

**SAILING UNCHARTED WATERS:
INSURANCE COVERAGE FOR INTELLECTUAL
PROPERTY DISPUTES ARISING FROM THE INTERNET**

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I. INTRODUCTION	1126
II. THREE ROADS CROSSING.....	1127
A. Insurance Coverage for Traditional Intellectual Property Disputes.....	1128
1. <i>Copyrights</i>	1130
2. <i>Trademarks</i>	1130
3. <i>Patents</i>	1131
B. Insurance Coverage for Internet-Related Disputes...	1132
C. Growing Intellectual Property Risks Arising from the Internet.	1135
1. <i>Copyrights</i>	1135
2. <i>Trademarks</i>	1137
3. <i>Patents</i>	1140
III. THE FUTURE.....	1141
IV. CONCLUSION.....	1145

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I. INTRODUCTION

The Internet has dramatically changed the landscape of commerce: providing an entirely new dimension to the business world. This unexplored dimension offers its commercial explorers the promise of great rewards. These new commercial explorers are also, however, taking on the corresponding risks of its uncertainty, whether consciously or not.

One particular risk already leaving its mark on the Internet horizon is the financial risk posed by intellectual property disputes. No sooner did the Internet open its doors to the public than disputes concerning intellectual property issues arose. These disputes have quickly blossomed into expensive litigation and pose a significant financial risk to the companies that have entered the Internet marketplace.

Like the commercial explorers who centuries before faced enormous financial risk by sailing through uncharted waters to establish trading routes to the New World, these new commercial explorers are increasingly searching for insurers that might underwrite the financial risks posed by their new ventures. The substantial cost of copyright, patent, and trademark litigation have particularly left companies looking into the language of their insurance policies in hopes of finding coverage.

This article attempts to peer into an interesting aspect of this uncharted territory: the intersection between insurance coverage and intellectual property disputes on the Internet. The text will first present an overview of the availability of insurance coverage for non-Internet intellectual property issues,¹ which will be followed

1. See *infra* Part II.A. The three areas of intellectual property of concern here include copyrights, patents, and trademarks. The three are often grouped together for their common attribute as products of intellect possessing commercial value. BLACK'S LAW DICTIONARY 813 (7th ed. 1999). Each process area, however, holds a different history. Greek and Roman scholars were the first to ask for recognition for their ideas, but it was not until the advent of the printing press that a work took on an economic value where protection was desirable. The United Kingdom officially recognized copyrights with the 1709 Statute of Anne, which codified the common law recognitions already in place. United Kingdom Patent Office, *Intellectual Property: A Brief History of Trade Marks*, at http://www.intellectual-property.gov.uk/std/resources/trade_marks/history/origins.htm (last visited Feb. 14, 2002). The United States Congress enacted the first federal copyright law in 1790, employing clerks to record the copyright. In 1870 these duties became part of the Library of Congress. Twenty-seven years later, the Copyright Office assumed these responsibilities, but still remained attached to the Library. As of 1994, the Office had registered 25,733,511 copyrights. Circular, U.S.

by a brief synopsis of the expanding range of scholarly works addressing the availability of insurance coverage for Internet-based claims.² Finally, the text will explore the growing range of intellectual property disputes arising from Internet use.³ After providing a basic understanding of the traditional applications of intellectual property law, this article suggests that future developments largely depend on the reactions of insurers and insureds by squarely addressing the potential liabilities arising from Internet-related intellectual property disputes.⁴ Among other concepts, this article suggests that businesses and their insurers must carefully consider how the traditional forms of insurance coverage will handle the expansion of intellectual property issues on the Internet, and whether specialized insurance will be required to address the particular intellectual property liabilities posed by the Internet.

II. THREE ROADS CROSSING

In order to fully understand the current implications of insurance coverage for intellectual property litigation arising from the Internet, the field is best viewed as three relationships merging together: (1) insurance coverage for traditional intellectual property disputes; (2) insurance coverage for Internet-related disputes; and (3) growing intellectual property disputes arising from the Internet.

Copyright Office, United States Copyright Office: A Brief History and Overview, Apr. 29, 1996, *available at* <http://www.loc.gov/copyright/docs/circ1a.html>.

In the United Kingdom, patent protection dates back 500 years. At that time, the Crown began awarding exclusive privileges to certain manufacturers and traders, a grant signified through Letters Patent, literally marked with the King's seal. The history of trademarks, on the other hand, stretches into ancient times when traders would alter their products to distinguish them from other wares. The rules governing these marks dates to medieval craft guilds. Despite these traditions, it was only within the last 200 years that law recognized these markings as "property" carrying a trader's goodwill and allowing that person to take action against those who tried to appropriate it. Congress opened the United States Patent and Trademark Office over 200 years ago, and today the agency processes more than 300,000 applications a year from individuals seeking the exclusive recognition and privilege for their unique ideas and inventions. United Kingdom Patent Office, *supra* note 1; Tom Austin, *PKI Protect Patents*, INFO. SEC., Mar. 2001, at http://www.infosecuritymag.com/articles/march01/features6_cs.shtml.

2. *See infra* Part II.B.

3. *See infra* Part II.C.

4. *See infra* Part III.

A. *Insurance Coverage for Traditional Intellectual Property Disputes*

Insurance coverage for claims of intellectual property violations marks a relatively new trend in litigation. Until the late 1980s and early 1990s, courts rarely interpreted the standard commercial general liability (“CGL”) policies to provide coverage for claims of patent, trademark, or copyright infringement unless they were particularly provided for in the policy.⁵ As a result, only those companies that purchased expensive, specialized coverage⁶ could be confident in receiving defense or indemnity for these claims.⁷ More expansive interpretation of the CGL policy for other types of claims, however, has recently led companies to increasingly demand coverage for a variety of intellectual property disputes. While some courts refused to even consider coverage into the mid-1990s, courts today have found insurance coverage in CGL policies for many of these claims.⁸

Although different claims under the general heading of intellectual property take on particular characteristics, as will be discussed below, the mere fact that it is a patent or trademark claim does not necessarily remove it from the basic principles of contract interpretation for insurance policies.⁹ Courts will typically¹⁰ first attempt to enforce the insurance contract according to the intent of the parties.¹¹ Where the terms of the policy do not speak for

5. See generally Brian Klemm, *Insurance Coverage for Intellectual Property Claims: A Changing Landscape*, 563 PLI/LIT 421 (1997).

6. Few companies could justify purchasing the specialized policies because of the enormous costs charged for premiums for this coverage. *Id.* See also Melvin Simensky & Eric C. Osterberg, *The Insurance and Management of Intellectual Property Risks*, 17 CARDOZO ARTS & ENT. L.J. 321, 328 (1999).

7. See generally Klemm, *supra* note 5.

8. See generally D. Peter Harvey, *Insurance for Intellectual Property Claims: The Growing Coverage Debate*, 624 PLI/LIT 143, 147 n.1 (2000) (citing *Winklevoss Consultants, Inc. v. Fed. Ins. Co.*, 991 F.Supp. 1024, 1026 (N.D. Ill. 1998)).

9. *New Castle County v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 243 F.3d 744, 749 (3d Cir. 2001); *Epstein Family P'shp v. Kmart Corp.*, 13 F.3d 762, 766 (3d Cir. 1994); *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807, 821-23 (1990) (holding that coverage clauses in insurance policies should be interpreted broadly, protecting the objectively reasonable expectations of the insured).

10. This discussion is obviously simplistic in its treatment of the many and varied issues that might arise in the interpretation of an insurance policy. This basic backdrop is useful, however, in understanding how insurance coverage for traditional intellectual property disputes has found a foothold in the advertising injury provisions of the standard CGL policy.

11. Richard Antognini, *What You Need to Know About Intellectual Property Coverage*, TORT & INS. L.J. 895, 899 (1996). See *Peerless Lighting Corp. v. Am. Motorists Ins. Co.*, Cal.Rptr.2d 753, 758 (Cal. Ct. App. 2000); *Mez Indus. v. Pac.*

themselves, courts will often read a specific provision according to its plain language and in light of the rest of the contract.¹² Courts often also construe ambiguities in favor of finding coverage.¹³ After coverage has been established and all conditions precedent have been satisfied, courts require an exclusion to defeat the coverage.¹⁴

The most common claim for coverage for intellectual property disputes under the typical CGL policy has found its home under the category of “advertising injury.”¹⁵ A thorough analysis of intellectual property claims under the advertising injury clause would constitute a work in and of itself.¹⁶ For the purposes of this discussion, it is sufficient to note the basic elements of a coverage claim under standard advertising injury provisions. To trigger coverage, the insured must first demonstrate that the injury occurred during the policy period and arose in an advertising activity.¹⁷ The activity must then be expressly identified in the policy and be the cause of the damages the insured claims.¹⁸ After establishing these factors, the particular analysis under each case

Nat. Ins. Co., 90 Cal.Rptr.2d 721, 729 (Cal. Ct. App. 1999).

12. *Adams v. Reliance Std. Life Ins. Co.*, 225 F.3d 1179, 1185 (10th Cir. 2000); *Owens-Brockway Glass Container Inc. v. Int’l Ins. Co.*, 884 F.Supp. 363, 366 (E.D. Cal.1995); *Lumbard v. W. Fire Ins. Co.*, 381 N.W.2d 117, 119 (Neb. 1986); *Denis v. Woodmen Acc. & Life Co.*, 334 N.W.2d 463, 465 (Neb. 1983) (stating that “[a]n ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.”).

13. *Springdale Donuts, Inc. v. Aetna Cas. & Sur. Co. of Ill.*, 724 A.2d 1117, 1120 (Conn. 1999); *In re KF Dairies, Inc. & Affiliates*, 224 F.3d 922, 926 (9th Cir. 2000).

14. *KF Dairies*, 224 F.3d at 927.

15. *See, e.g., Idg, Inc. v. Continental Cas. Co.*, 275 F.3d 916 (10th Cir. 2001); *Liberty Mut. Ins. Co. v. Metro. Life Ins. Co.*, 260 F.3d 54 (1st Cir. 2001); *Maddox v. St. Paul Fire & Marine Ins.*, — F.Supp.2d — (W.D. Pa. 2001), available at 2001 WL 1699199.

16. *See generally* David P. Brooks, *Advertising Injury: Getting the Most Out of Your Insurance Policy* 14 HASTINGS COMM & ENT. L.J. 389 (1992); William P. Kelly, *Scope of Advertising Injury Under Iowa Law in Commercial General Liability Policies*, 48 DRAKE L. REV. 625 (2000); Terri D. Keville, *Advertising Injury Coverage: An Overview*, 65 S. CAL. L. REV. 919 (1992); Bryon L. Romine, *Advertising Injury Coverage Analysis for Trademark and Trade Dress Infringement Claims in Texas: As Easy as One, Two, Three*, 6 TEX. WESLEYAN L. REV. 211 (2000).

17. *Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 7 F.3d 1047, 1050 (1st Cir. 1993); *Ind. Molding Corp. v. Am. Mfrs. Mut. Ins. Co.*, 17 F.Supp.2d 633, 637 (N.D. Tex. 1998); *New Hampshire Ins. Co. v. R.L. Chaides Constr. Co.*, 847 F.Supp. 1452, 1455 (N.D. Cal. 1994); *Grumman Sys. Support Corp. v. Traveler’s Indem. Co.*, 828 F.Supp. 11, 12 (E.D.N.Y. 1993).

18. *See, e.g., Sentex Sys. v. Hartford Accident & Indem. Co.*, 93 F.3d 578, 580 (9th Cir. 1996); *Winklevoss Consultants v. Fed. Ins. Co.*, 11 F.Supp.2d 995, 997 (N.D. Ill. 1998).

remains exclusive to the type of claim.

1. Copyrights

Of trademark, patent, and copyright claims for insurance coverage, copyright is the least litigated. Policies often expressly provide for the defense of claims for copyright infringement committed in the course of advertising, allowing the insurer very little room to dispute coverage under the policy language.¹⁹ Consequently, instead of interpreting the plain language of the insurance contract, courts more often face a decision as to whether the alleged violation occurred within the course of advertising.²⁰

2. Trademarks

The broad question concerning insurance coverage under a CGL policy for trademark disputes has yet to find definitive resolution in the courts. Those jurisdictions that have found for coverage do so by finding that a claim for trademark infringement falls under the “advertising injury” language, ordering coverage for “misappropriation of advertising ideas and style of doing business.”²¹ In 1996, however, the Sixth Circuit decision in *Advance Watch Co. v. Kemper National Insurance Co.*²² offered a new interpretation. The *Advance Watch* court held that if the insurer had intended to include claims for trademark or patent infringement the policy would have explicitly provided for such coverage.²³ The court explained that misappropriation of advertising ideas and style of doing business does not specifically include trademark violations in the stated language, as it does for copyright claims.²⁴ Not all courts have since agreed with this reasoning, instead holding that if

19. See generally Klemm, *supra* note 5.

20. See *Ziman v. Fireman's Fund Ins. Co.*, 87 Cal.Rptr.2d 397 (Cal. Ct. App. 1999) (explaining that where the copyright claim fell under policy language, displaying an unauthorized copy of a painting while showing a building to potential buyers does not constitute advertising). See also *Poof Toy Prod., Inc. v. U.S. Fid. & Guar. Co.*, 891 F.Supp. 1228, 1234-35 (E.D. Mich. 1995) (discussing the “causal element” necessary in claiming an advertising injury); *Irons Home Builders, Inc. v. Auto-Owners Ins. Co.*, 839 F.Supp. 1260, 1264-65 (E.D. Mich. 1993) (analyzing whether construction of a home constitutes advertising activity).

21. *Dogloo, Inc. v. N. Ins. Co.*, 907 F.Supp. 1383, 1388-90 (C.D. Cal. 1995); *P.J. Noyes Co. v. Am. Motorists Ins. Co.*, 855 F.Supp. 492, 494 (D. N.H. 1994); *B.H. Smith, Inc. v. Zurich Ins. Co.*, 676 N.E.2d 221, 223 (Ill. App. Ct. 1996).

22. 99 F.3d 795 (6th Cir. 1996).

23. *Id.* at 803.

24. *Id.*

insurers had meant to limit the policy *not* to include trademark claims they would have drafted a separate exclusion.²⁵ Other courts have found coverage by looking to different policy language under the advertising injury rubric. For example, in *American Economy Insurance Co. v. Reboans, Inc.*,²⁶ the court allowed for coverage under the language of “infringement of title.” In any event, regardless of what the particular policy contains, trademark disputes first require a causal nexus between the alleged injury and advertising.²⁷

3. Patents

Of all the intellectual property claims that fall under the language of an insurance policy, patent claims are the most rarely covered. While some courts have found coverage for trademark and copyright claims under the advertising injury provisions of the typical CGL policy, most courts have consistently refused to find coverage for patent claims.²⁸ Some insureds have taken the position, most unsuccessfully, that patent claims fall under coverage for “piracy” in advertising.²⁹ One court defined piracy under this context as “misappropriation or plagiarism found in elements of the advertisement itself in its text, form, logo, or pictures—rather than in the product being advertised.”³⁰ As evident in the description, not only must an insured argue that a patent violation is more than just the product advertised, but also that the patent infringement lies in the advertisement itself, thereby

25. See *Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co.*, 61 F.Supp.2d 611, 617 (S.D. Tex. 1999) (rejecting the reasoning expressed in *Advance Watch*); *Am. Employers’ Ins. Co. v. DeLorme Publ’g Co.*, 39 F.Supp.2d 64, 76 (D. Me. 1999) (also rejecting the *Advance Watch* decision). See also *Parameter Driven Software Inc. v. Mass. Bay Ins. Co.*, 25 F.3d 332, 337 (6th Cir. 1994) (holding no duty to defend because of an express exclusion for trademark claims).

26. 900 F.Supp. 1246 (N.D. Cal. 1994).

27. *Winklevoss Consultants v. Fed. Ins. Co.*, 11 F.Supp.2d 995, 1036 (N.D. Ill. 1998).

28. *United Nat’l Ins. Co. v. SST Fitness Corp.*, 182 F.3d 447 (6th Cir. 1999); *Everest & Jennings, Inc. v. Am. Motorists Ins. Co.*, 23 F.3d 226 (9th Cir. 1994); *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500 (9th Cir. 1994).

29. See *Intex Plastics Sales Co. v. United Nat’l Ins. Co.*, 23 F.3d 254, 255 (9th Cir. 1994); *St. Paul Fire & Marine Ins. Co. v. Advanced Interventional Sys., Inc.*, 824 F.Supp. 583, 586 (E.D. Va. 1993). But see *N.H. Ins. Co. v. R.L. Chaides Constr. Co.*, 847 F.Supp. 1452, 1456-57 (N.D. Cal. 1994) (holding that a patent infringement was “piracy” as described in the policy, but there would not be coverage because the infringement did not occur in the course of an advertising activity).

30. *Iolab Corp.*, 15 F.3d at 1506.

fulfilling the causal connection necessary in any of the intellectual property claims.³¹ Quoting a Virginia federal court, the *Advance Watch Co.* court commented:

[I]t is nonsense to suppose that if the parties had intended the insurance policy in question to cover patent infringement claims, the policy would explicitly cover infringement of “copyright, title or slogan,” but then include patent infringement, sub silentio, in a different provision, by reference to “unauthorized taking of . . . [the] style of doing business.”³²

The Eleventh Circuit is one of the few courts that has found coverage for a patent claim under a standard policy. In *Elan Pharmaceutical Research Corp. v. Employers Insurance of Wausau*,³³ the Eleventh Circuit held that the insurer should provide coverage for a patent infringement claim for advertising a competing form of a drug.³⁴ With rare exceptions to date, courts have summarily concluded that even though a certain patented item is advertised, it does not become a claim covered under the policy.³⁵

B. Insurance Coverage for Internet-Related Disputes

Another equally recent phenomenon in insurance coverage encompasses the question of defense and indemnification for disputes arising from the Internet. As e-commerce becomes one of the primary facets of doing business in this century, these transactions will undoubtedly seek the same protection as their non-electronic counterparts. Although little litigation has surfaced to establish precedent, commentators and insurers have nonetheless earnestly taken up the issue.³⁶

31. *Everest & Jennings*, 23 F.3d at 229; *Heritage Mut. Ins. Co. v. Advanced Polymer Tech., Inc.*, 97 F.Supp.2d 913, 922 n.5 (S.D. Ind. 2000); *Gitano Group v. Kemper Group*, 31 Cal.Rptr.2d 271, 276-77 (Cal. Ct. App. 1994).

32. 99 F.3d at 803 (citing *Advanced Interventional Sys.*, 824 F.Supp. at 586) (omissions in original).

33. 144 F.3d 1372 (11th Cir. 1998).

34. *Id.* at 1377.

35. *See, e.g., Everest & Jennings*, 23 F.3d at 229; *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1275, 10 Cal.Rptr.2d 538, 559 (1992).

36. Sonia Giordani, *Internet Liability Includes a Range of IP Infringements: Companies Stretch Old Terms and Definitions to Meet New Needs*, THE RECORDER, May 10, 2001, at <http://www.law.com/cgi-bin/gx.cgi/AppLogic+FTContentServer?pagename=law/View&c=Article&cid=ZZZTTUQ6IMC&live=true&cs=1&pc=0&pa=0> (attributing the lack of case law to settlement between insurers and their clients).

The trendy and futuristic image of business on the Internet has made the headlines,³⁷ but amid all of the hype of this new technology, businesses must work to fully understand the economic risks and potential areas for costly disputes arising from the Internet.³⁸ Currently, two broad categories of Internet liability have distinguished themselves: performance torts and publishing torts.³⁹

Performance torts refer to something akin to a physical destruction of property related to cyberspace.⁴⁰ These claims include destruction of computer data, damage or misappropriation of computer hardware and software, and the corresponding loss of business associated with the time these issues take to resolve.⁴¹ To establish insurance coverage for these claims, the insured must first define what can appropriately be considered insured "property."⁴² Once the property is defined, the insured must next demonstrate whether the property has suffered the requisite "physical loss or damage."⁴³ Even if both of these basic elements are established, the insured is still left with the most difficult task of determining the value associated with the loss.⁴⁴

Publishing torts include a variety of content-based disputes. Examples of publishing torts include defamation, invasion of privacy and intellectual property claims.⁴⁵ The federal government has taken some steps to legislate behavior to avoid some claims,⁴⁶ by

37. Daniel J. Langin, *The Economics of the Internet: Insurance and Risk Management, Advertising and other Business Models, Valuation and Tax Issues*, 482 PLI/PAT 447, 449 (1997).

38. *Id.*

39. Adam H. Fleischer, *Internet Torts and Cyberspace Insurance: New Issues for the Economy*, 88 ILL. B. J. 268, 268 (2000).

40. *Id.* at 273.

41. *Id.*

42. David R. Cohen & Roberta D. Anderson, *Insurance Coverage for "Cyber-Losses,"* 35 TORT & INS. L.J. 891, 897 (2000). *See generally*, *Rockport Pharmacy, Inc. v. Digital Simplistics, Inc.*, 53 F.3d 195, 198 (8th Cir. 1995) (discussing whether harm to components integrated into computer software system is considered property damage); *St. Paul Fire & Marine Ins. Co. v. Nat'l Computer Sys., Inc.*, 490 N.W.2d 626, 631 (Minn. Ct. App. 1992) (analyzing whether confidential information is tangible property); *Retail Sys., Inc. v. CNA Ins. Co.*, 469 N.W.2d 735, 738 (Minn. Ct. App. 1991) (holding that a tape is tangible property under an insurance policy).

43. Cohen & Anderson, *supra* note 42, at 897; Randy K. Paar, *Coverage for Losses Arising Out of Use of the Internet*, SE64 ALI-ABA 1095, 1102 (2000).

44. *Id.* at 1104; Cohen & Anderson *supra* note 42, at 898.

45. Fleischer, *supra* note 39, at 268.

46. *Id.* *See also* Computer Maintenance Competition Assurance Act, 28 U.S.C. § 4001; Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512 (2001); and The No Electronic Theft Act, amending 17 U.S.C. § 506(a) (2001)

passing both the Communications Decency Act⁴⁷ and the Digital Millennium Copyright Act (“DMCA”).⁴⁸ Other claims without statutory guidance, however, must resort to the elements of their traditional complaints.⁴⁹

Current insurance law has not yet fully developed in a manner that provides predictable guidance for Internet content disputes. Most Internet-related claims substantially differ from the more concrete damage claims found in traditional litigation settings.⁵⁰ Insureds have not yet found a comfortable home for most of their claims for coverage for the “typical” Internet-related liabilities. Instead, insureds have pursued varying types of insurance to obtain coverage including: commercial general liability policies (“CGL”), Errors and Omissions policies (“E & O”), policies for Directors and Officers (“D & O”), and specialized intellectual property coverage for those policyholders willing to pay the higher premium.⁵¹

and 18 U.S.C. § 2319 (2001) (criminalizing willful violations of copyright, particularly, “by electronic means”). For further analysis of the No Electronic Theft Act, see Karen Bernstein, *The No Electronic Theft Act: The Music Industry’s New Instrument in the Fight Against Internet Piracy*, 7 UCLA ENT. L. REV. 325 (2000) (providing a historical overview of copyright criminal law as well as a brief legislative history of the No Electronic Theft Act and concluding that the only way to prevent non-profit pirating is through increased prison sentences). See generally Stephanie Brown, *The No Electronic Theft Act: Stop Internet Piracy!*, 9 DEPAUL-LCA J. ART & ENT. L. & POL’Y 147 (1998) (summarizing the No Electronic Theft Act).

47. 47 U.S.C. § 223 (2001) (recognized as unconstitutional in *Kathleen R. v. City of Livermore*, 104 Cal.Rptr.2d 772 (Cal. Ct. App. 2001)).

48. 17 U.S.C. §§ 105-304 (1998). See also Howard C. Anawalt, *Using Digital Locks in Invention Development*, 15 SANTA CLARA COMPUTER & HIGH TECH L.J. 363 (1999) (discussing the use of digital locks when a developer wishes to protect trade secrets); Carolyn Andrepont, *Digital Millennium Copyright Act: Copyright Protections For The Digital Age*, 9 DEPAUL-LCA J. ART & ENT. L. & POL’Y 397 (1999) (analyzing the DMCA and considering its possible impact on the global information system); David Nimmer, *A Riff On Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000) (identifying important features of the DMCA).

49. David B. Goodwin & Edward R. Policy, *Internet Commerce: Can Firms Find the Insurance They Need?*, 3 NO. 12 INTELL. PROP. STRATEGIST 1 (1997).

50. Fleischer, *supra* note 39, at 272 (outlining “three main ways in which cyberspace torts differ from their ‘off line’ predecessors: (1) the number of suits involving these intellectual property claims can be expected to be exponentially greater than in pre-Internet days; (2) Complex issues of international law, multi-jurisdictional disputes, and technical computer expertise will drive up the costs of defending and indemnifying these losses; and (3) the Internet activities giving rise to these ‘cybertorts’ will present valid arguments for both insureds and insurers about whether they constitute ‘advertising’ under the policy’s ‘advertising injury’ provision”).

51. Langin, *supra* note 37, at 453.

C. *Growing Intellectual Property Risks Arising from the Internet*

Intellectual property claims on the Internet are fast making their way into the courts for adjudication to determine the boundaries for applying age-old concepts to e-commerce.⁵² In the past several years, Internet-related claims have been the subject of most of the intellectual property issues in litigation.⁵³ Claims for relief include a range of intellectual property disputes such as trademark, copyright and patent infringement.⁵⁴ Each of these broad claims encompasses a range of subcategories exclusive to Internet disputes and unique in their resolution as a cyberclaim.⁵⁵

1. *Copyrights*

Although most areas of traditional copyright law are well established in protecting the economic interests of authors, the Internet and growing computer technology have posed a new and complex forum for the traditional protections.⁵⁶ Despite these relatively new complexities, courts to date have been content with utilizing the old formulas of copyright protection.⁵⁷

52. Steven A. Meyerowitz, *Intellectual Property: Where the Boom Is*, 19 PA. LAW. 35, 36 (1997).

53. *Id.*

54. Bruce E. H. Johnson, *Regulatory Update: Internet Sheriffs Approach the Electronic Frontier*, 624 PLI/PAT 397, 427-37 (2000).

55. *Id.*; see also Brian Kennan, *Diverting Traffic on the Web*, FINDLAW.COM, 1999, at <http://library.lp.findlaw.com/scripts/getfile.pl?file=/firms/dwt/dwt000053.html>.

56. Michael Siegel, *Online Information Provider Liability for Copyright Infringement: Potential Pitfalls and Solutions*, 4 VA. J.L. & TECH. 7, *2 (1999) (stating that “[a]lthough copyright law has evolved to meet the challenges of new technologies such as photocopying and various forms of recording (digital and analog), the Internet presents challenges to the existing copyright paradigm that may not lend itself to national regulation.”).

57. Barbara Cohen, *A Proposed Regime for Copyright Protection on the Internet*, 22 BROOK. J. INT’L L. 401, 404 (1996). To prove copyright infringement a party must prove: (1) it possesses a valid copyright and (2) that defendants “copied” protectable elements of copyrighted work. *Id.* (citing *Intellectual Reserve v. Utah Lighthouse Ministry*, 75 F.Supp.2d 1290, 1292 (D. Utah 1999); *World Wrestling Fed. Entm’t v. Bozell*, 142 F.Supp.2d 514, 530-31 (S.D.N.Y. 2001); *Leigh v. Warner Bros.*, 212 F.3d 1210, 1214 (11th Cir. 2000); *Streetwise Maps v. Vandam*, 159 F.3d 739, 747 (2d Cir. 1998)). Where these two facts are proven, the court will uphold a copyright both in and outside of cyberspace. See *Tasini v. New York Times Co.*, 206 F.3d 161, 166-67 (2d Cir. 1999), *aff’d* 533 U.S. 483 (2001). Only in certain limited circumstances, where an author is given due recognition, will the courts allow copyrighted works to be reproduced, either on the Internet or otherwise. Cohen, *supra* note 57, at 404. See *Kelly v. Arriba Soft Corp.*, 77 F.Supp.2d 1116, 1122-23 (C.D. Cal. 1999).

Despite the courts' willingness to rely on traditional copyright concepts, new laws have been passed that significantly impact the future development of Internet-related copyright law. As mentioned previously,⁵⁸ the Digital Millennium Copyright Act ("DMCA") was signed into law on October 28, 1998.⁵⁹ The DMCA seeks to bring copyright law into the digital age⁶⁰ by fostering growth and development of e-technology while protecting intellectual property rights.⁶¹ The passage of this Act indicates a necessary shift in the regulation of copyright matters. It demonstrates the federal government's recognition that it is no longer sufficient to merely monitor the *use* of information, but also the *devices* through which the information travels.⁶²

The DMCA incorporates several goals for Internet copyright protection. The Act's language seeks to effectuate three primary purposes: (1) to implement the World Intellectual Property Organization's ("WIPO") treaties drafted in 1996; (2) to update copyright laws for effective application to the Internet; and (3) to ban the use and manufacture of devices used in the circumvention of security devices.⁶³ Congress set out these goals in five sections.⁶⁴ Title I implements the WIPO treaties, including §1201 which proscribes circumvention of security measures.⁶⁵ Title II, entitled

58. See generally discussion at note 48 and accompanying text.

59. 17 U.S.C. §§ 105-304 (2001); Andrepont, *supra* note 48, at 398.

60. It may confuse those less than technologically inclined as to why the "digital" age has fostered questions and difficulties not felt in earlier advances. The answer lies in the nature of digital technology itself. Carolyn Andrepont provides a description within reach of the non-scientific consumer:

Any two-dimensional work can be 'digitized,' transformed into a numeric digital code . . . This digital format allows the works to be copied with greater ease and speed than ever before. Digital format also ensures that both the first and the fiftieth copies will be of the same high quality. High-speed and high-capacity electronic information systems make it possible for individuals to deliver perfect copies of digitized works to an infinite number of recipients throughout the world.

Andrepoint, *supra* note 48, at 399.

61. David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 680-81 (2000). For a detailed analysis of the DMCA, see U.S. Copyright Office, *The Digital Millennium Copyright Act Of 1998: U.S. Copyright Office Summary* (Dec. 1998), available at <http://www.loc.gov/copyright/legislation/dmca.pdf>.

62. Nimmer, *supra* note 61, at 683.

63. Andrepoint, *supra* note 48, at 398-99.

64. *Id.* at 409. See also Howard C. Anawalt, *Using Digital Locks in Invention Development*, 15 SANTA CLARA COMPUTER & HIGH TECH. L.J. 363, 368-70 (1999).

65. Andrepoint, *supra* note 48, at 409. See also John Lunseth, *IP Issues in E Commerce*, SE8 C.L.E.-M.S.B.A. 1, 11 (2000); Nimmer, *supra* note 61, at 692

“Online Copyright Infringement Liability Limitation,” regulates the liability of Internet Service Providers.⁶⁶ Title III and IV amend and refine the Copyright Act by providing protection for computer repair services when working with copyrighted material and providing other adjustments necessary for our technological population.⁶⁷ Title V provides for very specific coverage of intellectual property rights in the design of boat hulls.⁶⁸ Although courts are still ironing out the details of how this new regulation will affect businesses and the holders of intellectual property rights, the DMCA will certainly have a significant impact on how Internet-related copyright disputes arise and are resolved in the future.⁶⁹

2. Trademarks

As in copyright, trademark disputes on the Internet have become a hot topic in the last decade. The law of trademark recognizes the “psychological function of symbols” and what better place for such displays than on the information superhighway?⁷⁰ The basic claim for trademark infringement is established through (1) the use and ownership of a particular mark; (2) the use of the same or a similar mark by the defendant; and (3) the likelihood that the defendant’s use will confuse the public and cause injury to the plaintiff.⁷¹ This confusion is established by demonstrating an adequate number of the firmly-established *AMF v. Sleekcraft Boats*⁷² factors to show that the defendant has effectively stolen a product’s

(providing an interesting analogy of the trafficking ban—likening it to the breaking and entering of a castle).

66. Andrepont, *supra* note 48, at 412. See also Michelle A. Ravn, *Navigating Terra Incognita: Why the Digital Millennium Copyright Act Was Needed to Chart the Course of Online Service Provider Liability for Copyright Infringement*, 60 OHIO ST. L.J. 755, 755 (1999).

67. Andrepont, *supra* note 48, at 410 n.101.

68. *Id.*

69. See, e.g., Nimmer, *supra* note 61, at 739; Anawalt, *supra* note 64, at 368; and Andrepont *supra* note 48, at 401.

70. *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 873 (9th Cir. 1999).

71. *Hasbro, Inc. v. Clue Computing*, 66 F.Supp.2d 117, 121 (D. Mass. 1999); *Axciom Corp. v. Axiom*, 27 F.Supp.2d 478, 490-91 (D. Del. 1998); *Riggs Mktg., Inc. v. Mitchell*, 993 F.Supp. 1301, 1305 (D. Nev. 1997).

72. 559 F.2d 341 (9th Cir. 1979). The factors set forth in the case are: (1) strength of mark, (2) proximity of the goods, (3) similarity of the marks, (4) evidence of actual confusion, (5) marketing channels used, (6) type of goods and degree of care likely to be exercised by the purchaser, (7) defendant’s intent in selecting the mark, and (8) likelihood of expansion of the product lines. *Id.* at 348-49.

individuality and goodwill.⁷³

The Internet provides an interesting dynamic to trademark law. Claims for infringement have thus far come in several flavors, and most prevalent are disputes over domain names and metatags.⁷⁴

As more people use the Internet and establish their own sites, domain names seem to have become an endangered species despite the universe of addresses available.⁷⁵ Over the past year, the Internet Corporation for Assigned Names and Numbers ("ICANN") authorized the use of additional top-level domains such as .biz, .info, .name, .aero, .coop, and .museum.⁷⁶ Despite these additions, companies are still in a panic to obtain the addresses of their choice.⁷⁷ These circumstances have led some individuals to try to take advantage of trademarks by purchasing the rights to certain domain names like "Wal-Mart" and attempting to resell them to the rightful owners.⁷⁸ These uses are commonly known as cybersquatting, but courts have held that when an individual or group registers a name for a valid purpose, such as for criticism or

73. *Id.* See also *Interstellar Starship Svcs., Ltd. v. Epix, Inc.*, 184 F.3d 1107, 1110 (9th Cir. 1999); *Wal-Mart Stores, Inc. v. Walsucks & Walmarket Puerto Rico*, No. D2000-0477, (WIPO Arbitration & Mediation Ctr. July 20, 2000), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0477.html> (admin. panel decision).

74. Dale M. Cendali & Rebecca L. Weinstein, *Intellectual Property and the Internet*, A.B.A. CTR. FOR CONTINUING EDUC. NAT'L INST.: REPRESENTING HIGH TECH. COS., A137, A144-A152 (1988). For domain disputes, see, for example, *Ford Motor Co. v. Great Domains*, 141 F.Supp.2d 763 (E.D. Mich. 2001); *TCPIP Holding Co. v. Haar Comm.*, 244 F.3d 88 (2d Cir. 2001). For metatag disputes, see *Trans Union v. Credit Research, Inc.*, 142 F.Supp.2d 1029 (N.D.Ill. 2001); *Bihari v. Gross*, 119 F.Supp.2d 309 (S.D.N.Y. 2000).

75. See generally Cendali & Weinstein, *supra* note 74.

76. David McGuire, *Dot-Pro Deal Expected Before March - ICANN*, NEWSBYTES, Feb. 4, 2002, available at 2002 WL 3447578; <http://www.newsbytes.com/news/02/174205.html>.

77. Karen D. Schwartz, *Here Come Da Names*, BUSINESS 2.0, Dec. 2000, available at <http://www.business2.com/articles/mag/0,1640,14355,FF.html>.

78. *Wal-Mart Stores, Inc. v. Walsucks & Walmarket Puerto Rico*, No. D2000-0477 (WIPO Arbitration & Mediation Ctr. 2000), available at <http://arbiter.wipo.int/domains/decisions/html/2000/d2000-0477.html> (admin. panel decision). The arbitration panel in this case was also quick to point out that by adding a "common or generic term" to a popular trademark does not create an individual mark and if such is done for the sole purpose of appropriating money from a business it is equally forbidden. See also *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1327 (9th Cir. 1998) (holding that the defendant had registered domain names to obtain money from Panavision).

legitimate need,⁷⁹ the use of an otherwise distinctive trademark is acceptable.⁸⁰

Metatags have also presented courts with an interesting dynamic to trademark infringement. Metatags, which are invisible to the casual user, are viewed by some search engines much like a “subject” or “keyword” index in a library catalog. By using another person’s trademark in their list of metatags, a website can attract attention and customers by virtue of another’s mark.⁸¹ One court analogized using another person’s trademark was much like “posting a sign with another’s trademark in front of one’s store.”⁸² Generally speaking, courts will allow a web site to list another’s trademark in their metatags as long as it is related to the site itself

79. One of the most interesting domain name disputes of late concerned the World Wrestling Federation’s breach of an agreement with the World Wildlife Fund for limited use of its initials. The New York court held that the similar websites of www.wwf.org (World Wildlife Fund) and www.wwf.com (World Wrestling Federation) created an unwanted association of the Wrestling Federation to the Wildlife Fund. Following this decision, the Wrestling Federation will be limited to the earlier agreement pertaining to the trademark rights of each party. See Ed Johnson, *Conservationists Fight for WWF Name*, ASSOCIATED PRESS, Aug. 10, 2001, available at 2001 WL 26178241.

80. *Wal-Mart Stores v. Walsucks*, No. D2000-0477 (WIPO Arbitration & Mediation Ctr. 2000) (admin. panel decision), available at <http://arbitrator.wipo.int/domains/decisions/html/2000/d2000-0477.html>. See also *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 873 (9th Cir. 1999). The subject of cybersquatting was expressly addressed in an expansive statute passed in 1999. Under the heading Anticybersquatting Consumer Protection Act (“ACPA”), this new law was passed as a reaction to business’ desire to protect their registered trademarks from individuals registering a trade name to hold for the purpose of depriving the owner of the trademark or profiting from registering the mark first. Bruce Fisher, *The Anticybersquatting Consumer Protection Act*, 75 FLA. B.J. 12, 13-15 (2001); Colby Springer, *Master of the Domain (Name): A History of Domain Name Litigation and the Emergence of the Anticybersquatting Consumer Protection Act and Uniform Dispute Resolution Policy*, 17 SANTA CLARA COMPUTER & HIGH TECH. L.J. 315, 341-44 (2001). This “cyberpiracy” now faces a more concrete authority for punishment. The ACPA essentially amends provisions of the Trademark Act, 15 U.S.C. § 1051, allowing a cause of action against those cyberpirates seeking to register domain names “with bad faith intent.” *Id.* at 14. See also D. Troy Blair, *My Trademark is Not Your Domain: Development and Recent Interpretation of the Anticybersquatting Consumer Protection Act*, 39 DUQ. L. REV. 415, 429-33 (2001). The statute not only protects the true owners of a trademark, but also provides direction for those individuals whose personal names are inappropriately registered. Lunseth, *supra* note 65, at 16. Unfortunately for those captives of cyberpiracy taken before November 29, 1999, the ACPA can only effect future registrations; leaving the earlier cases for the courts to resolve. *Id.*

81. See *Playboy Enters., Inc. v. Netscape Communications Corp.*, 55 F.Supp.2d 1070, 1074-75 (C.D. Cal. 1999).

82. *Brookfield Communications, Inc. v. West Coast Ent., Corp.*, 174 F.3d 1036, 1064 (9th Cir. 1999).

and is not seeking to appropriate business.⁸³ Protecting trademark interests on the Internet is not an easy task, although it may help to have statutes on the subject so that victims can rely on specific statutes as opposed to old laws stretched too far.

Congress took a step in attempting to regulate trademark violations on the Internet by passing the Anticybersquatting Consumer Protection Act ("ACPA")⁸⁴ on November 29, 1999. The ACPA creates a civil cause of action against those persons who have "a bad faith intent to profit from [another's] mark" or "registers, traffics in, or uses a domain name" that is identical, confusingly similar, or dilutive of a famous trademark or infringes on a specially-granted trademark.⁸⁵ Although the statute creates penalties of profits, damages and costs, and attorney fees,⁸⁶ it will be interesting to see what effect it has on the cybersquatting phenomena. Until now, cybersquatters could capitalize on the first-come first-claimed rights to popular trademarks by demanding top dollar for the affected companies to buy their names back.⁸⁷

3. Patents

In comparison to copyright and trademark claims, patent disputes on the Internet make up a minute portion of intellectual property disputes in cyberspace. The reason for the limited number of claims seems somewhat self-evident in the content context of the Internet, since it may seem difficult to successfully claim that a business process, for instance, was not obvious and was the exclusive idea of the inventor. In early 2001, however, the Federal Circuit Court of Appeals took on this previously unchallenged notion in *Amazon.com v. Barnesandnoble.com*.⁸⁸ The

83. See generally Cendali & Weinstein, *supra* note 74; TCPIP Holding Co. v. Haar Comm., 244 F.3d 88 (2d Cir. 2001); Playboy Enters., Inc., v. Terri Welles, Inc., 78 F.Supp.2d 1066 (S.D. Cal. 1999), *aff'd in part, rev'd in part*, — F.3d —, 2002 WL 130443 (9th Cir. 2002); Lindy Pen Co. v. Bic Pen Corp., 725 F.2d 1240, 1248 (9th Cir. 1984); P.A.W. Safety Charities v. Petco Animal Supplies, Inc., No. 3-99-CV-0212-P, 2000 WL 284193 (N.D. Tex. 2000); Brookfield Communications, Inc. v. W. Coast Entm't Corp., 174 F.3d 1036 (9th Cir. 1999).

84. 15 U.S.C. § 1125 (2001).

85. 15 U.S.C. § 1125(d)(1)(A) (2001).

86. 15 U.S.C. § 1125(c)(2) (2001); 15 U.S.C. § 1117(a) (2001).

87. Jonathan M Eisenberg, *A Guide to the Anticybersquatting Consumer Protection Act*, J. OF INTERNET L. (2000), at http://www.gcwf.com/articles/journal/jil_march00_1.html.

88. 239 F.3d 1343 (Fed. Cir. 2001). See also Scott M. Alter, *The Effects of the "One-Click" Patent and Reversal of the Amazon.com Decision-What Does it Mean for*

Court, following the traditional requirements for a patent infringement claim, held that although the defendants had literally infringed the patented “one-click” method of Amazon.com, the question of obviousness of the art warranted a further hearing.⁸⁹ Assuming that the Internet continues to make particular technological advances, the potential for patent disputes could grow, and with it, the court’s attention to internetpatent claims.

III. THE FUTURE

While one might speculate that the law relating to insurance coverage for intellectual property disputes arising from the Internet will merely be an amalgam of the developing law in the three separate areas highlighted above, there is no comfort in such speculation. Since each of these categories is experiencing volatile development, their development cannot be expected to be any more predictable or stable. As a result, any attempt to discern a direction or pattern in the overall availability of insurance coverage for Internet-related intellectual property liabilities could not be meaningfully accomplished. In this setting, rather than speculate on future trends, a more appropriate focus is on the role of each of the actors in the development of the law and what steps each can take to minimize the risk of adverse development. The remainder of this Article will attempt to outline this goal.

When any particular area of liability begins to develop, insurers and insureds alike face a heightened need to closely consider the risks accompanying the new liabilities and the level of coverage available under standard insurance policies. In the multi-faceted arena of Internet intellectual property disputes, where the law is developing and disputes are arising at an unprecedented pace, the need for such risk reflection is at its zenith. The type of concerns and necessary reflection varies based on the perspective. Insureds are facing different challenges than insurers. Each has its own risks and responsibilities when navigating these uncharted waters.

Fundamentally, insureds must first take affirmative steps to adequately analyze the level of Internet-related intellectual property exposure they are facing, and they must then confirm that they have access to insurance coverage suited to the level of risk.

“Business Method” Patents?, 650 PLI/PAT 115 (2001).

89. *Amazon.com*, 239 F.3d at 1346; Alter, *supra* note 88.

First, insureds must closely analyze and measure the level of additional risk they are facing. The old models of measuring intellectual property exposure do not sensibly apply to an enterprise that is engaged in e-commerce. Internet-related intellectual property risks arise in many additional formats and have a much greater potential magnitude. As soon as an insured makes the decision to enter the Internet marketplace by creating a web site, it has entered the realm of the publisher—with all of the attendant risks. For example, any photo, article or sound clip used in the development of an insured's web site creates the potential for copyright concerns, unless the insured has the specific electronic rights to publish the material. The more the insured intends to engage the public through its Internet presence, the more likely it will be facing some form of Internet-related intellectual property liability.

Second, insureds must remain constantly abreast of the development of intellectual property laws as they relate to the Internet. Unlike other potential areas of liability a company may face, the quickly developing law surrounding intellectual property disputes on the Internet can dramatically change an insured's level of risk exposure overnight.

Third, insureds should closely analyze their current insurance programs and attempt to determine if the new forms of Internet-related intellectual property liabilities are sufficiently covered by the terms. In particular, insureds should be mindful of the addition of policy language that expressly excludes many Internet-related exposures. They must also carefully consider how a potential claim might fit within the terms of policies that were likely written before the Internet became a viable form of business communication. While the insured often receives the benefit of any ambiguities contained in insurance policy terms, the standardized terms of CGL policies may be too difficult to fit reasonably within the constraints of a future intellectual property claim. If a recognized gap in coverage is discovered, the insured should seek specialized coverage for the risks associated with cyberspace liability.⁹⁰ The growing demand for this specialized insurance likely follows the realization by that no one is spared risk in e-business.⁹¹ Indeed,

90. Sylvia Hsieh, *Should Companies Be Buying Insurance for their Websites?* LAWYERS WEEKLY USA, Aug. 2000, at <http://www.sachnoff.com/news/mediadetail.asp?id=175>.

91. *Id.*

some insureds may conclude that given the broad uncertainty associated with the developing law, coverage would be appropriate for virtually “any corporation, partnership or individual providing services on the Internet.”⁹² Insureds, of course, must carefully review the language of their Internet insurance policies since some policies significantly limit areas of coverage, or – perhaps equally problematic – limit the policy’s jurisdiction.⁹³

Insurers likewise have a need to address the uncertain risks surrounding the developing law on Internet-based intellectual property disputes. They should do so by (1) determining whether the language of their CGL policies fits well with the new risks, (2) training their underwriters to recognize the risks associated with intellectual property, and (3) recognizing that the risks pertinent laws may be global in scope.

First, insurers ought to examine the standardized forms used for its CGL policies and determine whether the form language fits well with the nature of the new risks. If the old form language does not adequately address the level of Internet-related intellectual property risk that the insurer is willing to accept, the insurer ought to consider endorsement language or amendments to the standard form to better express the level of risk the insurer is willing to underwrite. In addition, insurers ought to consider the development of specialized insurance policies that allow for differentiation of their products and establishment of appropriate premiums.⁹⁴ Some companies have already drafted their policies to explicitly exclude coverage for Internet and intellectual property disputes⁹⁵ or have released new policies exclusively written for cyber-coverage.⁹⁶ The new insurance policies range in price from

92. Calvin C. Reno, *Internet Liability Insurance: A Gimmick or Panacea for High Tech Professionals?*, 1 NO. 7 WALLSTREETLAWYER.COM: SEC. ELEC. AGE 18 (1997), available at 1 No. 7 GLWSLAW 18 (Westlaw).

93. Hsieh, *supra* note 90; Reno, *supra* note 92; Cohen, *supra* note 57, at 407 (1996).

94. Several insurers have already announced the creation of new Internet-focused insurance policies that attempt to accomplish these purposes. See *ASP Industry Consortium Unveils Insurance Program for ASPs*, ASPSTREET.COM, July 25, 2001, at <http://www.aspstreet.com/archive/d.taf/id,9942> (discussing announcement of new insurance coverage by American International Group, Inc. (“AIG”) specially drafted for application service providers). See also Heather Williams, *The Hartford Offers Internet Coverage for Small Business*, INSURE.COM, Apr. 20, 2001, at <http://www.insure.com/business/hartford401.html>.

95. Hsieh, *supra* note 90.

96. *Id.* See also Reno, *supra*, note 92.

\$5 thousand for \$1 million in coverage to the more expensive policies drafted for high-risk companies.⁹⁷ Insurers who pursue this route should recognize that without standard pricing or language, these contracts will likely face substantial criticism under the established insurance law.⁹⁸

Second, insurers need to adequately train their underwriters to recognize the actual potential intellectual property risks that certain insurers may be facing. Businesses that once looked to have no risk of ever facing a serious intellectual property claim may now, because of their entrance into the e-commerce stream, have substantial exposure.

Third, insurers should be mindful that the level of risk an insured is facing may not be limited to the risk as defined by United States law or the law of the home jurisdiction of the insured. Cyberspace exposures are different than those encountered by traditional, brick-and-mortar companies. Once an insured places their business into the e-commerce stream, the potential risks are worldwide in scope, even if they are a local company in all other respects. Insurers must understand that they may be asked to respond to liability that arises in a foreign country, under foreign laws.

Both insurers and insureds share a common responsibility: the sensible development of the legal doctrines applicable to insurance disputes arising from Internet-based intellectual property liabilities. Given the current state of uncertainty in the law governing the Internet, not to mention the added variables inherent in traditional insurance coverage of intellectual property, it would be easiest to throw one's hands into the air and surrender to the mood of the court or the client on that day. Unfortunately, such passive behavior would have long-term consequences since the next five to ten years will likely lay the legal precedent for years to come.⁹⁹ How businesses and insurance companies react to the current trends described above will have a significant effect on their legal battles to come.¹⁰⁰ There is little to suggest that the use of the Internet and

97. Hsieh, *supra* note 90.

98. *Id.*

99. Meyerowitz, *supra* note 52, at 36.

100. One of the latest insurance coverage disputes for Internet claims was the MP3.com case. Westport Insurance Co. had given MP3.com a \$5 million excess liability policy, but then sought declaratory relief in the New York federal court stating that the company's blatant violation of "basic prohibitions of copyright law" warranted a refusal of coverage. While this case works its way through the courts, it

its resources will not continue to grow, making preparation now invaluable.

IV. CONCLUSION

When businessmen gathered at Lloyds' coffeehouse to underwrite the financial risks of ships carrying cargo to distant ports, they were facing no greater uncertainty than many of today's insurers when underwriting insureds that are involved in e-commerce. Internet-related intellectual property liabilities are still in a developing and constantly changing state, but yet have the potential to pose company-threatening losses. Added to this uncertainty is the uncertainty of which state or country's law might apply to create the liabilities. Until the law in this area more fully develops, insurers and insureds alike must carefully assess their risk programs and attempt, where possible, to ensure they have adequately transferred or accepted the level of risk they desire.

could provide new precedent for businesses and insurers alike. *See* Reuters, *MP3.com Loses Copyright Battle, Sued by Insurer*, SILICONVALLEY.COM, Mar. 6, 2001, at http://www.siliconvalley.com/docs/news/reuters_wire/9289751.htm; *Insurer Seeks Judgment Declaring No Duty to Provide MP3.com Coverage*, 6 NO. 6 MEALEY'S EMERGING INS. DISPUTES 3, Mar. 20, 2001, available at 6 No. 6 MEINSD 3 (Westlaw).