Liberty Specialty Markets

Intellectual Property

What is intellectual property (IP)?

Intellectual property, as defined by the WIPO (World Intellectual Property Organisation), refers to ‘‘creations of the mind: invention and artistic works, symbols, names, images and designs used in commerce.’’

It is divided into two categories: industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and copyright, which includes literary and artistic works such as drawings, paintings, photographs, sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.

Who should be buying IP cover?

Any company who designs, manufactures, sells or supplies a product may inadvertently infringe on third party intellectual property rights and incur liability. Even if you are only supplying a product that has been designed and/or manufactured by a third party, you may still incur liability for contributory infringement. Entities with a US exposure could find their legal expenses and court awards are significantly higher.

Intellectual property infringement insurance

What are intellectual property infringement liability risks?

Intellectual property infringement risks include the risk of infringing any patent, mark, copyright, design, domain name, or miscellaneous intellectual property rights. This third party cover is provided on a modular basis across the following sections (subject to policy terms, conditions and exclusions).

Intellectual property defence

Cover is provided for the legal fees and expenses or damages (including settlements), or both, incurred in defending any infringement allegations and judicial proceedings brought against the insured:

- Alleging that the insured has infringed a third party's intellectual property through dealing in any of their products or services, or through their use or licensing of any of their own intellectual property
- Alleging that, through dealing in any of their products or services, they have directly justified the imposition of an injunction
- Alleging that the insured has made groundless allegations of infringement against a third party in writing relating to any patent, copyright, design or mark
- Directly disputing or threatening the insured's rights in, or ownership of, their intellectual property
- The bringing of any counterclaim by the insured to a judicial proceeding listed above.

Intellectual property contractual liability

Cover is provided for the legal fees and expenses or damages (including settlements), or both, incurred in defending any judicial proceedings brought by a contractual partner (e.g. distributor, supplier, manufacturer, retailer or licensee) against the insured for compensation as a result of any indemnity agreement or hold-harmless provisions in a contract. It covers the exposure relating to infringement by a product or service or any invalidity of the insured's intellectual property in such a contract.

As the Contractual Liability policy is exclusive to the contract between the insured and the contractual partner, it can often be priced accordingly and cover provided more swiftly as it is restricted to disputes arising from a specific source.

Contractual intellectual property disputes

Whilst not strictly third party, we cover legal fees and expenses incurred in judicial proceedings brought by the insured against a third party for payment of licence fees due to the insured under an agreement or under an indemnity or hold-harmless provision in an agreement.

Cover is also provided for judicial proceedings brought against the insured for payment of licence fees under an agreement and the making or defence of any counterclaim by the insured directly relating to a judicial proceeding.

D&O intellectual property liability

Cover is provided for the legal fees and expenses or damages incurred in defending any judicial proceedings brought against the Directors or Officers of the insured for personal liability in the infringement of third party intellectual rights through the insured's products or services. Even where a Directors and Officers insurance policy has been purchased separately, these often have intellectual property exclusions.

Intellectual property value insurance

We also have a separate IP Value insurance product, which provides first party coverage for the loss of net profit and increased cost of working incurred by the insured as a result of:

1. 'Legal claims'

Cover is provided where a legal claim is made against the insured alleging that any of the insured's intellectual property rights are invalid or that they have infringed the claimant's intellectual property rights, as well as for claims by employees for ownership of intellectual property that they have been involved in the creation of.

2. 'Actions by governments and states'

Cover is provided where any law, order, decree or regulation prevents or restricts the insured from enforcing or exploiting their intellectual property rights. This could occur, for example, where a competitor was granted identical intellectual property rights or where the government decided to cancel the insured's authority to export or import their product.

Typically interested insurance industry sectors are the same as for the infringement product, as are limits available and minimum premiums. Cover is subject to policy terms, conditions and exclusions.

Do I already have some cover for IP infringement or IP value under my other insurance policies?

Professional Indemnity (PI)

Whilst PI policies often do have some cover for breach of intellectual property, patents and trade secrets are nearly always specifically excluded. There is no real appetite for offering full IP infringement cover within the PI market. Patent litigation is costlier than other IP litigation and the economic value of patents can lead to large awards and settlements.

Most PI policies will also exclude claims arising out of the sale or supply of a product and will restrict cover to the ‘professional services’ provided, which may not be deemed to include the relevant product to be insured. As PI is a liability insurance, it provides no first party cover, unlike the IP Value insurance.

General Liability (GL)

A GL policy will generally only cover you for bodily injury and property damage losses and, although it may also include cover for IP infringement arising out of advertising injury, cover under this is limited. This is because under most jurisdictions the courts do not deem the advertising of the product as the cause of the injury, but rather the sale of the patented product as the infringement.

Cover for advertising injury does not therefore respond and so cover for patent infringement under general liability policies is rare. There may be some cover for breach of copyright or trademark where the actual advertising includes copyrighted material belonging to the plaintiff, or if the actual method of advertising was patented.

Legal expenses

Whilst a legal expenses policy may provide some cover for defence costs and/or litigation expenses on pursuit claims, no cover will usually be provided for the substantial damages that can be awarded against an infringer or any agreed settlements.

Property

Your property insurance will typically only cover you for damage to your tangible property. As intellectual property is an intangible form of property, no coverage would be provided for damage to this.

Standalone IP policies are specifically covered to respond in the event of a claim. They provide specific ring-fenced limits for your IP exposure, which will not erode or be eroded by other risks.

Litigation case studies

The majority of intellectual property disputes are settled out of court with the terms not released to the public. Here are some typical litigation case studies.

1. A multibillion-dollar patent dispute that arose between two pharmaceutical companies.

The plaintiff was able to evidence that the defendant's hepatitis C drugs and method of delivery were infringing on the plaintiff's patent. After a nine-day trial and two hours of jury deliberation, damages of USD 2.54bn were awarded to the plaintiff.

Following the decision and appeal by the defendants the verdict was successfully overturned. The plaintiff would no longer be the proud recipient of the sizable pharmaceutical patent settlement, and their patent would be invalid. Both parties incurred huge costs in the process, costs that could have been covered under an intellectual property infringement defence policy.[1]

2. The defendant, a well-known media and broadcasting company, and the plaintiff, a small to medium-sized software company, go toe to toe in the CJEU and UK High Court over a Trademark dispute.

The broadcaster, who has many Trademarks, had one in particular that was registered in over 22 different classes. This created incredibly wide protection for the broadcaster, and not necessarily in the classes of business that they would normally operate.

In court the defendant made an attack on the validity of the plaintiff's Trademarks. How could a broadcaster feasibly exert rights in classes of business they had very little involvement in? The plaintiff had no direct interest in the development and sale of cloud migration software. Moreover, they had very little to do with any form of business software at all, yet still they attempted to invalidate the defendant's Trademarks which were registered under the appropriate classes for business tools software.

It was held that the broadcaster was registering the Trademark purely as a legal weapon for goods and services, and that they had no intention of using the mark for business tools software. The defendant was able to continue using their Trademarks for their cloud migration software.

Although the case did not result in settlement or damages, the defendant was ordered to pick up the legal costs of the plaintiff totalling more than GBP 1.5m, having registered the Trademarks in bad faith.[2]

3. A small start-up drug delivery product developer based in Ireland agreed to pay USD 2m to a multinational medical technology company to settle a lawsuit in relation to the former firm's inhaler technology.

The patented technology, which allows liquid medicine to be transformed into a fine mist and inhaled deep into the lungs of critically ill patients, was at the heart of a dispute between the two companies.

This resulted in the start-up paying a USD 2m settlement to the multinational. The start-up also agreed to grant the multinational a non-exclusive, royalty-free licence for use in the field outside of the start-up's primary target market.[3]

4. The plaintiff (a company that is no longer active) sued the defendant over a patent relating to Free and Open-Source Software (FOSS).

The plaintiff was seeking damages of USD 138m and the jury found that the defendant infringed two of the plaintiff's patent claims. The defendant conducted an independent evaluation of the plaintiff's claimed damages and argued that if infringement was found then damages should be significantly less than the amount being sought by the plaintiff. The judge found the evidence to be sufficient and the defendants managed to take some satisfaction in being burdened with USD 5m in damages as opposed to the USD 183m being sought.[4]

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