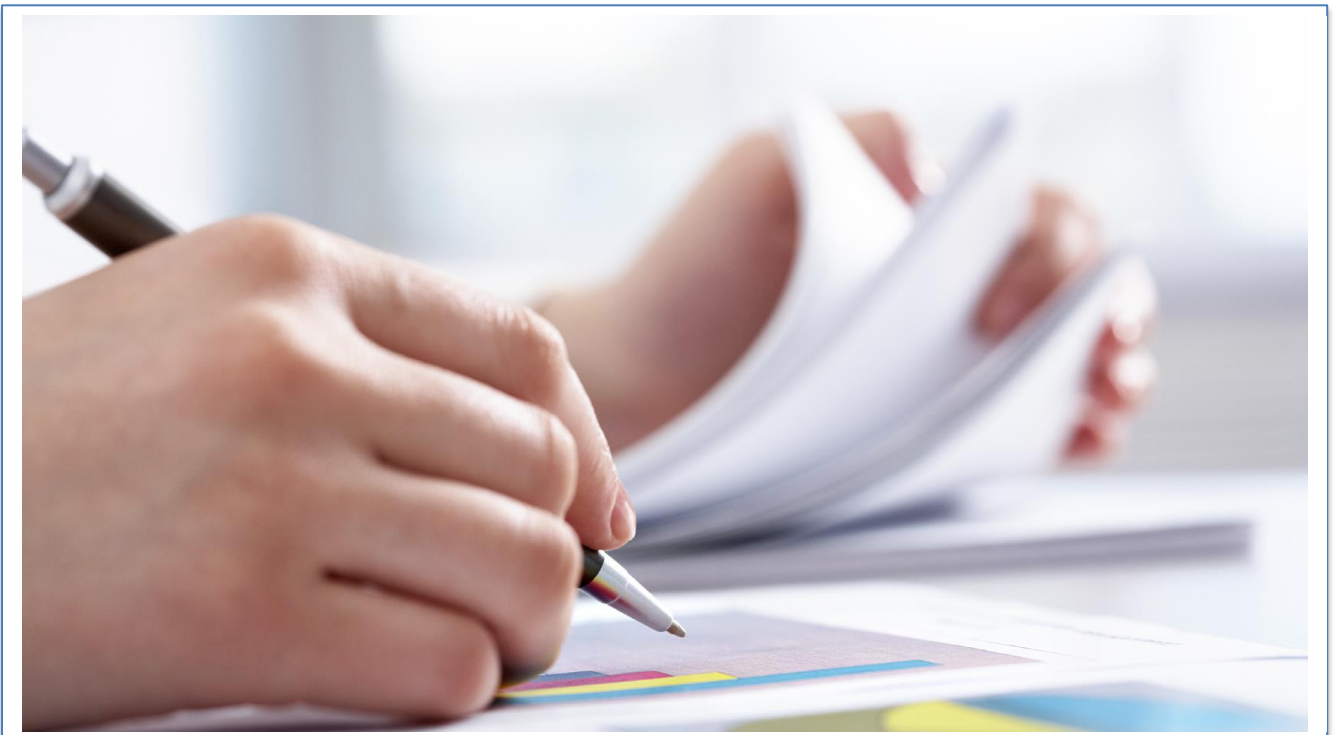


IP LITIGATION INSURANCE LANDSCAPE



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IP LITIGATION INSURANCE LANDSCAPE

April 2018

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I. INTRODUCTION

The European Observatory on Infringements of Intellectual Property Rights (the Observatory) was created to improve the understanding of the role of Intellectual Property (IP) and of the negative consequences of infringements of Intellectual Property Rights (IPR).

The *Commission Staff Working Paper on putting intellectual property (IP) at the service of small and medium-sized enterprises (SMEs) to foster innovation and growth*¹ puts forward policy actions to support access to, and the use of, IP by European innovative and creative SMEs, especially start-ups.

The Commission has undertaken to put in place a package of IP-support measures for start-ups and SMEs across the EU that will have the effect of improving coordination and consistency in addressing sub-optimal use of IP. These measures include, inter alia, encouraging the creation of EU-level insurance schemes for IP litigation².

The ability to enforce IP rights is essential to maintain and exploit their value. However, SMEs do not necessarily have the financial means to do so. IP litigation insurance would allow the financial burden and risks associated with IP litigation to be shared or transferred. This could bring a significant benefit to innovative SMEs.

In this regard, the Commission will seek to encourage insurance companies to enter this market in respect of EU-wide IP titles, and to assist innovative SMEs to access such services. To this end, a two-year pilot project on multi-territory patents will be launched, after which the initiative will be evaluated and, if appropriate, continued and possibly extended to other IP titles.

Before doing so, the Commission is interested in mapping the IP insurance products available on the EU market, in particular, which contractual clauses — to the extent that this information is available — differ from country to country and from sector to sector, and whether the unitary patent is perceived as an opportunity for such products to develop.

Engaging with SMEs and supporting them to protect and enforce their IP on several levels is part of the Observatory's Multiannual Plan 2014-2018 and Work Programme 2017. In this regard, the Observatory is working together with the Commission to help develop practical initiatives and to promote close engagement with SMEs. Furthermore, the Observatory is embarking on a research study on the valuation of IP assets.

The present report on IP litigation insurance products aims to assist the Commission in mapping the market for IP litigation insurance products in Europe. As a first step, the Observatory carried out preliminary desk research and, subsequently, carried out an initial survey amongst some of its stakeholders, the results of which are summarised in this report.

¹ See <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2016:373:FIN>

² Unless otherwise indicated, intellectual property (IP) in the context of insurance products is understood to include patents, trade marks, designs and copyright.

II. METHODOLOGY AND DATA

This report is based on an online survey, carried out by the Observatory between May and June 2017, desk research carried out concurrently with the survey, and information provided by the European Patent Office (EPO), the Danish Patent and Trademark Office (DKPTO) and the UK Intellectual Property Office (UKIPO).

The objective was to obtain an overview of the major IP insurance providers in Europe and of the perception of IP insurance products amongst some of the Observatory stakeholders³. This report is by no means a conclusive map of the IP insurance landscape in the EU, but rather, provides a snapshot of the current landscape.

The questionnaire for the online survey was drawn up by the Observatory in consultation with the Commission (DG Internal Market, Industry, Entrepreneurship and SMEs). The focus was on collecting key information in a simple and direct way. For this reason, only a small number of questions were included. The questions are given in Annex I. The responses to the questionnaire are shown in Annex II⁴. Annex III provides a list of the references consulted, and Annex IV, a list of IP insurance providers. Information that was gathered outside the survey and desk research was also considered and is referred to in the 'Findings' section of this report.

³ International Federation of Intellectual Property Attorneys (FICPI), International Association for the Protection of Intellectual Property (AIPPI), Licensing Executives Society (LES), International Trademark Association (INTA) and European Communities Trade Mark Association (ECTA).

⁴ Some of the answers were provided via email, rather than through the online survey. The answers received via email were taken into consideration, but are not listed in Annex II.

III. FINDINGS

This section presents and analyses the responses to the survey and the results of the desk research.

A. SURVEY

A subgroup of the Observatory stakeholders⁵ was invited to participate in the survey. All provided a response to the online questionnaire. However, the level of detail provided in the responses varies significantly. A total of 25 responses to the online survey were received.

The level of awareness (Question 1) was high among the respondents. Seventeen out of 25 confirmed that they are aware of IP insurance products in the EU (or elsewhere). Fourteen respondents were able to name insurance providers offering IP insurance products (Question 2)⁶. The names of the insurance companies provided are listed in Annex IV. Lloyds of London is the most frequently mentioned provider.

While the majority of responses did not provide much input about the popularity of these types of insurance products (Question 3), four responses suggest that these products are not very popular, while three responses signal a growing popularity. From the responses received, it appears that popularity depends on the region. According to some responses, this type of insurance products is more popular in Australia, China, Japan and the USA than in Europe. According to one response, the Chinese and Japanese Patent Offices offer subsidies to SMEs for joining an IP insurance scheme.

Regarding the reasons for not purchasing IP litigation insurance (Question 4), the main reason given is the cost. A number of responses suggest that the insurance premiums and the associated expenses are too high compared to the benefits they give. Other respondents appear to be reluctant because IP insurance products are too complex or require the disclosure of a great deal of information, while, for some, no such insurance coverage exists in their territory or providers are difficult to find. In some jurisdictions, the costs of litigation are considered to be reasonable, so there is little perceived need for insurance coverage.

A majority of the respondents believe that the unitary patent will have an impact on the demand for IP litigation insurance (Question 5), while an almost equal number believes either that the unitary patent will have no impact or that the impact is currently unknown. One respondent notes that increasing demand is caused by a general increase in the knowledge of IP and not necessarily by the introduction of the unitary patent.

⁵ The main criteria in the definition of the subset were to be a stakeholder of the Observatory, with a broad international membership active in patent-related matters.

⁶ From some of the responses it is unclear, whether the insurance companies named offer IP litigation insurance or professional liability insurance for IP patent and trade mark attorneys.

B. DESK RESEARCH

The findings of the desk research mirror, to a large extent, the findings of the online survey.

1. AWARENESS

In recent years, a number of documents and studies have been produced on this topic⁷, including studies commissioned by the European Commission⁸. The studies commissioned by the Commission, which concluded that an affordable insurance scheme would have to be mandatory, inter alia, are not considered in this report.

A study of the viability of patent insurance in Spain was carried out in 2013. This study provides a very detailed collection of resources and background information on IP insurance schemes, not just in Spain, but in the EU and the United States⁹.

In other EU Member States, the UKIPO¹⁰ and the DKPTO have addressed the topic, and are offering dedicated information and guidance on their websites¹¹. The DKPTO launched a patent insurance scheme (PatentEnforcer) in 2007, with the aim of facilitating the introduction of IP insurance products for Danish businesses. This scheme was specifically developed to support SMEs¹² and led to several insurance companies developing and offering tailored IP insurance products, mainly for the Danish market. To date, at least three insurance companies¹³ are offering competing IP insurance products in Denmark. According to the DKPTO, the level of awareness about IP insurance products of businesses continues to be low, and better promotion is still one of the key factors in making these types of products more attractive.

IP insurance has been available in the United Kingdom for a long time, but used to have the poor reputation of not being very useful. With a view to stimulating mainly the domestic market, the UKIPO is actively facilitating IP insurance products by helping insurance companies to better understand the needs of IPR holders, and by assisting IPR holders to obtain better knowledge about this option. Raising awareness among IPR holders continues to be one of the activities the UKIPO considers to be crucial.

In addition to initiatives by IP offices, there have been several governmental and/or private initiatives in Europe aimed at promoting IP insurance schemes, for example, in Sweden and France.

⁷ Many of the documents and information reviewed during the desk research are not very recent. For more details in this regard, see the list of references in Annex III.

⁸ See, for example, the 2003 and 2006 studies of CJA Consultants Ltd on insurance schemes against patent litigation risks.

⁹ Pérez Carrillo, E. F., Cuypers, F., *Viability of patent insurance in Spain*, Fundación Mapfre, 2013.

¹⁰ See: <https://www.gov.uk/guidance/intellectual-property-insurance>

¹¹ See: <http://www.dkpto.org/ip-law--policy/international-patenting/patent-litigation-insurance.aspx>

¹² See: European Commission, Directorate-General for Enterprises & Industry, *Making IPR work for SMEs: Annex B: best practice cases*, 2014.

¹³ Söderberg & Partners, Willis Towers Watson, IF; see also Annex IV.

A review of the offers in the marketplace shows that there are a number of different insurance products available in the EU offering various types of cover. On the one hand, there are insurance products that protect existing IP rights, and, on the other hand, there are insurance products that protect against the inadvertent infringement of the IP rights of others (or combinations thereof). Furthermore, current insurance products tend to insure all the IP rights relating to a particular product or a complete product line, rather than a particular IP right, such as an individual patent. IP insurance products are mainly tailor-made and their coverage ultimately depends on the desired scope¹⁴. Coverage may be limited to the provision of legal opinions only, or be extended to cover the legal costs of enforcement and the defence against infringement, including potential damages payable if a court case is lost. Another factor is the territorial scope of the insurance product. While some products provide national coverage only, products offering worldwide coverage also exist. All these factors have an impact on the premiums applicable.

It is clear from the resources consulted that information about IP insurance products is publicly available. While this information might be perceived as not being widespread or very detailed, it will at least provide an interested party with basic information about the insurance concept and the relevant contact information. It is, therefore, safe to conclude that the existence of IP insurance products is known to the interested public. This was also confirmed by the online survey carried out by the Observatory.

2. POPULARITY

Regarding the popularity of IP insurance products in the EU, it is difficult to come up with a reliable conclusion simply because there is not much public information about the attractiveness of IP insurance products. IP litigation insurance appears to be a small niche product, as most general commercial insurance products appear to provide no, or only very limited, coverage for IP-related disputes. Parties interested in IP litigation insurance are forced to search for a very particular insurance product (bundle) that covers their particular needs, and that is only offered by specialised insurance companies or brokers.

The UKIPO lists a large number of advantages of IP insurance products on its website¹⁵. The DKPTO has also identified a number of the benefits of IP insurance within its initiative to promote a national insurance scheme¹⁶. However, neither provides an indication as to the popularity of such products. While the UKIPO did notice an increase in demand for IP insurance products, their popularity remains relatively low, taking into account the number of innovative businesses. In this regard, the reform of the United Kingdom lower courts had a direct, positive impact on insurance premiums. According to the DKPTO, the key to a successful scheme is high volumes in order to make it affordable for the insured and profitable for the insurer. To date, there are three insurance companies offering competing IP insurance products in Denmark. There are, however, no statistics available as to the actual use of these products. The DKPTO is in regular contact with the insurance providers and, according to its experience, the IP insurance products offered are used but only to a modest extent.

¹⁴ Although no particular information could be revealed as to the coverage of trade secrets, in general, it appears to be possible to obtain such coverage by means of a tailor-made insurance package.

¹⁵ See footnote 5 above.

¹⁶ See European Commission, Directorate-General for Enterprise & Industry, *Making IPR work for SMEs: Annex B: best practice cases*, 2014.

The unitary patent is perceived by the DKPTO and the UKIPO as a potential opportunity for insurance companies to expand their products from a relatively small market to a European-wide market.

3. OBSTACLES

The main reason preventing IP right holders, in particular SMEs, from signing up for an IP insurance product, appears to be the costs. Insurance premiums are perceived to be too high, while coverage is too limited. The volumes of litigation in the field of IP are relatively low, making insurance underwriting difficult. A survey on patent litigation carried out in France from 2000 to 2009¹⁷ revealed that, although France is the fourth largest market in the world for patent litigation, there were only an average of 350 new patent litigation cases per year in the country. Compared to other litigation cases, this number is certainly low, which may suggest that an IP insurance product is not very attractive for the insurer nor for the potential insurance-taker.

The reasons for not purchasing IP insurance were explored in a recent study carried out in Germany¹⁸. The majority of respondents (including SMEs and start-ups) did not see any added value in contracting patent insurance. The insurance premium is considered high, while the expected litigation costs are perceived to be relatively predictable and relatively low. According to this study, for a patent insurance product to be successful, it would have to provide flexibility regarding the territorial coverage (worldwide or national) and the different levels of risk, and would also need to provide the insured with the ability to fully control the different levels of a dispute. Finally, the study concludes that the limited data available for insurance providers is causing a higher risk premium. This might be reduced only if the insurer can obtain more reliable data stemming from more frequent use of the insurance product. Further disadvantages, such as the complexity and difficulty of providing the necessary cover, and the difficulty of obtaining coverage from the insurer, are also discussed. Complicated and difficult application procedures, as well as non-transparent pricing, have been identified by the DKPTO as obstacles for IPR holders joining IP insurance schemes.

In addition to costs and a relative lack of awareness about the option, the UKIPO considers poor strategic planning for mitigating IP risks as an obstacle for entering into IP insurance products. Many businesses, in particular SMEs, might only take out insurance at a stage when there is a higher risk, which may lead either to a refusal of coverage or to a negative impact on the premium.

These obstacles have been confirmed to some extent by the study of patent insurance in Spain¹⁹. According to this study, the slow development of patent insurance might be attributed to the difficulty in assessing the risk of IPR infringements, the absence of reliable statistical data, and the highly fragmented nature of the boundaries of temporary and territorial aspects relating to IPRs.

¹⁷ Véron, P., *Patent litigation in France: statistical study 2000-2009*.

¹⁸ Leiprecht, S., *Patentrechtsschutzversicherung und die Besicherung von geistigem Eigentum: Chancen für Deutsche KMUs?*, Technische Universität München.

¹⁹ Pérez Carrillo, E. F., Cuypers, F., *Viability of patent insurance in Spain*, Fundación Mapfre, 2013.

IV. CONCLUSION

IP insurance products do exist in Europe and there is a reasonable level of awareness of the availability of these products among IP right holders. Despite this existing level of knowledge, there remains a strong need to raise awareness about the details of IP insurance options, in particular amongst SMEs. While some practical experience could be gathered in some European countries, IP insurance schemes remain special niche products with limited use by IP rights holders, and it seems that insurance companies continue to struggle to reach critical mass with these types of products.

IP insurance products are not necessarily linked to a particular IP right but, rather, cover a particular product or product line and encompass all of its associated IP rights. The level of popularity of IP insurance varies depending on the territory and size of the IP rights holder. However, in general, popularity has been low for various reasons, cost being the most prominent one. Lowering insurance premiums appears to be a key factor in making these types of products more attractive for IPR holders.

The likely impact of the unitary patent on the popularity of IP insurance products remains uncertain for the time being. However, there appears to be a positive perception insofar as the unitary patent represents an improved business opportunity for insurance providers to offer existing products on a broader geographical scope.

V. ANNEXES

ANNEX I: QUESTIONNAIRE

Q1

Are you aware of IP insurance providers in the EU (or elsewhere)?

Q2

If so, can you provide the names of such providers?

Q3

Do you have any knowledge as to the popularity of IP litigation insurance products?

Q4

Are you aware of any particular reasons preventing you from purchasing such insurance products?

Q5

Do you expect the unitary patent to have an impact on the demand for IP litigation insurance products?

ANNEX II: QUESTIONNAIRE ANSWERS

SURVEY RESPONSE 1	
Response ID	9
Date submitted	1980-01-01 00:00:00
Last page	1
Start language	EN
Are you aware of IP insurance providers in the EU (or elsewhere)?	Yes
If so, can you provide the names of such providers?	No
Do you have any knowledge as to the popularity of IP litigation insurance products?	In Germany, such products are not very popular.
Are you aware of any particular reasons preventing you from purchasing such insurance products?	At least for patent litigation, proceedings are (currently) much cheaper in Germany than elsewhere, so there appears not to be a significant need for insurance products.
Do you expect the unitary patent to have an impact on the demand for IP litigation insurance products?	Maybe

SURVEY RESPONSE 2	
Response ID	12
Date submitted	1980-01-01 00:00:00
Last page	1
Start language	EN
Are you aware of IP insurance providers in the EU (or elsewhere)?	I am aware of their existence. I do not know their identities.
If so, can you provide the names of such providers?	No I cannot since I do not know of their identities.
Do you have any knowledge as to the popularity of IP litigation insurance products?	Yes, they popularity waxes and wanes.
Are you aware of any particular reasons preventing you from purchasing such insurance products?	No
Do you expect the unitary patent to have an impact on the demand for IP litigation insurance products?	No - my experience is that insurance for patent products, though not unknown is rare.

SURVEY RESPONSE 3

Response ID	14
Date submitted	1980-01-01 00:00:00
Last page	1
Start language	EN
Are you aware of IP insurance providers in the EU (or elsewhere)?	Yes at least in Finland there are IPR insurances available.
If so, can you provide the names of such providers?	IF Vahinkovakuutusyhtiö Oy at least has an IPR insurance in Finland.
Do you have any knowledge as to the popularity of IP litigation insurance products?	It is very seldom that our clients have an IPR insurance even that IPRs are very important for several of our clients.
Are you aware of any particular reasons preventing you from purchasing such insurance products?	Those are quite expensive and also the insurance company requests lot of information from the company applying for an IPR insurance.
Do you expect the unitary patent to have an impact on the demand for IP litigation insurance products?	Do not know

SURVEY RESPONSE 4

Response ID	22
Date submitted	1980-01-01 00:00:00
Last page	1
Start language	EN
Are you aware of IP insurance providers in the EU (or elsewhere)?	No
If so, can you provide the names of such providers?	No
Do you have any knowledge as to the popularity of IP litigation insurance products?	Not much
Are you aware of any particular reasons preventing you from purchasing such insurance products?	IP litigation insurance is complicated and expensive, not always cost efficient
Do you expect the unitary patent to have an impact on the demand for IP litigation insurance products?	Not sure yet of its consequences as regards to insurance

SURVEY RESPONSE 5

Response ID	23
Date submitted	1980-01-01 00:00:00
Last page	1
Start language	EN
Are you aware of IP insurance providers in the EU (or elsewhere)?	There seem to be several IP insurance providers located mainly in countries like UK, Germany, Denmark or Sweden.
If so, can you provide the names of such providers?	ADF Insurance Brokers Ltd, Aon Risk Solutions, TheJudge, La Playa, Allianz, Lloyd's, Miller Insurance Services
Do you have any knowledge as to the popularity of IP litigation insurance products?	We do not have such knowledge; however, it can be presumed that IP litigation insurance products could be popular mainly amongst pharmaceutical companies and high-tech companies, since the risk that they will be involved in patent litigation is above the average.
Are you aware of any particular reasons preventing you from purchasing such insurance products?	In our jurisdiction (Czech Republic), we are not aware of any insurance providers that would provide this kind of insurance. On the contrary, according to our information most of the insurance products offered by the Czech insurance providers related to litigation insurance specifically exclude IP litigation from their coverage.
Do you expect the unitary patent to have an impact on the demand for IP litigation insurance products?	Since the unitary patent litigation will result in a substantial rise of the patent litigation costs, it could be presumed that there will be increased demand for IP litigation insurance products.

SURVEY RESPONSE 6

Response ID	24
Date submitted	1980-01-01 00:00:00
Last page	1
Start language	EN
Are you aware of IP insurance providers in the EU (or elsewhere)?	No
If so, can you provide the names of such providers?	No
Do you have any knowledge as to the popularity of IP litigation insurance products?	It has been tried several times and it does not work. A reliable system will be too expensive and an affordable one is useless because insurance companies only cover low quality legal support
Are you aware of any particular reasons preventing you from purchasing such insurance products?	See above
Do you expect the unitary patent to have an impact on the demand for IP litigation insurance products?	No

SURVEY RESPONSE 7

Response ID	25
Date submitted	1980-01-01 00:00:00
Last page	1
Start language	EN
Are you aware of IP insurance providers in the EU (or elsewhere)?	Yes, we are aware of IP insurance providers in the EU and other countries/regions, since most of them are rather global. They are mostly located in the UK.
If so, can you provide the names of such providers?	The providers we know are Opus Underwriting, Thomas Miller and Lloyds.
Do you have any knowledge as to the popularity of IP litigation insurance products?	It depends on the countries/regions. We believe it is more popular in the UK, Australia and the US and less in Europe in general.
Are you aware of any particular reasons preventing you from purchasing such insurance products?	So far, it seems to be the cost of such insurance, although the benefits are numerous.
Do you expect the unitary patent to have an impact on the demand for IP litigation insurance products?	We believe there is already a need from IP users for such insurance as far as the cost can be kept reasonable. FICPI is working for 2 years now on an IP insurance project designed for its members to enable them to offer IP insurance to their clients. Therefore we would be glad to discuss this matter with you and join forces to develop such system in the interest of IP users.

SURVEY RESPONSE 8

Response ID	26
Date submitted	1980-01-01 00:00:00
Last page	1
Start language	EN
Are you aware of IP insurance providers in the EU (or elsewhere)?	No I am not aware of such
If so, can you provide the names of such providers?	See above
Do you have any knowledge as to the popularity of IP litigation insurance products?	No
Are you aware of any particular reasons preventing you from purchasing such insurance products?	No
Do you expect the unitary patent to have an impact on the demand for IP litigation insurance products?	Yes

SURVEY RESPONSE 9

Response ID	27
Date submitted	1980-01-01 00:00:00
Last page	1
Start language	EN
Are you aware of IP insurance providers in the EU (or elsewhere)?	Yes
If so, can you provide the names of such providers?	CFC Underwriting, Liberty, Tokio Marine Kiln, Opus Underwriting, IPISC, RPX Corp
Do you have any knowledge as to the popularity of IP litigation insurance products?	Yes, they are growing in popularity. The Japan Patent Office and China Patent office are offering IP insurance subsidies for joining an SME insurance scheme. In the USA the threat of patent trolls makes insurance attractive. In the EU, I have heard it is growing more slowly - so EU SMEs are up against Insured counterparts in rest of world
Are you aware of any particular reasons preventing you from purchasing such insurance products?	Costs of policy - high premiums, high deductibles, high co-insurance. Pursuit coverage is prohibitively expensive, but defence coverage is getting cheaper. Policies are cheaper if they exclude USA/Canada territory too
Do you expect the unitary patent to have an impact on the demand for IP litigation insurance products?	The introduction will create crossover in jurisdiction on similar technologies currently granted in different jurisdictions if patents are not 'opted out' so an IP insurance product would make sense to purchase. May be easier to market to patent holders than non-patent holders. Non patent holders can still infringe patents so could still benefit from IP insurance

SURVEY RESPONSE 10

Response ID	28
Date submitted	1980-01-01 00:00:00
Last page	1
Start language	EN
Are you aware of IP insurance providers in the EU (or elsewhere)?	Yes
If so, can you provide the names of such providers?	Lloyd's Initiative of the Danish IP Office
Do you have any knowledge as to the popularity of IP litigation insurance products?	These products are not very popular. They correspond to niche markets for very specific needs. They are related to product/business lines rather than to specific IP rights.
Are you aware of any particular reasons preventing you from purchasing such insurance products?	IP litigation insurance is costly and complex.
Do you expect the unitary patent to have an impact on the demand for IP litigation insurance products?	Possibly in the long term, by making it easier to product relevant statistics on patent litigation in Europe.

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ANNEX IV: LIST OF PROVIDERS²⁰

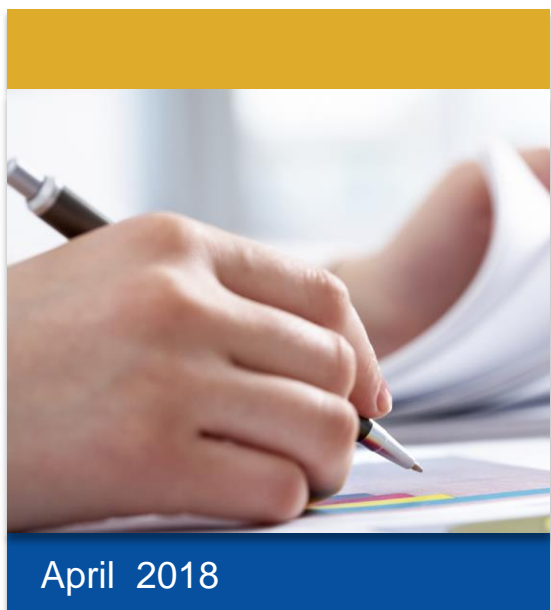
- Abbey Legal Protection
- AIG
- CFC Underwriting Ltd
- GMP Gesellschaft für Marken- und Patentrechtsschutzversicherung Vertriebsgesellschaft mbH
- Gras Savoye
- Howden UK Group Ltd.
- If Skadeförsäkring
- Intellectual Property Insurance Services Corporation
- Lloyds of London
- Liberty Specialty Markets
- OPUS Underwriting Limited
- Poolsegur
- QBE European Operations
- Safeguard IP
- Sanza Seguros
- Söderberg & Partners
- Tokio Marine Kiln
- Willis Towers Watson

²⁰ Apart from insurance companies, there are a number of insurance brokers that are offering IP litigation insurance products. Due to the high number of brokers, no list of brokers will be provided in this report.

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