

Intellectual Property Insurance Factsheet

What is Intellectual Property?

Intellectual Property (often abbreviated as IP) is intangible property that is a result of creation. It can be brands, logos, designs, inventions, writing, art, photographs, film, radio or television.

The value of intellectual property is in its uniqueness. It can be the source of direct income or indirect income by building client loyalty and reputational value. It can enhance trading value, increase security when used to leverage funding or investment and can also create a barrier to entry to competitors.

The law gives the owner of the Intellectual Property the ability to prevent others making, using or exploiting their creations without permission by way of Intellectual Property Rights. These rights also enable companies to commercialise their Intellectual Property through licencing and franchising.

Do I have Intellectual Property?

This is obvious to the likes of Coca Cola, whose brand is worth billions, although identification of intellectual property will not always be so easy for smaller companies. However, most companies will have a brand or logo and many will have designs, inventions, recipes, software, products or services that are unique. Virtually all will have customer lists and databases that they will wish to keep confidential. Ask yourself what would be of value to your competitors? It could just be the company name or a domain name. The value of intellectual property to a business will vary, but could be the most valuable asset.

Once Intellectual Property is identified, consideration can be given to protection and how it can be exploited commercially. However, you firstly need to check that you own it, if consultants and designers have been used, they will still own the intellectual property unless ownership has been specifically transferred to you by an agreement.

Types of Intellectual Property Rights

Patents – protect new inventions and products in relation to their technical specification and function, how they work, what they do, how they do it, how they are made and what they are made of.

Design Rights – protect the visual appearance of a product, ie the ‘look’, style or the character, which could be its shape. There are unregistered design rights that offer limited protection for a short period or greater protection is available by registering the design.

Trade Marks –protect characteristics that distinguish a company’s goods and services from those of another i.e. their ‘brand’. Trade marks can be logos, words, phrases, shapes, colours or sounds, either singularly or combined.

Copyright – protects the creator of literature and the written word, artistic, dramatic, or musical works, sound recordings, TV broadcasts, photography and films, as well as plans (ie architectural), software and databases, although copyright relating to digital material has been modified by the Intellectual Property Act 2014. Copyright covers the expression of, rather than the idea behind the work. Copyright is automatic and gives the originator or subsequent owners the right to control its reproduction and distribution.

Trade Secrets and Confidentiality –by their nature are secret and not registered in public. Secrets are protected by the use of confidentiality or non-disclosure agreements (NDA) with any other party told about the secret and the law enables legal action to be taken if NDAs are infringed.

What is Intellectual Property Insurance?

Intellectual Property insurance provides cover for legal costs and expenses incurred in protecting your Intellectual Property. These can either be the costs involved in defending an alleged infringement (by you) or pursuing an infringement of your Intellectual Property by a third party.

There are a number of cover options starting with a basic ‘Opinion Only’ policy to assess the prospect of success. The next step up is cover for legal expenses incurred in the defence of an alleged infringement of a third parties’ intellectual property, with the option of cover for any damages and costs (known as adverse costs) awarded against you should your defence be unsuccessful.

To many the most important option is cover for the legal cost of pursuing rights against another company infringing their Intellectual Property (known as assertion costs).

The widest policies will cover all the above and include extensions for loss of income and costs involved in product recall, redesign and rebranding, as well as reputational harm.

A number of insurers offer ‘package’ policies for smaller to medium sized companies to include a range of these covers, whereas others can be bespoke to suit a company’s individual requirements. These could include contractual liability cover, particularly if licencing or franchise arrangements are involved. Policies can cover specific contracts or whole portfolios and some insurers will offer after the event cover.

Other types of insurance policies including Cyber, Directors and Officers, Professional Indemnity and Commercial Legal Expenses may provide cover relating to Intellectual Property (generally for defending infringement claims only), but many policies exclude

Intellectual Property issues entirely. It is worth checking, although a specialist Intellectual Property Policy is normally required for anything other than limited cover.

As with many insurance policies, the devil can be in the detail, so check the policy wording carefully and look at our things to watch section

Do I need Intellectual Property Insurance?

The answer will depend on the value of your Intellectual Property to your business, but Intellectual Property disputes can be expensive. Without insurance, you may need deep pockets to either defend an action or be in a position to deal with infringements of your Intellectual Property and enforce your rights.

The Intellectual Property Office estimate that the average cost of an Intellectual Property dispute is £30,000 and that increases to £250,000 where patents are involved. Not only are Intellectual Property disputes expensive, litigation is on the increase as disputes are not clear cut and much is down to the interpretation/opinion of a court. Also, disputes often involve counter claims, which in turn increase costs.

Other benefits of Intellectual Property insurance include:

- The mere fact that you have insurance will give you an advantage and can act as a deterrent. Your opponent will know that you have the funds to mount a legal defence or pursuit. It can also be a deterrent to nip disputes in the bud and some insurers are happy for you to advertise the presence of Intellectual Property insurance on your website or marketing literature.
- It may be required as collateral for some secured lending, particularly leading up to or after the sale of a business.
- The preparation of patent specifications is complex and requires the use of a Patent Attorney with scientific and technical knowledge. It can be expensive, so why not give yourself the means to enforce your patent rights.
- It is a means of protecting income from royalty, licence or franchise agreements.

How much does Intellectual Property Insurance cost?

Typically premiums start from £1,500 plus Insurance Premium Tax and will depend on a range of factors, such as the level and type of cover required, the type of Intellectual Property ie patents are generally more expensive, your industry sector and the jurisdiction and geographical areas to be covered. UK only will be the cheapest and increases as Europe, the rest of the world (excluding North America) and finally North America are added.

Things to watch

Claims Made Basis - policies are underwritten on a claims made basis and only provide cover for claims made (and reported to the insurer) during the period of insurance. It is a condition that any circumstance that may give rise to a claim under the policy is notified to insurers at that time.

Reasonable Prospect of Success - claims are subject to a reasonable prospect of success clause, ie an opinion from a specialist lawyer (generally an over 50% chance, but it can be more).

Specific Lawyers - some insurers will require you to use specific lawyers (of their choice). Even where greater freedom is allowed, all insurers will need to authorise the choice of lawyer and will only meet legal costs that they have agreed.

Courts – some insurers apply restrictions on the level of courts to which the insurance will apply.

Excess or Co-Insurance – a minimum excess of £1,000 usually applies or a certain % of a claim is excluded, known as a co-insurance clause. If there is a 10% co-insurance clause and a £100,000 claim occurs, the insurers pay £90,000 and you bear £10,000 yourself.

Exclusions – any dishonest, fraudulent, reckless or wilful act or omission and fines, penalties and enhanced or no-compensatory damages awarded in respect of wilful or knowing infringement

There is also a lot of useful information and contacts on the Intellectual Property Office website www.gov.uk/government/organisations/intellectual-property-office

For more information please speak to your usual Nsure contact on 01903 520200 or email phil.bristow@nsure.co.uk