATENT INSURANCE: TOWARDS A MORE AFFORDABLE, MANDATORY SCHEME?

J. Rodrigo Fuentes¹

Even though businesses insure against myriad risks, patent litigation is often excluded from their general commercial liability insurance policy. Companies understand that patent litigation is an expensive ordeal, and some opt for specialized patent insurance. However, most businesses do not carry such protection because it is too costly. This is unfortunate because some studies suggest that patent insurance fosters research and development among small-to-medium sized enterprises. Following this finding, the European Commission called on CJA Consultants to study the feasibility of a mandatory, EU-wide patent insurance scheme in early 2003. In 2006, CJA Consultants concluded that such a scheme was feasible.

This Note analyzes the mandatory patent insurance scheme proposed by CJA Consultants and considers whether a similar scheme could be implemented in the United States. First, the Note provides a background on patent insurance. Then, actual policy specimens from a patent insurer are analyzed to explain the differing types of insurance, their costs, and their shortcomings. Ultimately, the CJA Consultants' proposal is analyzed and compared to the identified shortcomings. The Note concludes that a mandatory U.S. patent insurance scheme would fail.

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I. INTRODUCTION

The United States is becoming an information economy. Intangible assets like patents represent a leading asset class that leads to wealth creation.² Accordingly, “corporate leaders are beginning to recognize the value of their intangible assets.”³ But these leaders also recognize that some of these crown jewels can disappear with the drop of a gavel. Patents are subject to legal actions which can eliminate or diminish their value.⁴ Companies whose primary value comes from patents are exposed to daunting litigation risks. While there are a variety of ways to manage patent litigation risk,⁵ this Note focuses on insurance.

Generally, insurance offsets the risk that a future event with potentially catastrophic damages may occur by presently paying a premium worth a fraction of those damages.⁶ For example, many homeowners insure their homes against earthquakes. Similarly, businesses can protect themselves against infringing a patent, while patentees can insure the litigation expense needed to enforce their rights. High litigation costs and ambiguous patent rights stimulate demand for patent insurance.⁷ Unsurprisingly, insurance companies provide coverage for these types of risks.⁸

² See Stephen Bennett, *The IP Asset Class: Protecting and Unlocking Inherent Value*, 5 J. Marshall Rev. Intell. Prop. L. 401, 402 (2006) (“The task force concluded intangible inputs are as important, or more important, to wealth creation than tangible assets.”).

³ *Id.* at 402.

⁴ Consider, for example, a court’s finding of invalidity; or a claim construction which narrows the scope of a patent.

⁵ See Melvin Simensky & Eric C. Osterberg, *The Insurance and Management of Intellectual Property Risks*, 17 Cardozo Arts & Ent. L.J. 321, 322 (1999) (indicating that an internal compliance program is another alternative).

⁶ See Rory A. Goode, *Self-Insurance as Insurance in Liability Policy “Other Insurance” Provisions*, 56 Wash. & Lee L. Rev. 1245, 1252 (1999) (explaining that the traditional insurance model is a device to transfer risks).

⁷ See Alan Ratliff, *Damages*, Presentation at AIPLA 2007 Annual Meeting at 4 (Oct. 18, 2007), available at http://www.aipla.org/Content/ContentGroups/Speaker_Papers/Annual_Meeting_Speaker_Papers/200717/Ratliff-paper.pdf (“According to the AIPLA, the cost of large case patent litigation through trial has increased steadily from over \$3 to about \$5 million per party”); Posting of David Schwartz, *Claim Construction Reversal Rates I – Overall Reversal Rates*, to Patently-O Patent Law Blog, <http://www.patentlyo.com/patent/2008/02/claim-construct.html> (Feb. 27, 2008, 11:00 EST) (tabulating claim construction reversal rates as high as 43.5%).

⁸ See Jason A. Reyes, Note, *Patents and Insurance: Who Will Pay for Infringement?*, 1 B.U. J. Sci. & Tech. L. 3, ¶7 (1995) (discussing the inclusion of patent insurance under the terms “piracy” and “unfair competition” in commercial general liability insurance).

There are two types of patent insurance. Patent litigation insurance, or defensive insurance, covers the litigation expenses incurred defending against allegations of patent infringement. Patent enforcement insurance, or offensive insurance, reimburses patentees for litigation expenses arising from the pursuit of an infringer.

Patent insurance is desirable to promote innovation among small-to-medium-sized enterprises (“SMEs”). According to Lanjouw and Schankerman, SMEs have higher patent litigation exposure per patent.⁹ Because they rarely have the resources to enforce their rights, SMEs tend to avoid patenting their innovations.¹⁰ Therefore, “the system is skewed against SMEs.”¹¹ Research indicates that this has a detrimental effect on a country’s economy and knowledge base.¹² Lanjouw and Schankerman suggest using affordable patent insurance to redress the imbalance without interfering with the incentive to innovate.¹³ This view is in line with various commentators who believe that patent insurance is a valuable method to protect SMEs and foster research and development.¹⁴ However,

[b]ecause of the steep cost of patent insurance, many large and small businesses choose to go without any coverage despite the daunting exposures. Until the insurance industry is able to offer its insureds affordable patent coverage, while at the same time controlling its own

⁹ See Jean O. Lanjouw & Mark Schankerman, *Protecting Intellectual Property Rights: Are Small Firms Handicapped?*, 47 J.L. & Econ. 45, 63 (2004) (providing empirical data suggesting that a smaller patent portfolio increases the risk of being involved in a suit on any individual patent).

¹⁰ See Jeff A. Ronspies, *Does David Need a New Sling? Small Entities Face a Costly Barrier To Patent Protection*, 4 J. Marshall Rev. Intell. Prop. L. 184, 211 (2004) (“But the ability of the small-entity inventor to obtain and enforce patent rights is becoming an increasingly difficult financial burden to bear. The extreme cost of protecting a patent through litigation may result in fewer patents filed by small entities and thus less innovation.”).

¹¹ Michael Edwards & Assoc., *Scoping Study: Report of the Patent Enforcement Project Working Group 17* (2004), available at <http://www.ipo.gov.uk/enforcementfinalreport.pdf>.

¹² See Mette Gørtz & Merete Konnerup, *Welfare Effects of a Patent Insurance – Microeconomic Evaluation and Macroeconomic Consequences 5* (June 2001), http://www.ecomod.net/conferences/ecomod2001/papers_web/konnerup_Welfare%20Effects%20of%20a%20Patent%20Insurance.pdf (arguing that lower litigation costs will lead to gains in Denmark’s economy and knowledge base).

¹³ See Lanjouw & Schankerman, *supra* note 9, at 68-69.

¹⁴ See, e.g., Lanjouw & Schankerman, *supra* note 9, at 68-69; Ronspies, *supra* note 10, at 209; Gørtz & Konnerup, *supra* note 12, at 5.

risks, high-technology companies will continue to suffer severe financial set-backs or possible dissolution from increasing patent litigation.¹⁵

To date, patent insurance remains largely unpopular¹⁶ despite interest from SMEs.¹⁷

According to CJA Consultants, Ltd., (“CJA Consultants”) author of “Patent Litigation Insurance: A Study for the European Commission on the Feasibility of Possible Insurance Schemes Against Patent Litigation Risks,”¹⁸ a sufficiently widespread insurance scheme leads to lower costs.¹⁹ Thus, success could be found through a mandatory patent insurance scheme since it would provide a sufficiently large customer base so that insurers could lower the premiums to an attractive amount. Such a mandatory scheme must: (1) meet the needs of patentees; (2) achieve technical progress in the EU; and (3) attract insurers to offer the patent litigation insurance.²⁰ In 2006, CJA Consultants concluded that such a scheme was feasible in the European Union (EU).²¹ The question remains — can a similar scheme be successfully adopted in the United States?

Part II of this Note begins with a background on patent insurance. The remainder of Part II describes two types of patent insurance and their cost. Part III analyzes the failures of these insurance schemes. Part IV analyzes the mandatory patent insurance

¹⁵ Lisa A. Small, *Offensive and Defensive Insurance Coverage for Patent Infringement Litigation: Who Will Pay?*, 16 *Cardozo Arts & Ent. L.J.* 707, 745 (1998) (citations omitted).

¹⁶ Lanjouw & Schankerman, *supra* note 9, at 68 (asserting that patent insurance, though available, is underdeveloped); M. Qaiser & P. Mohan Chandran, *Patent Insurance: Teflon Coating on Armour?*, Boloji.com, Feb. 26, 2006, <http://www.intelproplaw.com/Articles/files/Patent%20Insurance.pdf> [hereinafter Qaiser I] (“Though it is neither well known, nor widely subscribed, patent insurance has been around for almost a decade on the international scene.”).

¹⁷ CJA Consultants Ltd, *Patent Litigation Insurance: A Study for the European Commission on Possible Insurance Schemes Against Patent Litigation Risks* 10 (2003), *available at* http://ec.europa.eu/internal_market/indprop/docs/patent/studies/litigation_en.pdf [hereinafter European Study 2003] (concluding that European SMEs desired patent insurance). This Note assumes that U.S. SMEs are similarly averse to patent litigation and would desire a risk spreading device.

¹⁸ CJA Consultants Ltd, *Patent Litigation Insurance: A Study for the European Commission on the Feasibility of Possible Insurance Schemes Against Patent Litigation Risks Final Report* (2006) *available at* http://ec.europa.eu/internal_market/indprop/docs/patent/studies/litigation_en.pdf [hereinafter European Study 2006].

¹⁹ *Id.* at 37.

²⁰ *Id.*

²¹ *Id.* at 45-52.

scheme proposed by CJA Consultants and considers whether that scheme can be implemented in the United States. Part V concludes this Note and suggests some opportunities for future research.

II. BACKGROUND

Three types of insurance have covered patent litigation. This Note focuses on two: patent litigation insurance and patent enforcement insurance.²²

A. Patent Litigation Insurance

Patent litigation insurance has been developed to cover alleged infringers.²³ Unlike commercial general liability (“CGL”) insurance, there are only a few providers in this nascent field.²⁴ This Note focuses on Intellectual Property Insurance Services Company (“IPISC”) because it provided robust information on its policies.

²² The third type of insurance covering patent litigation is commercial general liability (CGL) insurance. As businesses transitioned to an information economy, they sought coverage for patent infringement under their existing CGL policies. Reyes, *supra* note 8, ¶7. But this type of insurance is not discussed here, because it is practically dead. See Jason A. Reyes, Column, *CGL Insurance Coverage for Patent Infringement*, 2 B.U. J. Sci. & Tech. L. 14, ¶21 (1996) (“One is tempted to draw a conclusion that CGL coverage for patent infringement is nearly uniformly dead.”). Further, the courts have distinguished and narrowed case law in the few jurisdictions that applied CGL insurance to patent infringement. See, e.g., *U.S. Test, Inc. v. N D E Envtl. Corp.*, 196 F.3d 1376, 1382 (Fed. Cir. 1999) (distinguishing *Rymal v. Woodcock*, 896 F. Supp. 637 (W.D.La. 1995)); *Heil Co. v. Hartford Accident & Indem. Co.*, 937 F. Supp. 1355, 1364 (E.D. Wis. 1996) (distinguishing *Union Ins. Co. v. Land and Sky, Inc.*, 529 N.W.2d 773); *Mez Indus. v. Pac. Nat’l Ins. Co.*, 90 Cal. Rptr. 2d 721, 731 (Cal. Ct. App. 1999) (distinguishing *Union Ins. Co. v. Land and Sky, Inc.*, 529 N.W.2d 773 (Neb. 1995)); *Konami, Inc. v. Hartford Ins. Co.*, 761 N.E.2d 1277, 1283-84 (Ill. App. Ct. 2002) (distinguishing *Union Ins. Co. v. Land and Sky, Inc.*, 529 N.W.2d 773).

²³ Robert M. Roach Jr. & Daniel L. McKay, *Technology Risks and Liabilities: Are You Covered?*, 54 SMU L. Rev. 2009, 2045-46 (2001).

²⁴ M. Qaiser & P. Mohan Chandran, *Patent Insurance: An Inside View*, Domain-B, Apr. 15, 2006, http://www.domainb.com/finance/insurance/2006/20060415_inside.html [hereinafter Qaiser II] (listing American International Specialty Lines Insurance Company, Evanston Insurance Company, Aon, Indian Harbor, Lexington, Reliance, Nutmeg, and Chubb).

To seek business, IPISC specifies that “median litigation costs for an infringement suit [amount] to \$5,500,000 for patents in the U.S. as a whole.”²⁵ IPISC’s marketing materials highlight several benefits the insurance offers. For example:

- 1) It enables you to mitigate the risk of unexpected infringement litigation;
- 2) It relieves the pressure to settle a winning suit because of lack of financial resources; and
- 3) It will discourage frivolous infringement suits and prevent loss of market share by demonstrating your ability to financially protect your business practices²⁶

The devil is in the details, and the following sections scrutinize the IPISC policy specimen.

1. Coverage

IPISC’s patent defense insurance provides coverage for “Litigation Expense”²⁷ incurred in defending a “Covered Litigation.”²⁸ The insured can choose from as little as \$100,000 to \$5,000,000 in coverage.²⁹ This money can be used for expenses like attorneys’ fees, expert witnesses, raising a defense of invalidity, and reexamination

²⁵ IPISC, Features of Intellectual Property (IP) Defense Cost and (Optional) Damages Reimbursement Insurance 1 (2007), *available at* <http://www.ipisc.com/downloads/Defense-FAQ.pdf> [hereinafter Defense FAQ].

²⁶ *Id.* at 1-2.

²⁷ Throughout this Note, contract defined terms, printed in all caps in the original documents, have been changed to title-case type to enhance readability.

²⁸ IPISC, Infringement Defense Cost and Damages Reimbursement Insurance Policy 1 (2005) (on file with author) [hereinafter Defense Policy Specimen]. For a lawsuit to be “Covered Litigation,” it must: (1) be brought during the policy period; (2) be reported to the insurer within the policy period; (3) name the insured as an infringer; (4) correspond to an item listed on the Declarations Page; and (5) the insurer has acknowledged in writing that the “Litigation Expense” will be covered. *Id.* at 6.

²⁹ Defense FAQ, *supra* note 25, at 2. “Claim” is a defined term in the policy specimen that refers to a prepared form notifying IPISC that the insured has been sued, where said prepared form has been approved for coverage by IPISC through written acknowledgement. *See* Defense Policy Specimen, *supra* note 28, at 4. Additionally, “[d]amages of up to \$1 billion can be covered by insurance, but \$20 to \$30 million policies are most common.” Qaiser II, *supra* note 24.

proceedings.³⁰ The policy limits coverage, however, to “Covered Litigation” brought during the policy period in the United States, its territories or possessions.³¹ Note that greater coverage can be obtained—known as obtaining an endorsement—for an additional fee.³² IPISC does this on a case-by-case basis.

A typical endorsement adds indemnity against damages.³³ According to the policy, IPISC will reimburse an insured for money paid to “a claimant pursuant to either judgments, awards or settlements negotiated with the written consent of [IPISC], . . . as lost profits and/or royalties for past infringement, and/or reasonable attorneys’ fees assessed by the Court”³⁴ Notably, “Litigation Expense” consumes the reimbursement limit. Thus, IPISC indemnifies damages up to the difference between the obtained coverage and the “Litigation Expense.”³⁵ For example, assume Inventor obtained coverage for \$1,000,000 and his litigation expenses totaled \$800,000. If a court found that Inventor owed \$500,000 in lost profits, then IPISC will only cover \$200,000 in damages. Inventor must pay the remaining \$300,000.

Besides optional damages, IPISC further limits its coverage to disclaim unwanted risks. First, the term “Covered Litigation” has three significant exceptions: (1) it excludes counterclaims;³⁶ (2) it excludes suits commenced a year after a claim is made that arise out of interrelated acts which are the basis of the claim;³⁷ and (3) it requires authorization for appeals unless the insured was the prevailing party “and the opposing party appeals such decision.”³⁸ Second, the policy sets a pro-rata framework for

³⁰ Defense Policy Specimen, *supra* note 28, at 6.

³¹ *Id.* at 2.

³² For example, an insured may obtain an endorsement for foreign or increased coverage. Gotham Ins. Co., Endorsement No.: IPI 843-04 (1999) (on file with author).

³³ Defense Policy Specimen, *supra* note 28, at 2 (“[T]he Company shall reimburse the Named Insured only for Litigation Expense and Damages (if Damages are designated on the Declarations Page) . . .”).

³⁴ *Id.* at 5.

³⁵ *Id.* at 2.

³⁶ *Id.* at 5. But the policy allows “asserting any Invalidity Counterclaim or initiating any Re-Examination Proceeding which is a direct consequence of Covered Litigation.” *Id.* at 6.

³⁷ Imagine that an insured makes a claim in 2008 based on activities that infringe patent ‘111. Those same activities also infringe the ‘222 patent. IPISC will not cover an infringement suit for the ‘222 patent if the second claim is filed in 2009.

³⁸ Defense Policy Specimen, *supra* note 28, at 5.

allocating reimbursement if the lawsuit involves a mix of covered and uncovered claims.³⁹ For example:

If the Civil Proceeding includes counts or causes of action (“Count(s)”) which are not Covered Litigation, reimbursable Litigation Expenses shall be determined by multiplying the reasonable and customary attorney’s fees, costs and disbursements arising from the Civil Proceeding by a fraction whose numerator is the number of Counts which are Covered Litigation present in the suit at the time those costs arose, and whose denominator is the total number of Counts in the Civil Proceeding at that time.⁴⁰

Third, the insurer stands to recoup the litigation expenses if there are “recovered costs” arising from the litigation, including costs, or attorneys’ fees.⁴¹

These limitations barely scratch the surface. IPISC explicitly excludes twenty-three other situations.⁴² The list below is not comprehensive, but it gives a sense of the exclusions. Costs arising from the following are excluded from reimbursement: (1) “fines, or penalties, including but not limited to punitive, exemplary, treble, or multiple damages of any kind”; (2) willful infringement; (3) “anti-trust or anti-competitive conduct”; (4) declaratory judgment actions initiated by the insured; (5) International Trade Commission proceedings, except reexaminations; and (6) any claim made by any “Named Insured” under this policy against any other “Named Insured” under this policy.⁴³ Assuming these and other exclusions do not apply, the insured must submit a claim to IPISC to obtain reimbursement.

The claims process begins when the Named Insured submits an “Infringement Defense Claim” report to IPISC.⁴⁴ This report must provide “the nature of the action,” including the allegedly infringed patents, “an explanation of how and when the alleged Infringing acts occurred,” and “a projection quantifying the negative impact to the Named Insured” if the plaintiff prevails.⁴⁵ After the report, the Named Insured must provide several documents “no later than sixty (60) days from the date of the initial

³⁹ *Id.* at 2. For example, a lawsuit may allege patent infringement and tortious wrongdoing.

⁴⁰ *Id.*

⁴¹ *Id.* at 17.

⁴² *Id.* at 9-12.

⁴³ *Id.*

⁴⁴ *Id.* at 12.

⁴⁵ *Id.*

request for authorization,” like a “Favorable Infringement Opinion”⁴⁶ and a budget projection for the litigation.⁴⁷ IPISC then authorizes or denies the claim for coverage – subject to more restrictions, of course.

Before authorizing a defense, the insurer may restrict control of the litigation. For example, IPISC may deny authorization because it disapproves of the Named Insured’s counsel or proposed budget.⁴⁸ But disapproval is not fatal to a claim for coverage because the rejections may be submitted to binding arbitration.⁴⁹ Moreover, IPISC requires written authorization before settling the litigation.⁵⁰ And if the Named Insured refuses to settle “within the policy limits recommended by [IPISC] and acceptable to the claimant,” then IPISC may withdraw from the defense.⁵¹ In this event, the insurer’s liability

shall not exceed the smaller of (i) the then remaining applicable limit of indemnity, or (ii) the amount for which the Covered Litigation could have been settled if such recommendation had been consented to, plus Litigation Expenses incurred by [IPISC], and Litigation Expenses incurred by the Named Insured prior to the date of such refusal.⁵²

In sum, IPISC offers defensive insurance to take on typical patent lawsuits. The protection, however, comes with considerable limitations, exclusions, and controls.

2. Cost

Annual premiums “usually range between 2 to 5 per cent of the insured amount. The average premium ranges between \$24,250 and \$60,625 per annum, with the

⁴⁶ *Id.* at 13. “Favorable Infringement Opinion” is defined in the policy as “an opinion by an intellectual property attorney . . . which opines that more likely than not a properly advised trier of fact or law or both would conclude that there is no Infringement of any unexpired U.S. patent . . . vis-à-vis a Manufactured Product” *Id.* at 6. Note that the insurer does not cover the cost of obtaining an infringement opinion. *Id.*

⁴⁷ *Id.* at 13-14. These are only two of eight items that the Named Insured must provide.

⁴⁸ *Id.* at 14.

⁴⁹ *Id.*

⁵⁰ *Id.* at 15.

⁵¹ *Id.*

⁵² *Id.* at 16.

minimum premium at \$20,000.”⁵³ While estimates may be given, IPISC gives premiums quotes “only after [an] application has been submitted for insurance.”⁵⁴ This is largely because the yearly fee “depends upon many factors.”⁵⁵ For example, the premium can change depending on the industry in which the applicant seeks coverage.⁵⁶

DEFENSE Industry	Limits of Liability	Premium
Electronics	\$1 million	\$27,000
Electronics	\$3 million	\$150,000
Medical Device	\$2 million	\$60,000
Medical Device	\$3 million	\$80,000
Software	\$2 million	\$72,000
Software	\$2 million	\$40,000
Distributor/Auto Acc.	\$1 million	\$112,000
Lighting	\$1 million	\$24,000

Furthermore, applicants may choose to lower the premium by opting for higher coinsurance or deductible.⁵⁷

The coinsurance and deductible are shared defense costs which must be paid before reimbursement begins. The basic policy uses a coinsurance of 10%;⁵⁸ this is the percentage of litigation expenses that the insured must pay. To illustrate, imagine that Inventor obtains \$5,000,000 in coverage. If his litigation costs \$6M, then he must pay \$500,000 in coinsurance plus the remaining uncovered amount. In addition to coinsurance, the Named Insured must pay a deductible, or “Self Insured Retention.” The deductible is “the amount of unreimbursable . . . for each Claim that the Named Insured shall be obligated to pay before [IPISC] shall reimburse any Claim amounts.”⁵⁹ The

⁵³ Qaiser II, *supra* note 24.

⁵⁴ Defense FAQ, *supra* note 25, at 2.

⁵⁵ *Id.*

⁵⁶ See IPISC, Sample Premiums by Industry, <http://www.ipisc.com/products/insurance-policies/sample-premiums-by-industry/> (last visited Mar. 11, 2009).

⁵⁷ See Qaiser I, *supra* note 16, at 3 (discussing lower premiums with higher coinsurance of 25%).

⁵⁸ See IPISC, Defense Cost Reimbursement Insurance Program Summary 1 (2007), available at <http://www.ipisc.com/downloads/Defense-Policy-Summary.pdf> [hereinafter Defense Program Summary].

⁵⁹ Defense Policy Specimen, *supra* note 28, at 8.

minimum starts at 2% of the policy limit, and higher options are available.⁶⁰ Assuming \$5,000,000 in coverage, Inventor must pay a \$100,000 deductible before he is reimbursed. Finally, the coinsurance and deductible are negotiable and can have a significant impact on the premium.⁶¹

In sum, premiums can vary depending on many factors, like the industry in which the insured practices, the coinsurance payment, and the deductible. And this is just for the basic policy. Additional endorsements modify the insurer's exposure, which in turn modify the premiums. According to IPISC, its average premium for a defense policy with damages indemnity was \$30,000 in 2007.⁶²

B. Patent Enforcement Insurance

IPISC also offers patent enforcement insurance, otherwise known as offensive insurance. Here, the insurer pays "for the legal fees of prosecuting patent enforcement litigation."⁶³ It is well known that small companies face difficulties enforcing their patent rights due to low resources.⁶⁴ Not surprisingly, IPISC markets enforcement insurance to SMEs, claiming it is useful:

- 1) To strengthen the owners negotiation position and licensability of intellectual properties;
 - 2) To provide enough funds to support a strong legal front, thereby increasing the likelihood of a favorable outcome; [and]
 - 3) To make funds available when necessary, rather than utilize operating capital or attempt financing;⁶⁵
1. Coverage

⁶⁰ See Defense Program Summary, *supra* note 58, at 1.

⁶¹ See Qaiser II, *supra* note 24, at 4 (classifying premiums based on varying coinsurance, "[t]he minimum premiums at IPSIC range from \$2,500 for \$250,000 [in coverage] (75:25 co-payment) to \$7,500 for \$1,000,000 [in coverage] (75:25 co-payment)").

⁶² See Defense FAQ, *supra* note 24, at 2; Interview with Bruce Birkenfeld, Account Representative, Intellectual Prop. Ins. Servs. Corp., in Louisville, Ky. (Apr. 11, 2008) (stating that the majority of premiums listed on their website included damages indemnity).

⁶³ Reyes, *supra* note 8, ¶36.

⁶⁴ See *id.* ¶ 35 ("Unfortunately for small companies and individual inventors, enforcing a patent—especially against a well-funded infringer—is a very expensive and time-consuming proposition." (citations omitted)); Ronspies, *supra* note 10, at 209.

⁶⁵ IPISC, IP Abatement Insurance: Enabling Market Share, <http://www.ipisc.com/products/insurance-policies/abatement/> (last visited Apr. 8, 2008) [hereinafter Enabling Market Share].

IPISC's enforcement policy offers coverage from \$100,000 to \$5,000,000.⁶⁶ The insurer indemnifies the Named Insured⁶⁷ for litigation expense incurred (1) to stop infringement, (2) to defend an invalidity counterclaim, and (3) to defend a declaratory judgment.⁶⁸ Endorsements can extend coverage to seek reissue of an infringed patent and to defend against a reexamination proceeding.⁶⁹ Reimbursable costs arising from the foregoing actions include attorneys' fees, court costs, depositions, and expert witnesses' fees.⁷⁰ Like infringement insurance, coverage is limited to claims made during the policy period and within United States, its territories or possessions.⁷¹

The enforcement policy uses a pro rata framework to avoid paying extraneous fees.⁷² The framework boils down to multiplying the following fractions by the total litigation expense: (1) the insured patents divided by the total number patents in the suit; (2) the number of counts alleging infringement divided by the total number of counts; and (3) the number of defendants charged with infringement divided by the total number of defendants.⁷³

Preventing exposure to preexisting infringements is another important limitation. IPISC shall automatically revoke a previously granted authorization if it discovers that any party actually began infringing before the policy period. In this event, "the Named Insured shall return all Litigation Expense paid" ⁷⁴ But if the predating infringement is discovered while seeking authorization, then IPISC may reject the claim against

⁶⁶ See IPISC, Intellectual Property Infringement Abatement Insurance Program Summary 1, available at <http://www.ipisc.com/downloads/Abatement-Policy-Summary.pdf> [hereinafter Abatement Program Summary].

⁶⁷ "Named Insured" is a term defined in the policy. Basically, any individual, partnership, joint venture, or corporation is a "Named Insured" to the extent that the individual(s) or entity "is/are the Owner or Exclusive Licensee or has an insurable interest by way of contractual obligation to enforce the Insured Intellectual Property." IPISC, Intellectual Property Infringement Abatement Insurance Policy Specimen 3 (2000) (on file with author) [hereinafter Abatement Policy Specimen].

⁶⁸ *Id.* at 2.

⁶⁹ Gotham Insurance Co., Endorsement No.: IPI 843-02 (1999) (on file with author). Note that Gotham Insurance Co. is IPISC's policy carrier, and IPISC tendered this sample endorsement on request.

⁷⁰ Abatement Policy Specimen, *supra* note 67, at 7.

⁷¹ *Id.* at 2.

⁷² *Id.* at 7.

⁷³ *Id.*

⁷⁴ *Id.* at 5.

specific parties, like the infringing party, its subsidiaries, and its licensees or licensors.⁷⁵ Fundamentally, IPISC will not pay for infringement existing before the insured bought the policy. This is a way of addressing the ubiquitous adverse selection problem insurers face.

IPISC mitigates abuse by designing coverage to indemnify losses only. For example, the “Economic Benefit Provision” lessens the incentive to use litigation as a “speculative opportunity to provide the insured with a profit.”⁷⁶ “In the event that any Authorized Litigation results in the Named Insured receiving an Economic Benefit, such recovery shall be shared between [IPISC] and the Named Insured pro rata in proportion to their respective contributions to Litigation Expense”⁷⁷ For example, monetary settlements are always shared, with IPISC receiving no more “than 1.25 times the amount expended by [IPISC] in Litigation Expense.”⁷⁸ The Named Insured keeps the remaining balance of the “Economic Benefit.”⁷⁹ But if the “Economic Benefit” is not objectively measureable, such as an injunction, then the “Economic Benefit shall be presumed to be 1.25 times the amount expended by [IPISC] in Litigation Expense.”⁸⁰

Winning an injunction, or some other intangible benefit, can result in an odd situation where the insured pays an *injunction bonus* to IPISC.⁸¹ For example, assume that (1) the “Litigation Expense” reached the coverage limit of \$1,000,000, (2) IPISC paid \$800,000 after coinsurance, (3) the Named Insured paid \$200,000 after coinsurance, and (4) the “Economic Benefit” was an injunction. Under these facts, the injunction is valued automatically at \$1,000,000 – or 1.25 times the amount IPISC contributed to the litigation. According to the policy, this “Economic Benefit” of \$1,000,000 must be shared pro rata between IPISC and the Named Insured. Consequently, the Named Insured must give IPISC \$800,000. But where does it get this money? Even though the Named Insured benefits from increased market share, the money may not be available immediately.

⁷⁵ *Id.*

⁷⁶ Enabling Market Share, *supra* note 65.

⁷⁷ Abatement Policy Specimen, *supra* note 67, at 12.

⁷⁸ *Id.*

⁷⁹ *Id.* at 13.

⁸⁰ *Id.*

⁸¹ *Id.* at 12 (“If there is an *injunction, court order, or settlement agreement prohibiting the accused infringer from continuing the infringement* or a settlement including cross-licensing, then there is Economic Benefit. Since the amount of such benefit is difficult or impossible to ascertain, the Economic Benefit shall be presumed to be 1.25 times the amount expended by the Company in Litigation Expense.”) (emphasis added).

Because state champerty laws ban recovery sharing,⁸² the “Economic Benefit” provision seems troublesome. But the enforcement policy ensures that IPISC never recovers more money than the contracted coverage amount.⁸³ To demonstrate, assume that (1) the “Litigation Expense” reached the coverage limit of \$1,000,000; (2) the case settled for \$3,000,000; (3) IPISC paid \$800,000 after coinsurance; and (4) Named Insured paid \$200,000 after coinsurance. Because IPISC can never collect more than 1.25 times the amount it contributed to “Litigation Expense,” it will receive \$800,000 times 1.25, a total of \$1,000,000. More importantly, any money IPISC receives “shall go to reinstate the policy limits by the amount received”⁸⁴ Thus, the “Economic Benefit” provision may ultimately benefit the insured.

IPISC’s enforcement insurance also excludes coverage under a variety of circumstances. For example, costs arising from the following are excluded from reimbursement: (1) salaries or expenses for officers, employees, and in-house attorneys; (2) “willful acts of the Named Insured giving rise to Infringement” of the insured patents; (3) infringement when Named Insured knew or had reason to suspect a third party was infringing before the policy began; (4) declaratory judgment actions initiated by the insured; (5) Administrative Proceedings, including the ITC; (6) anti-trust litigation; and (7) infringement by a licensee who, because of an “Act of Breach,” is no longer licensed.⁸⁵

The claims process is very similar to the defense policy discussed above. Mainly, the insurer must authorize litigation before reimbursement begins. IPISC considers authorization when the insured submits a claim, which states the “nature of the proposed action and the expected result; an explanation of how and when the Infringement was first discovered; . . . when the Infringement first began irrespective of when [it] was discovered; and a project quantifying the negative impact to the Named Insured”⁸⁶ Within sixty days of submitting a claim, the insured must submit nine other supporting documents.⁸⁷ Primarily, the insured must obtain an opinion from independent patent counsel that highlights the validity of the insured patent and the infringement thereof.⁸⁸

⁸² Reyes, *supra* note 8, ¶ 44 (“Recovery sharing between the patent holder and IPISC faces difficulties in some states due to champerty laws, which ban the sharing of damage awards with third parties.”). Champerty is defined as “an agreement between a stranger to a lawsuit and a litigant by which the stranger pursues the litigant’s claim as consideration for receiving part of any judgment proceeds.” Black’s Law Dictionary 224 (7th ed. 1999).

⁸³ See Abatement Policy Specimen, *supra* note 67, at 12.

⁸⁴ *Id.* at 13.

⁸⁵ *Id.* at 15-17.

⁸⁶ *Id.* at 9.

⁸⁷ *Id.* at 9-10.

⁸⁸ *Id.*

Other documents require the insured to provide a budget projection, preference of litigation counsel, and the manner in which markings⁸⁹ were applied to the patent.⁹⁰ Failure to provide these, or other enumerated documents, results in the forfeiture of a claim.⁹¹

There are also significant controls on the litigation. For example, the insured's chosen litigation counsel is subject to IPISC's approval.⁹² The same goes for the litigation budget.⁹³ Coverage for an appeal must be approved if the "Named Insured does not prevail in the Authorized Litigation"⁹⁴ But if the Named Insured *prevails*⁹⁵ and the infringer appeals, then IPISC must authorize coverage for the appeal.⁹⁶ Remarkably, the enforcement policy does not contain a settlement provision.⁹⁷

The basic enforcement policy can be upgraded through endorsements. For instance, an insured can obtain "increased policy limits from a previous IP infringement abatement policy."⁹⁸ But the new coverage limit only applies to infringement existing after the endorsement took effect; hence, there are no retroactive increases for ongoing litigation.⁹⁹ Another typical endorsement provides for licensee coverage, so that the insured can sue licensees who, because of a breach, are no longer licensed.¹⁰⁰ Other

⁸⁹ Here, "markings" refer to "notice [given] to the public that the [article] is patented, either by fixing thereon the word 'patent' or the abbreviation 'pat.,' together with the number of the patent, or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is contained, a label containing a like notice." 35 U.S.C. § 287(a) (2006). This is an important consideration in enforcing patent infringement because if the patented article is not marked, then damages may be truncated to the time the infringer received notice of lawsuit. Abatement Policy Specimen, *supra* note 67, at 9-10.

⁹⁰ Abatement Policy Specimen, *supra* note 67, at 10

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 6.

⁹⁵ Note that the term "prevail" is analyzed *infra* Part III.

⁹⁶ Abatement Policy Specimen, *supra* note 67, at 6.

⁹⁷ This may be an anomaly in the dates of the policy specimens. The patent litigation insurance policy is from 2005, while the enforcement policy is from 2000. The settlement controls may have been added sometime in between.

⁹⁸ Gotham Ins. Co., Endorsement No.: IPI 843-08B (1999) (on file with author).

⁹⁹ *Id.*

¹⁰⁰ Gotham Ins. Co., Endorsement No.: IPI 843-01-A (1999) (on file with author).

endorsements include: (1) insurance for patent applications which cover infringements that begin while the patent is pending;¹⁰¹ (2) coverage for foreign patents in their respective countries;¹⁰² and (3) coverage for reexamination and reissue proceedings.¹⁰³

Predictably, the analyzed litigation and enforcement policies have many structural similarities, since the same insurer wrote both. For example, coverage is limited to acts occurring during the policy period, and the authorization procedure requires a written report with infringement and validity opinions. There are, however, key differences. Chiefly, enforcement insurance is an offensive tool, designed to reimburse costs for a lawsuit alleging infringement; and as an offensive tool, it is subject to abuse by speculative litigants. As a result, IPISC includes an “Economic Benefit” provision, which decreases the incentives for profiteering by reducing the insured’s recovery. Another important difference is the cost of insurance, which is described below.

2. Cost

According to IPISC, “[o]ne patent, of average risk, at \$1 million in limits, is approximately \$7000 - \$9000 annual premium.”¹⁰⁴ But the “average Abatement policy, regardless of limits and number of IP, [costs] about \$13,000.”¹⁰⁵ However, these are only estimates that do not account for the specific risks of the insured or the protected technology. For example, the premium again varies considerably depending on the industry covered.¹⁰⁶

¹⁰¹ Gotham Ins. Co., Endorsement No.: IPI 843-03 (1999) (on file with author).

¹⁰² Gotham Ins. Co., Endorsement No.: IPI 843-04 (1999) (on file with author).

¹⁰³ Gotham Ins. Co., Endorsement No.: IPI 843-02 (1999) (on file with author).

¹⁰⁴ Enabling Market Share, *supra* note 65.

¹⁰⁵ *Id.*

¹⁰⁶ IPISC, Sample Premiums by Industry, *supra* note 56; *see also* IPISC, Claims Scenarios, <http://www.ipisc.com/iprisk/claims-scenarios/> (last visited Apr. 11, 2008) (noting that the “personal fitness industry is one of the most litigious areas of art”).

ABATEMENT Industry	Limits of Liability	Premium
Medical Device	\$1 million	\$48,000
Medical Device	\$2 million	\$103,000
Electronics	\$1 million	\$35,000
Industrial Equipment	\$1 million	\$37,000
Agriculture	\$1 million	\$12,000
Building	\$1 million	\$11,000
Tools	\$1 million	\$13,000

The insurer also factors in the litigiousness of the patent owner during the underwriting process.¹⁰⁷

These premiums are also subject to coinsurance and deductible payments. The deductible for enforcement insurance is the same – 2% per claim – as for the defensive insurance. But IPISC requires a minimum of 20% coinsurance. This is considerably higher than the 10% minimum required by the patent litigation insurance. IPISC probably requires a higher coinsurance to deter moral hazards, like speculative litigation. Notice that the defensive insurance does not suffer from this moral hazard problem. Infringing in reliance of insurance protection would be excluded under the policy¹⁰⁸ and probably constitutes willful infringement under the objective recklessness standard.¹⁰⁹

III. FAILURES OF PATENT INSURANCE

Patent insurance “has not been successful throughout the world.”¹¹⁰ There are several patent insurance providers, but “demand has been severely limited by high prices”¹¹¹ Other prominent problems include the “poor experiences in the past with

¹⁰⁷ See IPISC, Intellectual Property Abatement Insurance Application 6 (2007), available at <http://www.ipisc.com/downloads/IPISC-Abatement-App.pdf> [hereinafter IPISC Application] (asking for the applicant’s average enforcement costs in the past three years).

¹⁰⁸ Defense Policy Specimen, *supra* note 28, at 15.

¹⁰⁹ *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (holding that willful patent infringement requires a minimum showing of objective recklessness).

¹¹⁰ European Study 2003, *supra* note 17, at 8.

¹¹¹ Lanjouw & Schankerman, *supra* note 9, at 49.

conflict between insured and insurer,”¹¹² an expensive application, costly claims making process, and the “need for complex and expensive evaluation of risk for insurers.”¹¹³

A. Patent Insurance is too Expensive for Businesses

The average cost of offensive patent insurance is \$13,000. From a business perspective, insurance looks like an additional maintenance fee for each patent. Assuming that a patent is insured from its application onward, the average lifetime fee would add up to \$260,000.¹¹⁴ Given that the average cost to obtain a patent is \$25,000,¹¹⁵ the first premium adds 52% more to the cost. So for every two years a company pays its patent insurance, it could have paid for another patent. Essentially, these premiums are too expensive for SMEs.¹¹⁶ The same can be said for defensive patent insurance, which costs even more per year.

At least one author has performed a cost-benefit analysis on purchasing patent insurance.¹¹⁷ As a framework, Bennett posits a hypothetical inventor, Walter, who must decide whether to buy offensive patent insurance.¹¹⁸ Using a decision tree analysis, each path of Walter’s scenario is played out using assumed costs and probabilities.¹¹⁹

¹¹² European Study 2003, *supra* note 17, at 8.

¹¹³ *Id.*

¹¹⁴ This figure is the average cost of offensive insurance, \$13,000, times the lifetime of a patent, 20 years.

¹¹⁵ Mark A. Lemley, *Reconceiving Patents in the Age of Venture Capital*, 4 J. Small & Emerging Bus. L. 137, 138 n.3 (2000) (estimating an average of \$25,000 in prosecution costs through issuance); Clarisa Long, *Patent Signals*, 69 U. Chi. L. Rev. 625, 679 n.44 (2002) (“Conservative estimates peg the administrative costs of obtaining an average U.S. patent at \$20,000.”).

¹¹⁶ Assume that American and European patentees have similar price sensitivity to premiums as a percentage of obtaining the patents. In a follow-up study on the feasibility of patent insurance in Europe, survey respondents indicated that proposed premiums of €12,240 were too high; they further commented that “the already high patenting and maintaining cost could be increased by up to almost 30%.” CJA Consultants Ltd, Summary Report of Replies to the Public Consultation on the Follow-up Study on Patent Litigation Insurance⁵ (2007), *available at* http://ec.europa.eu/internal_market/indprop/docs/patent/studies/consultation/summary_report_en.pdf [hereinafter European Study 2007].

¹¹⁷ Bennett, *supra* note 2.

¹¹⁸ *Id.* at 404-09.

¹¹⁹ *Id.* at 419.

Foregoing insurance yields an expected value of \$75,000, while purchasing insurance achieves an expected value of \$63,000.¹²⁰ The decision tree analysis suggests that Walter should not purchase insurance unless he has low risk tolerance.¹²¹ Although Bennett's model is rudimentary, his conclusion only gets stronger with the corrections made later in this Note.

The first correction to Bennett's model is that insurers covering Walter's widgets would not likely authorize litigation against Webster, a hypothetical infringer. In his analysis, Bennett assumes that there is a "25% probability that legal action will be necessary against Webster" ¹²² But the insurer has the right to reject coverage because Walter had a "reason to suspect" that a claim would be filed upon obtaining insurance.¹²³ Accordingly, the 25% probability must be replaced with an appropriate figure, like the probability that a lawsuit will occur with respect to the average patent. According to Lanjouw and Schankerman, only 1% of patents are litigated in United States District Courts.¹²⁴

Correcting Bennett's assumption shows that patent insurance is even more of a sunk cost than he predicted. "Since the probability of a lawsuit is only 25%, Walter stands a 75% chance of losing \$15,000."¹²⁵ The updated calculus would read: Since the general probability of a lawsuit is only 1%, Walter stands a 99% chance of losing \$15,000. Thus, Walter's expected benefit decreases. Furthermore, Walter's premium is four times lower than the average enforcement policy. Inputting the average \$13,000 policy in the analysis would further decrease Walter's expected value.

Assume: (1) the cost of the insurance is \$ 3,000 per year with a coverage limit of \$ 500,000; (2) litigating the issue is expected to cost \$ 500,000; (3) if the suit prevails, the expected damage award is \$ 1,000,000; (4) litigating the issue is expected to take five years; (5) the plaintiff's policy stipulates a shared award totaling 125% of the insurer's cost on all litigation. Walter's analysis indicates a 25% probability that legal action will be necessary against Webster and an 80% probability of winning the suit once filed. Walter will spend \$ 15,000 on insurance premiums across the five years of litigation (assuming litigation begins this year). The insurance company will retain \$ 625,000 (the cost of litigation plus 25%) in the event litigation is successful but Walter will not be responsible for any litigation costs under the terms of the policy.

Id.

¹²⁰ *Id.* at 420.

¹²¹ *Id.*

¹²² *Id.* at 419.

¹²³ Abatement Policy Specimen, *supra* note 67, at 15.

¹²⁴ See Jean O. Lanjouw and Mark Schankerman, *Characteristics of Patent Litigation: A Window on Competition*, 32 RAND J. Econ. 129, 131 (2001).

¹²⁵ Bennett, *supra* note 2, at 419 (\$15,000 refers to premiums paid over five years of a potential litigation).

Another branch should be added to Bennett's decision tree – the probability and cost that the insurer will litigate to deny coverage. “[A]n insurer may appear to abide by the spirit of a policy, but, as shown in the CGL litigation described above, that same insurer will litigate to deny coverage if that course appears more profitable than paying claims.”¹²⁶ Unfortunately, statistics are not as readily available because some policies, like IPISC's, rely on binding arbitration.¹²⁷ If there is a dispute, “the cost of Arbitration shall be shared equally between the Named Insured and the Company including filing fees, costs, and Arbitrator's charges.”¹²⁸ But, as revealed in *Plug-in Storage System v. Homestead Insurance Co.*, determining whether and how arbitration applies can be another source of litigation.¹²⁹ Moreover, the probability that an insured will have to litigate against the insurer depends on the clarity of the terms in the policy.

IPISC's policies “contain terms that are sufficiently ambiguous to litigate at length in court or arbitration.”¹³⁰ One such term is “prevail.” Both the defensive and offensive policies contain some sort of authorization appeals provision:

Authorization to appeal is required to be obtained by Named Insured if the Named Insured does not *prevail* in the Covered Litigation and wishes to appeal the decision. However, authorization is not required to be obtained again by the Named Insured if the Named Insured is the *prevailing* party in the Covered Litigation and the opposing party appeals such decision.¹³¹

“Prevail” is not defined in the policy. According to Merriam-Webster's Dictionary of Law, prevail means “to obtain *substantially the relief* or action sought in a

¹²⁶ Reyes, *supra* note 8, ¶32; *see also Amerisure Ins. Co. v. Laserage Tech. Corp.*, 2 F. Supp. 2d 296 (W.D.N.Y. 1998) (granting summary judgment for insurers when the insureds failed to give timely notice of the lawsuit); *Homedics, Inc. v. Cigna Fire Underwriters Ins. Co.*, No. SA CV 99-1352 DOC (Anx), No. SA CV 99-0928 DOC (Anx), 2000 U.S. Dist. LEXIS 8927 (D. Cal. 2000) (granting coverage for insured's attorneys' fees arising from patent infringement lawsuit);

¹²⁷ Defense Policy Specimen, *supra* note 28, at 16-17.

¹²⁸ *Id.* at 17.

¹²⁹ *Plug-In Storage Sys. v. Homestead Ins. Co.*, 81 F. Supp. 2d 371 (D. Conn. 1999) (deciding whether tort statute of limitations precluded patent insurer from demanding arbitration).

¹³⁰ Reyes, *supra* note 8, ¶32.

¹³¹ Defense Policy Specimen, *supra* note 28, at 5 (emphasis added). Although the defensive policy is cited, the offensive policy has substantially similar language. Abatement Policy Specimen, *supra* note 67, at 6.

lawsuit”.¹³² Alternatively, we could analogize to the law of costs: “[T]o be a ‘prevailing party,’ for the purposes of awarding costs, a party must obtain *at least some relief* on the merits of the party’s claim or claims.”¹³³ Given these definitions, it appears that counsel for both sides can argue their case.

And what about interlocutory appeals — Is there a “prevailing party” before final judgment has been entered? Does the insured need authorization to appeal a claim construction after a *Markman* hearing? These debatable questions are ripe for litigation between the insurers and the insureds. Furthermore, the appeals provision does not address a situation where the Named Insured is the prevailing party but wishes to appeal the decision anyway. This could arise if the trial court grants judgment in favor of the insured, but the insured believes that damages were erroneously assessed.

In addition to litigation against the insurer, the application costs are missing from Bennett’s analysis. Patent insurance applicants must obtain an infringement opinion.¹³⁴ The cost of an opinion depends on many factors, like the applicant’s industry. In 1998, an infringement opinion cost at least \$10,000 if the patent had any “real complexity,” while “an opinion on a set of submarine patents [] cost well over \$ 100,000.”¹³⁵ But typically, obtaining an infringement opinion from a large New York law firm costs about \$30,000.¹³⁶ Thus, Walter needs to consider the \$30,000 fixed cost attached to purchasing insurance.

The studied policies have several hidden costs, which add penalties to certain paths in Bennett’s decision tree model. For example, an expense is hidden in the claims making process. Recall that under both defensive and offensive policies, the insured must present an infringement opinion whenever the Named Insured submits a claim to IPISC.¹³⁷ Stated differently, deciding to sue is not free. As a result, Walter’s expected value for filing a lawsuit decreases by \$30,000. Specific to the enforcement insurance,

¹³² Merriam-Webster’s Dictionary of Law, Prevail, <http://dictionary.reference.com/browse/prevail> (last visited Apr. 13, 2008) (emphasis added).

¹³³ 20 Am. Jur. 2d Costs § 13 (emphasis added); *see also Beraha v. C.R. Bard, Inc.*, 870 F. Supp. 1085 (N.D. Ga. 1994), *aff’d*, 64 F.3d 678 (Fed. Cir. 1995) (awarding costs to prevailing party defendants in a patent infringement action where the accused devices did not literally infringe, but did infringe under the doctrine of equivalents).

¹³⁴ IPISC Application, *supra* note 107, at 1.

¹³⁵ Edwin H. Taylor & Glenn E. Von Tersch, *A Proposal to Shore Up the Foundations of Patent Law that the Underwater Line Eroded*, 20 Hastings Comm. & Ent. L.J. 721, 740 (1998).

¹³⁶ Interview with Henry Lebowitz, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP, in New York, N.Y. (Apr. 11, 2008).

¹³⁷ Abatement Policy Specimen, *supra* note 66, at 9-10; Defense Policy Specimen, *supra* note 28, at 13.

another hidden cost lies in the “Economic Benefit” provision. Recall that an insured may have to pay a bonus to IPISC should the court issue an injunction-like remedy.¹³⁸

B. Patent Insurance is too Risky for Insurers

Premiums are expensive because it is difficult to calculate an insured’s risk profile. Because the insurance is voluntary, no applicant would pay to protect useless patents. Only valuable, contestable patents are worth protecting. While the risk of litigation for the “average” patent may be 1%, insurers fear that their customers make up sizeable portion of that 1%. This is known as the adverse selection problem.

To screen out these bad risks, the insurers engage in a “complex and expensive technical risk assessment,” known as underwriting.¹³⁹ This process takes into account various factors, like the insured’s litigiousness and industry.¹⁴⁰ While these risk variables may be quantified, others cannot.

Underwriting is premised on a snapshot of the law at the time that the insured was approved. Thus, the changing patent laws create additional risk. To illustrate, recall that the enforcement insurance uses an “Economic Benefit” provision to recover the litigation expense; and if an injunction is ordered, IPISC recovers 1.25 times the litigation expense.¹⁴¹ When insured patentees secured injunctions easily, IPISC recovered a substantial portion of its operating expense. Then *eBay v. MercExchange*¹⁴² was decided, making it more difficult for a patentee to obtain an injunction as a matter of course. Consequently, previous risk calculations were probably leading to underperforming rewards.¹⁴³ Insurers can contain the problem of changing laws by using yearly contracts.

¹³⁸ Abatement Policy Specimen, *supra* note 67, at 13.

¹³⁹ European Study 2006, *supra* note 17, at 9.

¹⁴⁰ See IPISC Application, *supra* note 107, at 6 (insurance application requires applicant to disclose patent litigation costs of the past 3 years); Benjamin Hershkowitz, *What Are My Chances? From Idea Through Litigation*, Kenyon & Kenyon (2003) available at <http://library.findlaw.com/2003/Oct/16/133092.html> (noting that the incidence of patent litigation per industry varies, from 0.16% for chemical patents to greater than 25% for the “most ‘valuable’ drugs and health patents”).

¹⁴¹ Abatement Policy Specimen, *supra* note 67, at 12.

¹⁴² *eBay v. MercExchange*, 547 U.S. 388 (2007).

¹⁴³ Alternatively, the changing laws could work in the insurer’s favor. In *KSR International v. Teleflex Inc.*, 550 U.S. 398 (2007), the Supreme Court held that the Teaching-Suggestion-Motivation test was not the only way to prove obviousness; thus, making it easier to invalidate patents. Consequently, insurers could expect for lawsuits to win or lose sooner, which lowers litigation costs. Rachel Krevans, *Comments on KSR Supreme Court Ruling*, IP Frontline, Apr.

Each time the law changes, so does the policy. But this solution increases transaction costs, which are passed on to customers. This could lead to decreased market share if the customers are price-sensitive.

To summarize the failures described above: the premiums are too expensive for the businesses, and the risk is too high for the insurers. Worse yet, the insurers cannot reduce the price of the insurance until there are enough businesses to spread the risk.

IV. TOWARDS MANDATORY PATENT INSURANCE

The patent insurance industry suffers from negative network externalities. In other words, “there may be a ‘chicken and egg’ problem in which no one makes the initial investments necessary to induce everyone else to join the network, and the [product] remains unexploited.”¹⁴⁴ Patent insurers are not willing to lower premiums until more insureds join the risk pool. But insureds will not join until the premiums are lowered. So which comes first - the insurer or the insured?

Both should come at the same time, according to CJA Consultants.¹⁴⁵ A mandatory patent insurance scheme would enlarge the customer base so that insurers could lower premiums to an attractive amount.¹⁴⁶ Concluding that such a scheme was feasible, CJA Consultants proposed a mandatory patent insurance scheme to the European Commission in June 2006.¹⁴⁷ This Note considers that mandatory insurance scheme, and whether it is adaptable to the U.S. market.

A. The Scheme

CJA Consultants proposed sixteen options. All of these options cover only European Patents, which are those granted under the European Patent Convention Article 2(1).¹⁴⁸ Simply put, European Patents are a bundle of nationally-enforceable, nationally-

30, 2007, <http://www.ipfrontline.com/depts/article.asp?id=14923&deptid=7> (commenting that KSR “will make it easier to obtain summary judgment that a patent is obvious”).

¹⁴⁴ Dennis W. Carlton & Alan S. Frankel, *Transaction Costs, Externalities, and "Two-Sided" Payment Markets*, Colum. Bus. L. Rev. 617, 623 (2005)..

¹⁴⁵ European Study 2006, *supra* note 17, at 16.

¹⁴⁶ *Id.* at 37.

¹⁴⁷ *Id.* at 16.

¹⁴⁸ European Patent Convention [hereinafter *EPC*] Art. 2(1) (2000) (“Patents granted under this Convention shall be called European patents.”).

revocable patents.¹⁴⁹ Further, each option consists of varying features, like whether an insurer should cover damages. This Note focuses on Option 1 (“the Scheme”), which contains all of the features identified by CJA Consultants.

The Scheme calls for the implementation of mandatory insurance by European Union-wide legislation via EU Regulations.¹⁵⁰ Currently, a European patentee will prosecute their patent at the European Patent Office (“EPO”); and after the EPO grants a patent, the European patentee must *validate* the patent in each of the EU Member States where he desires protection.¹⁵¹ The mandatory scheme takes advantage of this process by requiring European patentees to show a certificate of insurance to the member state’s patent office where it wishes to obtain validation of its European patent.¹⁵² If the patentee does not have the certificate, then the patent cannot be validated or renewed; the patent will not be in force in that member state.¹⁵³

The Scheme proposes the following insurance product. A European patentee would purchase insurance from an approved insurer, like Lloyd’s of London.¹⁵⁴ The policy would cover expenses related to suing infringers in the member state for which insurance was purchased. Due to dramatic variances in the number of litigations filed and settlements accomplished among countries, the Scheme requires European patentees to choose where they want coverage.

¹⁴⁹ EPC Art. 2(2) (2000); David Hunt, et al., *Patent Searching: Tools & Techniques* 76 (Wiley 2007); Carl A. Nelson, *Import/Export: How to Take Your Business Across Borders* 60 (McGraw Hill Professional, 3d ed. 2000).

¹⁵⁰ European Study 2006, *supra* note 17, at 47.

¹⁵¹ European Patent Office, *How to apply for a European patent*, <http://www.epo.org/patents/One-Stop-Page.html> (last visited Apr. 25, 2009). Depending on the jurisdiction, validation consists of paying fees and filing translations of the specification.

¹⁵² European Study 2006, *supra* note 17, at 47.

¹⁵³ *Id.*

¹⁵⁴ Lloyd’s is the only insurer that demonstrated interest in providing insurance for the mandatory scheme. *Id.* at 56.

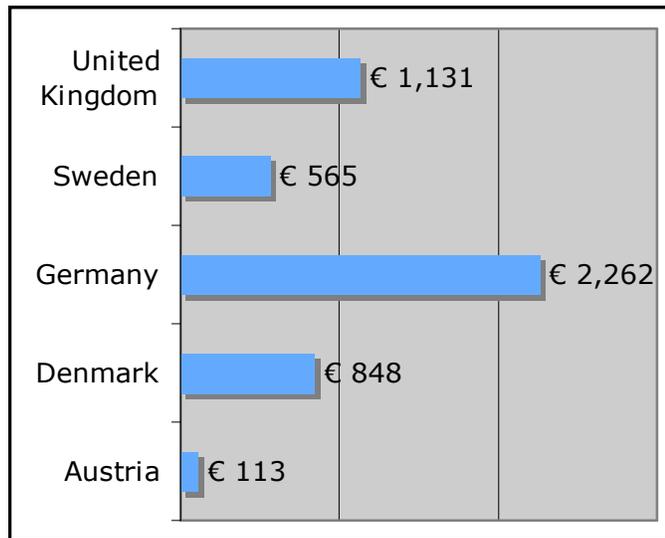


Figure 1 – The chart displays indicative annual premiums for a few countries, assuming €500,000 in coverage.¹⁵⁵

For example, a European patentee may decide to purchase insurance for only the United Kingdom, Germany, and Austria. In addition to offensive coverage, the Scheme covers costs incurred in defending against allegations of infringement. However, the scope of defense would be limited to cover only products or processes related to the insured patent.¹⁵⁶ As for the geographic scope, the defensive insurance covers the European patentee in any EU member state. Moreover, the insurance would impose a coverage limit, deductible, and co-insurance payment – all of which are negotiable.¹⁵⁷

To achieve the premiums displayed above, CJA Consultants stress that the Scheme *must* forego “the expense and time consuming consequences of a technical risk assessment at the time of taking out the insurance contract.”¹⁵⁸ The “technical risk assessment” is the same as IPISC’s requirement for an “infringement opinion,” described above. Essentially, the Scheme requires insurers to cover European patentees while postponing calculating the patent’s risk profile “until a specific risk . . . is known.”¹⁵⁹ But the insurer may use a non-technical risk assessment—such as the company’s size and commercial field—to calculate the premium.¹⁶⁰

¹⁵⁵ *Id.* at 72.

¹⁵⁶ *Id.* at 43.

¹⁵⁷ *Id.* at 51, 62.

¹⁵⁸ *Id.* at 37 (emphasis omitted).

¹⁵⁹ *Id.* at 40.

¹⁶⁰ *Id.* at 41.

Nonetheless, infringement opinions are still necessary. When a European patentee wants to submit a claim for offensive coverage, he must order a technical risk assessment of his patent. The insurer must cover the costs so long as the European patentee has a 51% or better chance of success.¹⁶¹ But CJA Consultants note that patentees cannot be so restrained by the technical risk assessment. A patentee must have the “right to fight” because “only the threat of injunction and damages awarded by a court can maintain the value of patents in general.”¹⁶² Accordingly, if a European patentee insists on proceeding with litigation despite worse than 51% odds, then he must bear the costs.¹⁶³ But if the patentee sues and wins despite the insurer’s refusal to cover costs, then the insurer must pay the costs as if the technical risk assessment had concluded that there was a 51% chance of winning.¹⁶⁴

Finally, the Scheme contemplates some exemptions. For example, insurers “may exclude a class of patentees which they consider to be inappropriate, . . . on the grounds that their patent litigation activities are globally oriented and they operate under their own globally oriented patent litigation budgets”¹⁶⁵ According to CJA Consultants, globally oriented companies do not want to be covered in the European market— “[l]itigation in their case is a budgeted loss not a risk”¹⁶⁶ Interestingly, insurers do not want to cover globally oriented companies because the insurers tend to have little influence over the companies’ global litigation strategies.¹⁶⁷ In addition to globally oriented companies, “[p]atentees can seek exemption on the ground that they can demonstrate their own significant patent litigation spend [sic] and thus have no external risk to cover”¹⁶⁸

B. Obstacles and the U.S. Market

To recap, the failures of the patent insurance industry are high premiums, expensive applications, pricey claims making process, costly underwriting, and conflict between insurers and insureds.

¹⁶¹ *Id.* at 44.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 45.

¹⁶⁵ *Id.* at 60.

¹⁶⁶ *Id.* at 58.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 60.

The Scheme apparently solves two of these problems. For example, insuring a patent for €500,000 in coverage in the most expensive member state, Germany, is predicted to cost less than €2,500 per annum—and this includes both offensive and defensive coverage related to the patent. Compare that to IPISC’s annual averages of \$30,000 for defensive litigation insurance plus \$13,000 for offensive litigation insurance in the U.S. Second, applications are cheaper if insurers drop the initial technical risk assessment. But, ultimately, the Scheme does not resolve the pricey claims making process, costly underwriting, and conflict between insurers and insureds.

In addition to overcoming the general failures of the patent insurance industry, the Scheme, or some U.S.-variant, would have to surmount other obstacles specific to its features. For example, the Scheme requires policing mechanisms to check a patentee’s certificate of insurance upon issuing a patent or paying its maintenance fees. A U.S. version of the Scheme would add an additional administrative burden to the already overworked USPTO.¹⁶⁹

Because some businesses will not want to pay the mandatory insurance, and because the premiums are negotiable, some businesses might effectively evade the insurance by opting for 99% coinsurance and a high deductible. To counter “virtual evasion,” the Scheme proposes minimum standards for the coverage limit, deductible, and coinsurance.¹⁷⁰ The lowest coverage limit proposed by the Scheme was €100,000 per year.¹⁷¹ This can result in over-insuring some SMEs, which is an unnecessary financial burden because they are paying for more risk than they are exposed to. Further, the Scheme does not propose workable criteria for determining the minimums.

Another problem is that the Scheme increases initial costs for start-up companies that use patents. CJA Consultants found that premiums for a modified version of the Scheme (i.e., excluding damages and limiting coverage to €250,000) would account for a 22.5% increase in total costs for obtaining and maintaining a European patent validated in all countries for a period of ten years.¹⁷² But this figure merits skepticism. CJA Consultants only accounted for six years of annual premiums in obtaining a figure that is supposed to span ten years.¹⁷³ Recalculating their study to include ten years of annual premiums shows that the premiums are 37.5% of total patenting costs.¹⁷⁴

¹⁶⁹Ashley Chuang, *Fixing the Failures of Software Patent Protection: Deterring Patent Trolling by Applying Industry-Specific Patentability Standards*, 16 S. Cal. Interdisc. L.J. 215, 227-28 (2006) (“The USPTO is busy, under-funded, and under-staffed.”).

¹⁷⁰ European Study 2006, *supra* note 17, at 51.

¹⁷¹ *Id.* at 70-74.

¹⁷² *Id.* at 79. See the last row of Table 14, which calculates the premiums as a percentage of total costs ten years from application.

¹⁷³ *Id.* Table 14 is populated using data from Table 9, “Indicative premiums by country for Option 2.” *Id.* at 78. In Table 14, the total premium for “all countries” is €17,640. The sum of 17,640 is obtained by adding the individual premiums for each country listed. *Id.* (see the penultimate column, titled “Premiums €”). The problem with the figure is that the total premium

Thus, while the Scheme may propose to help SMEs, it may be hindering a new generation of innovators. But assuming a start-up can establish a beachhead, perhaps the benefits outweigh the costs. According to Llobet and Suarez, who mathematically studied the value of enforcement insurance across different legal-cost allocation rules, it is always optimal for a patentee to undertake some patent enforcement insurance.¹⁷⁵ Indeed, in comparing the UK to the U.S., Llobet and Suarez found that “the benefits of patent litigation insurance are clearly greater in the US system when monopoly profits are relatively small and litigation costs are large.”¹⁷⁶

Another barrier to adopting the Scheme in the United States is its potential for increasing litigation. Already the United States is criticized for generating excessive patent litigation,¹⁷⁷ and the Scheme can only exacerbate that problem. CJA Consultants recognize as much with respect to the EU,¹⁷⁸ stating “the aggregate costs of an increased number of proceedings would probably rise.”¹⁷⁹

Both of the aforementioned concerns—that the Scheme would stymie SMEs and increase litigation—were raised by the American Chamber of Commerce to the European Union (“AmCham EU”), an organization in Europe representing the views of companies of American nationality. In response to CJA Consultants’ 2006 study, AmCham EU stated:

listed for each country is only six years worth of annual premiums according to Table 9. No explanation is given as to why only six years of annual premiums, rather than ten years, are used. Further, “all countries” only represents those included in Table 14 (Germany, UK, France, Netherlands, Spain, Belgium, Austria, and Sweden). Notably, the following countries are missing: Czech Republic, Denmark, Finland, Greece, Hungary, and Poland.

¹⁷⁴ According to Table 14, six years of premiums for “all countries” would cost €17,640 (€2,940 per year). Multiplying this by ten years equals €29,400. Table 14 states that the total costs for obtaining and maintaining a European patent in “all countries” equals €78,472. Thus, premiums account for 37.5% of the total costs (i.e., €29,400 divided by €78,472) over a ten year period. *See id.*

¹⁷⁵ Gerard Llobet & Javier Suarez, Patent Litigation and the Role of Enforcement Insurance 2-3 (July 2008), available at <http://www.cemfi.es/~suarez/llobet-suarez.pdf> (unpublished manuscript).

¹⁷⁶ *Id.* at 5. “When monopoly profits are small,” effectively refers to SMEs.

¹⁷⁷ *Amendment in the Nature of a Substitute to H.R. 2795, the “Patent Act of 2005”*: Hearing on H.R. 2795 Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 7, 47 (2005) (statement of Emery Simon, Counsel, The Business Software Alliance) (“[T]he problem of excessive litigation continues to spiral out of control in our industry.”); Dennis D. Crouch, *The Patent Lottery: Exploiting Behavioral Economics for the Common Good*, 16 Geo. Mason L. Rev. 141 (2008).

¹⁷⁸ European Study 2006, *supra* note 17, at 9 (recognizing that wider use of patent litigation insurance would “increase the amount of litigation”).

¹⁷⁹ *Id.* at 9.

[We have] serious concerns regarding proposals for a mandatory patent litigation insurance scheme. Such a scheme would further increase the cost of obtaining patent protection in the European Union, particularly for small and medium size enterprises which already often hesitate to file for protection of their patentable inventions because of expensive patent application, translation, prosecution and maintenance fees. Moreover, such a scheme raises the risk of expensive and disruptive patent litigation practices in Europe such as those already common in the United States.¹⁸⁰

Specifically, AmCham EU points out that patent litigation insurance may have the “unintended side effect” of fomenting patent trolls because insurers may prefer a quick settlement instead of litigating.¹⁸¹

Indeed, the Scheme *is* “designed to lead to quicker and fairer settlements, including more licensing in appropriate cases, and out-of-court settlements.”¹⁸² Hence, as AmCham EU noted, insurers will likely undermine a patentee’s commitment to litigate by pressuring settlement. Consequently, an opponent may benefit by reducing the probability that a patentee will hold out for better settlement terms or a better litigation outcome, like an injunction.¹⁸³ On the other hand, Llobet and Suarez urge—with a mathematical model as evidence—that a patentee with enforcement insurance is more likely to achieve better settlements due to their commitment to incur litigation costs.¹⁸⁴

Given the identified problems, what are the stakeholders’ appetites for mandatory patent insurance? In a follow-up study, CJA Consultants summarize twenty-eight responses to the Scheme: “The overall stakeholders’ reaction to the study’s conclusions is negative. All the responses to the consultation oppose the introduction of the insurance

¹⁸⁰ Press Release, American Chamber of Commerce to the EU, AmCham EU Comments on the June 2006 Study Undertaken by CJA Consultants Ltd. On ‘Patent Litigation Insurance: A Study for the European Commission on the Feasibility of Possible Insurance Schemes on Patent Litigation Risks,’ (Feb. 2, 2007), *available at* http://www.eucommittee.be/Pops/2007/IP_PatentLitigationInsurance_02022007.pdf.

¹⁸¹ *Id.*

¹⁸² European Study 2006, *supra* note 17, at 9.

¹⁸³ Press Release, Trademarks, Patents & Designs Federation, Comment to European Commission re patent litigation insurance, 2-3 (Dec. 2006), *available at* http://www.tmpdf.net/cms/images/newsimages/06_PP022%20Patent%20litigation%20insurance%20to%20Commission.pdf [hereinafter TMPDF Comment].

¹⁸⁴ Llobet and Suarez, *supra* at note 175, at 25.

schemes”¹⁸⁵ In addition to the identified problems, the follow-up study summarizes three more issues raised by stakeholders.

First, the proposed premiums are too expensive. Insuring a single patent in the United Kingdom, Germany, and Austria for the highest level of coverage (€500,000) would cost €3,506 per year.¹⁸⁶ Although this amount is remarkably less than IPISC’s average premiums, a similarly priced mandatory insurance program would likely face substantial opposition from SMEs in the United States. Ideally, patent insurance would cost about the same as commercial general liability insurance, which has a proven market. According to Intellisurance,¹⁸⁷ “agents can provide Commercial General Liability (CGL) coverage to most industries at a rate as low as \$350 a year.”¹⁸⁸ Moreover, the indicative premiums are based on EU litigation statistics, where there is much less litigation than in the United States. Hence, it is reasonable to assume that a U.S. Scheme would cost more per year.

Second, the indicative premiums assume, incorrectly, that insurers will forego a technical risk assessment when a patentee applies for insurance. Recall that the principal method of reducing costs associated with patent litigation insurance is to omit the technical risk assessment from the application process. Yet the European Insurance Committee (“CEA”) and the International Association of Legal Expenses Insurance (“RIAD”) have flatly rejected that possibility: “Waiving an individual risk assessment is contrary to fundamental rules of the insurance business and cannot be accepted by insurers.”¹⁸⁹ The CEA further opined that “to make sure that high risks can be covered by the flat premium, this premium will have to be substantially higher than an average premium based on an individual risk assessment.”¹⁹⁰ Likewise, U.S. patent insurers, like IPISC, would not omit the infringement opinion from the application process.

¹⁸⁵ European Study 2007, *supra* at note 116, at 4. The respondents included insurers, national patent offices, industry associations, a company, patent attorneys, and individuals.

¹⁸⁶ See European Study 2006, *supra* note 17, at 72 tbl.8.

¹⁸⁷ Intellisurance is a full-service online insurance brokerage offering both personal and commercial insurance. See generally Intellisurance Insurance Brokerage, About Us, <http://www.intellisuranceusa.com/index.php?p=about-us> (last visited May 9, 2009).

¹⁸⁸ Intellisurance, Commercial General Liability, <http://www.intellisuranceusa.com/index.php?p=package-commercial-general-liability> (last visited Apr. 16, 2009).

¹⁸⁹ CEA, CEA Position Paper on Feasibility Study on a Patent Litigation Insurance 2 (2006), <http://www.cea.eu/uploads/DocumentsLibrary/documents/position306.pdf> [hereinafter CEA Position Paper]; RIAD, Joint Position Paper of CEA and RIAD on the Final Study on the Feasibility of Possible Insurance Schemes against Patent Litigation Risks (2006), <http://www.riad-online.net/61.0.html>.

¹⁹⁰ CEA Position Paper, *supra* note 189, at 2.

Third, the Scheme contemplates that the insurer, not the insured, may make strategic decisions. In some circumstances, this may implicate the insured's choice of litigation counsel or infringement opinion counsel.¹⁹¹ Still worse, under the Scheme the insurer can take direct control of the litigation.¹⁹² Because "[l]itigation management is vital to any potential litigant,"¹⁹³ such limitations practically render the Scheme ineffective. This concern is universal and would apply equally to a U.S. version of the Scheme.¹⁹⁴

On the whole, the Scheme is a detailed attempt at solving some of the failures of the patent insurance industry, such as stratospheric premiums and expensive applications. However, the Scheme does not address important issues, like pricey claims making process, costly underwriting, and conflict between insurers and insureds. To be sure, the Scheme seems to create more problems than it solves. A U.S. version of the Scheme would fail as a result. Notwithstanding, further research, like that of Llobet and Suarez, is necessary to provide empirical support for the European Commissions' intuitions on a mandatory patent litigation insurance scheme.

V. CONCLUSION

As the United States becomes an information economy, the value of patents will become increasingly important. At bottom, patents grant exclusionary rights, which require resources to pursue infringers. Recent statistics show that this can cost as much \$5,000,000. Moreover, patentees are not the only entities subject to expensive litigation risks, for businesses in general may infringe patents. Not surprisingly, venturing underwriters developed two types of insurance to address these problems.

Patent litigation insurance covers the litigation expenses incurred while defending an allegation of patent infringement. The defensive policy contains several important limitations, like veto power over the selection of counsel, budget, settlement, and appeals. Logically, the defensive policy excludes coverage for certain circumstances, like willful infringement. Typical coverage ranges from \$100,000 to \$5,000,000. On average, the annual premium for this insurance is about \$30,000. Patent enforcement insurance, on the other hand, reimburses the litigation expenses arising from a lawsuit against an alleged infringer. The same insurer wrote both policies, so they were largely the same. But the offensive policy diverges in some important ways, like using recovery sharing to

¹⁹¹ European Study 2006, *supra* note 17, at 51-52.

¹⁹² *Id.* at 52 ("It is normal for the practitioner to have a limited costs authority whereby when costs reach a certain level (for instance €10,000) the underwriter or their representatives will take direct control of the conduct of the case.").

¹⁹³ TMPDF Comment, *supra* note 183, at 2-3.

¹⁹⁴ *See id.*, at 2-3, 5 (strongly opposing insurers control of litigation and listing TMPDF members, like U.S. businesses Xerox, Hewlett-Packard, IBM, and Microsoft).

recoup litigation expenses. An average offensive policy costs \$13,000 per year.

Although patent insurance has been offered for the last fifteen years, the demand remains severely limited.¹⁹⁵ It is not difficult to see why. As described in Part III, patent insurance is too expensive for businesses and too risky for insurers.

It is important to address the problems facing patent insurance. Over time, SMEs' inability to enforce patents due to expensive litigation could lower incentives to innovate.¹⁹⁶ Patent insurance can provide the resources SMEs need to enforce their patent rights.¹⁹⁷ Furthermore, a restored confidence in the patent system leads to more patenting, which enriches the national knowledge base. For this reason, Gørtz and Konnerup conclude that "a legal expense insurance programme increases the value of patents."¹⁹⁸ But a "certain level of public involvement will probably be required during a start-up phase if it is to attain sufficient volume and critical mass"¹⁹⁹

To that end, this Note analyzed CJA Consultants' mandatory patent insurance scheme for the European Union. Their study concluded that only a compulsory program can produce the critical mass required to lower the premiums. A mandatory scheme would also address other shortcomings of the policies, like the expensive claims process and costly applications. But on the whole, a mandatory program faces significant challenges. Part IV questioned whether such a program could be adapted in the United States. For now, the answer is a resounding no.

But statistical studies similar to those conducted in Europe are necessary to analyze the feasibility of a mandatory patent insurance program in the United States. Ideally, such studies would detail a functional program which both avoids the identified pitfalls in the IPISC policy specimens and proves the statistical feasibility of sub-\$1000 premiums.

¹⁹⁵ *Id.* at 4.

¹⁹⁶ Ronspies, *supra* note 10, at 211.

¹⁹⁷ Lanjouw & Schankerman, *supra* note 9, at 49, 68-69.

¹⁹⁸ Gørtz & Konnerup, *supra* note 12, at 5.

¹⁹⁹ *Id.* at 6.