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Leo P. Martinez
UC Hastings College of the Law, martinezleo@uchastings.edu

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Recommended Citation
Leo P. Martinez, *The Marriage of Intellectual Property and Insurance Law: An Introduction*, 8 *Conn. Ins. L.J.* 1 (2001).
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Author: Leo P. Martinez

Source: Connecticut Insurance Law Journal

Citation: 8 Conn. Ins. L.J. 1 (2001).

Title: *The Marriage of Intellectual Property and Insurance Law: An Introduction*

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THE MARRIAGE OF INTELLECTUAL PROPERTY AND INSURANCE LAW: AN INTRODUCTION

Leo P. Martinez[*]

TABLE OF CONTENTS

> *"[N]o modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business."*[1]
>
> Hugo Black

INTRODUCTION

Justice Black's observation was an undeniable proposition in 1944 and it remains true today. As Professor Kenneth Abraham has succinctly stated, "[i]nsurance pervades our society."[2]

Professor Abraham does not overstate the case. Insurance law has cut a wide swath through any number of substantive areas including agency, antitrust law, property, torts, and, of course, contracts. The currents of insurance law continue to affect the allocation of relative responsibility in complex tort cases and the Serbonian Bog of environmental law. Finally, insurance law shapes our societal behavior in not so subtle ways.[3]

With the foregoing, it cannot have escaped anyone's notice that intellectual property law has gained in importance and visibility in recent years. In addition to becoming an increasingly valuable commodity, intellectual property has also become more vulnerable to infringement in

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* Professor of Law and Academic Dean, University of California, Hastings College of the Law; chair, American Association of Law Schools Section on Insurance Law.

1. *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 540 (1944).

2. KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 1 (3d ed. 1999).

3. *See generally* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

HeinOnline -- 8 Conn. Ins. L.J. 1 2001-2002

part because of the increasing popularity of the Internet.[4] Between 1992 and 1996, there was a 20% increase in the number of infringement suits filed in the federal court system.[5] Thus, it should come as no surprise that insurance law will have an increasing impact on the field of intellectual property.

THE PROGRAM

Those experienced with the intricacies of insurance law know that application of insurance to intellectual property will not be an exercise in accurate prediction. In an attempt to minimize the confusion, or at least not add to it, the Section on Insurance Law of the Association of American Law Schools (AALS) devoted itself to the topic *Insurance Coverage of Intellectual Property Disputes* at the AALS Annual Meeting in January, 2001 in San Francisco. The topic comprised the Insurance Section's program at the meeting and was intended to facilitate the understanding of the application of insurance law in a new context. The selection of the topic was the result of a collaborative effort by Professor Charlie Silver of Texas, Professor Tom Baker of the University of Connecticut and me. We thought that a focus on a nascent area would allow an examination of insurance law principles from a fresh perspective as well as provide for a lively discussion. The location of the AALS Annual Meeting in San Francisco also gave us access to local talent.

The topic was addressed in the format of a panel consisting of four law professors and three practitioners who undertook a discussion of the issues expected to rise to the forefront in the intersection of insurance law and intellectual property.[6] In the end, the quality and depth of the presentations did not disappoint. The discussion included both academic and practitioner perspectives, and provided an overview of intellectual property. The panel

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4. Alfred C. Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1834 (2000).

5. Melvin Simensky and Eric C. Osterberg, *Insurance and Management of Intellectual Property Risks*, 17 CARDOZO ARTS & ENT. L.J. 321, 321 (1999).

6. The panelists included: Professor Tom Baker of the University of Connecticut; Professor Hazel Glenn Beh of the University of Hawaii; David Goodwin, a partner in the San Francisco law firm of Heller Ehrman White and MacAuliffe; Professor Robert H. Jerry, II, Floyd R. Gibson Endowed Professor at the University of Missouri- Columbia; Edward F. Mullowney a partner in the Menlo Park office of the Shearman and Sterling law firm; and Douglas Richmond of the Kansas City law firm of Armstrong Teasdale. I served in dual capacities as program moderator and panelist.

HeinOnline -- 8 Conn. Ins. L.J. 2 2001-2002

shed new light on basic insurance issues such as the intentional acts exclusion and physical loss limitations. The four articles that follow pick up on some of the themes discussed in the course of the program.

In their article, *Cybercoverage for Cyber-Risks: An Overview of Insurers' Responses to the Perils of E-Commerce*, Professor Robert H. Jerry, II and Michele L. Mekel make the observation that traditional causes of action within the context of existing insurance law are up to the task of addressing most doctrinal concerns. They temper their observation, however, with the astute caution that the traditional system may well be overwhelmed by the sheer volume of cases that will arise, the complexity engendered by the multi-jurisdictional aspect of intellectual property disputes, and the basic nature of intellectual property coverage disputes.[7] As an example they cite the difficulties created in first-party coverage disputes (in which an insured has a direct claim against its insurer) where new kinds of losses may occur, such as denial of service attacks from an unknown source.[8]

In the third-party context (in which an insured seeks from its insurer indemnity and defense for harm the insured might have caused to a third party) Jerry and Mekel point out a number of issues that courts will be asked to resolve. These range from discrepancies in coverage that result from the evolution of variations in insurance policy language to the definition of coverage terms in those policies.[9] Ultimately, Jerry and Mekel predict a distinct trend towards insurance policies with a diminishing scope of coverage offset by the advent of narrowly tailored insurance polices devoted to specialty markets.[10]

Douglas R. Richmond, a partner in the Kansas City law firm Armstrong Teasdale, provides the hardened perspective informed by a sophisticated insurance practice in his article, *A Practical Look a E-Commerce and Liability Insurance.* He makes the simple point that most Commercial General Liability insurance policies were drafted well before

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7. Robert H. Jerry II and Michele L. Mekel, *Cybercoverage for Cyber-Risks: An Overview of Insurers' Responses to the Perils of E-Commerce*, 8 CONN. INS. L.J. 7, 8 (2001).

8. A denial of service attack is one in which a website, typically a commercial seller's (e.g. Amazon.com) computers or, more properly servers, are inundated with false orders or information which effectively prevents legitimate access to the website.

9. Jerry and Mekel, *supra* note 7, at 16-19. For example, Jerry and Mekel question whether the terms "broadcast" and "published" can encompass material which appears on a website. *Id.* at 19.

10. *Id.* at 28.

HeinOnline -- 8 Conn. Ins. L.J. 3 2001-2002

the development and the revolution wrought by the Internet.[11] This fact, coupled with his view that the ethos of the Internet does not lend itself to close attention to business management in general and risk management in particular, will lead to the creation and marketing of insurance products tailored to the specifics of e-commerce.[12] In so doing he is in harmony with Jerry and Mekel. Richmond asserts, however, that it will be incumbent upon insurers to educate potential insureds of the need to acquire insurance products which protect them from the vagaries of the unique risk aspects of e-commerce.[13] His perspective assumes an active role by insurers in filling the risk management vacuum that will exist in an Internet economy.

In her article, *Physical Losses in Cyberspace*, Professor Hazel Glen Beh delves with considerable depth into probing one of the many areas in which we can expect academic debate and legal wrangling. She tackles the problem faced by insureds who incur cyber-losses without physical harm where the insurance coverage extant protects against "physical losses."[14] Her focus on the single first-party concern serves to highlight the theme that recurs in these articles, that is, the relative inadequacy of current form insurance policies to account for a different world. She sees insureds as vulnerable because they may make the unwarranted assumption that "traditional first party policies can and should stretch to provide coverage in the absence of clear exclusions . . . ."[15] Like Jerry and Mekel, Professor Beh foresees the proliferation of insurance products that are designed to meet the unique demands of e-commerce.

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11. Douglas R. Richmond, *A Practical Look a E-Commerce and Liability Insurance*, 8 CONN. INS. L.J. 87, 88 (2001).

I note Doug Richmond's self-deprecating attempt to shift any shortcomings in his contribution to me. *Id.* at 87. As a brief electronic search will reveal, Doug Richmond is a widely published author with a collection of publications that would do justice to any academic. As but one example of the quality of his work, I note that his article, Douglas R. Richmond, *The Two-Way Street of Insurance Good Faith: Under Construction, But Not Yet Open*, 28 LOY. U. CHI. L.J. 95 (1996), was cited by Justice Joyce Kennard of the California Supreme Court in her persuasive dissent in the well-publicized *Kransco v. American Empire Surplus Lines Ins. Co.*, 2 P.3d 1 (2000). Thus, I disclaim any responsibility for his piece and redirect any reader's ire to him.

12. Richmond, *supra* note 11, at 92-93.

13. *Id.* at 96.

14. Hazel Glen Beh, *Physical Losses in Cyberspace*, 8 CONN. INS. L.J. 55, 55-56 (2001).

15. *Id.* at 62-63.

HeinOnline -- 8 Conn. Ins. L.J. 4 2001-2002

Professor Francis J. Mootz III of Dickinson School of Law completes the symposium with an article entitled *Coverage for Unfair Competition Torts Under General Liability Policies: Will the "Intellectual Property" Tail Wag the Coverage Dog?*[16] Professor Mootz provides an excellent perspective on the structural problem presented by the explosive growth of a new discipline, intellectual property, within the confines of an existing regime, insurance law.[17] Broadly, he observes that the reaction of an efficient insurance market to new risks follows a predictable pattern. First, courts attempt to stretch existing insurance policy language to fit the unforeseen risk; second, insurers respond by revising insurance policies to exclude the risk; and third, insurers develop new policies to deal with the specific risk.[18] His global view fits neatly with Beh's examination in a narrower context.[19] Both arrive at the same endpoint. He ends by noting that we appear to be entering the last stage of the pattern he describes.

CONCLUSION

Today it is clear that we have traded the certainty of the physical past for the uncertainty of the cyber future. Despite the uncertain landscape in which intellectual property intersects with insurance law, the concluding note must emphasize the consensus with which the academy and the bar predicts the narrowing of traditional forms of coverage and the corresponding growth of specialty insurance policies targeted at specific coverage problems.

An attempt at perspective at this stage of the marriage of intellectual property and insurance law seems arrogant at best. At the same time, it is safe to conclude that insurance law will continue to pervade all aspects of the law and that it will pervade even those fields, the existence of which is not even within the range of our dreams.

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16. While Mootz was not a panelist, his work was inspired by attendance at the subject AALS Insurance Law Section program.

17. Francis J. Mootz III, *Coverage for Unfair Competition Torts Under General Liability Policies: Will the "Intellectual Property" Tail Wag the Coverage Dog?*, 8 CONN. INS. L.J. 37 (2001).

18. *Id.* at 37-38.

19. Beh, *supra* note 14, at 77-80.

HeinOnline -- 8 Conn. Ins. L.J. 5 2001-2002

HeinOnline -- 8 Conn. Ins. L.J. 6 2001-2002