

“Insurance Coverage for the Intellectual Property Risks: A Comparative Analysis of India, U.S.A, U.K. & China”

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Abstract

This research paper conducts a comprehensive comparative analysis of insurance coverage for intellectual property (IP) risks across India, the United States, the United Kingdom, and China. In today's knowledge-driven economies, intellectual property, comprising patents, trademarks, copyrights, and trade secrets, holds immense value for businesses. Recognizing the increasing importance of safeguarding these intangible assets, the study initiates an exploration of the distinctive legal frameworks governing intellectual property in each jurisdiction. This includes an examination of statutory protections and enforcement mechanisms, highlighting variations that influence IP risk management. The research further delves into the evolving landscape of IP risks, encompassing issues such as infringement, litigation, and emerging challenges in the digital age. Against this backdrop, the paper scrutinizes the available insurance products and mechanisms designed to mitigate these risks, emphasizing similarities and differences in each jurisdiction's approach. Additionally, the study assesses the regulatory environments shaping the insurance industry's response to intellectual property risks, taking into account government policies, industry standards, and legal precedents. By drawing comparisons between these four diverse jurisdictions, the research aims to provide a nuanced understanding of existing strengths and limitations in intellectual property insurance frameworks. The insights generated from this analysis are intended to inform policymakers, businesses, and insurers, facilitating the development of enhanced practices for managing and protecting these critical intangible assets.

Introduction

Insurance is a contract between two parties where one party will ensure to protection of the other party against risks. The person providing protection is called the Insurer that is the Insurance Company and the other person who is taking the policy and promising to pay consideration is called as Insured. Common examples of insurance are Home, Life, Health Insurance, and many more. As the country's economy increases with the help of intangible assets, nowadays, insurance is being given to intellectual property assets. Whereas, intellectual property is the legal right that is given to the creator of the new creation for a specified period. It will be providing an exclusive right to that creator to enjoy the monetary benefits. This is an

intangible asset. The two concepts are different in nature and do not have a common element. The lack of specific laws and a complete system for intellectual property (IP) insurance in India is a big problem. This research focuses on the crucial issue of protecting IP and having insurance, comparing how India, the United States, the United Kingdom, and China handle it. Since intellectual property is vital for a country's economic growth, the fact that India doesn't have clear rules for insurance coverage to Intellectual Property raises concerns. This gap can lead to financial losses for companies, which in turn can slow down innovation and make it harder for them to compete.

The study looks into the rules and regulations each country has for IP insurance. It strongly emphasizes that India should follow global standards. The problem is urgent, and the research suggests changing the current laws, as recommended by the 161st committee, to create a strong system for IP insurance. By comparing these countries, the research wants to show how India is falling behind in this area. The goal is to propose solutions that not only fix the problems but also encourage innovation, protect companies, and help the country progress economically. The research highlights the need for India to catch up in IP insurance to support its overall growth.

Need for IP Protection

Intellectual property rights promote innovation, and creativity which in turn generate jobs and improve competitiveness. IP rights enable authors, artists, designers, inventors, and other IPR users to benefit when others use their creations and inventions. If intellectual property rights are not protected, it could result in the loss of profits for the companies, and could ultimately result in closing the companies. It covers claims such as the claims related to the patents, copyright, and trademark infringement. Patents, trademarks, copyrights, and trade secrets are examples of intellectual property, which makes up a significant portion of an organization's intangible assets. In a time of rapid technological development and intense international rivalry, protecting these assets has become essential. IP insurance serves as an essential instrument for risk management, providing monetary safeguarding against possible violations, legal expenses, and income loss resulting from the unapproved utilization of intellectual property. Businesses need a strong IP protection plan that is complemented by insurance because they are depending more and more on innovation and original ideas to get a competitive edge. This creates an environment that is favorable for ongoing innovation and economic progress by stimulating investment in R&D and offering a safety net for businesses navigating the complex landscape of intellectual property rights.

Working of IP Insurance

Intellectual property insurance serves two purposes. They are; 1. It can help the companies over litigation costs about the enforcement or defense of patents, Trade Marks, or Copyrights. 2. It protects the policyholder from patent infringement claims brought against them.

Moreover, the insurance company will compensate the IP owner on behalf of the policyholder if he commits the act of infringement. The insurance company will compensate the IP owner on behalf of the policyholder if he commits the act of infringement. The IP has certain

characteristics (I.E.) with its terms of protection and territoriality. Therefore, the insurance will be valid only to the extent the IP is provided protection and limited to the particular period of protection. For example, normally the tenure of protection to a patent is 20 years. If the patentee acquires insurance for those patents, then the insurance will be valid only for 20 years. After the expiry of the 20th year, if the patentee has not renewed the patent, the insurance will also be invalidated. The process of using intellectual property insurance includes determining, evaluating, and controlling the risks associated with copyright infringement, legal action, or losing market exclusivity. The first step for businesses or individuals looking for coverage is usually to assess their intellectual property portfolio and calculate its worth. They can buy an insurance policy that is specifically designed to cover legal costs, damages, and settlements in the case of an intellectual property issue once the risk profile has been determined. This kind of insurance helps shield companies from financial losses brought on by legal disputes involving intellectual property, which is especially important in fields where innovation and original ideas are valued highly. Depending on the particular requirements and circumstances of the insured, the insurance terms and coverage may change.

Treaties and International Agreements

There are various treaties and international agreements that state the rules, and regulations of various IP Assets such as patents, Trademarks, Copyright, Trade Secrets, Industrial Designs, etc., but these agreements do not deal with the protection of IP through insurance. Impliedly, some of the agreements indirectly dealt with insurance coverage for the IP Assets.

The most extensive multilateral agreement on intellectual property (IP) is the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It is essential for commerce in innovation and knowledge, for settling trade disputes involving intellectual property, and for giving WTO members the freedom to pursue their national policy goals. It presents the IP system in terms of public welfare, innovation, and technology transfer. A balanced IP system is required, and the Agreement is a formal acknowledgment of the importance of the connections between intellectual property and trade. It sets out various forms of intellectual property protection. While TRIPS itself does not address insurance, it creates a framework for member countries to establish robust intellectual property protection systems. The enforcement and protection of intellectual property rights under TRIPS may influence the demand for IP insurance. Whereas, the Paris Convention and the Berne Convention which deal with the protection of Patents and Copyright do not state any provisions for providing insurance coverage to the Intellectual Property. It deals only with the protection of the patent and the copyright alone.

Therefore, it is presumed that, if there is no international agreement for providing insurance to intellectual property, then it will be regulated by the legal and national framework of each country. Hence, there will be no uniform set of rules for insurance coverage.

Protection of IP by Insurance Coverage in the United Kingdom

In the Year of 2017, a report was made by the IP Office which was a study of the United Kingdom Intellectual Property Valuation Market. It states that IP is the currency of the knowledge economy. The report estimates that about 70% of the company's worth lies in intangible assets. In July 2022, the government of the United Kingdom published official statistics for 2021 which show patent grants have increased by 11.5 %. The United Kingdom also has jurisdiction for hearing and deciding the cases relating to insurance protection of Intellectual Property risks. The court to which the claim for intellectual property insurance is made is that "The choice of forum usually will be based on the value of the claim the party is seeking for. In the United Kingdom, there is a special court called as "Intellectual Property Enterprise Court" which has 2 forums/tracks (I.E.) Small Claims Court and Multi Track Court. If the claim is for a value of under 10,000/- pounds the court which has the jurisdiction will be a small claims court. And, if the claim is for 60,000/- or more pounds then the case will be heard and decided by the Multi-Track Court.

If insurance is acquired, it will safeguard cash flow and prevent the company's capital from being constrained as intellectual property lawsuits are very expensive. Additionally, it will guard against infringement on intellectual property assets. The infringement of intellectual property will cease once the offender is aware of the insurance coverage.

Types of Insurance Coverage for the Intellectual Property Infringement by the United Kingdom:

The U.K. has certain types of Insurance Coverage for intellectual property infringement. They are as follows;

1. Infringement Liability Coverage
 2. Contractual Liability Coverage
 3. Enforcement Coverage
- **Infringement Liability Coverage:** It can cover the risk that a company is alleged to infringe on someone else Intellectual Property by for example; Using, Making, Importing, or Selling an item. This does not have to be a formal lawsuit but can be any allegation in writing, and cover can include legal costs as well as damage or settlement awards.
 - **Contractual Liability Coverage:** It can protect and indemnify another contracting party against an intellectual property claim resulting from something supplied under that contract, or it can cover claims arising out of a contractual warranty. This is a frequent justification for acquiring intellectual property insurance, and it can result from a variety of contract situations, such as those involving sales, licensing, or joint ventures between businesses. An intellectual property insurance coverage may be necessary in a merger or acquisition, either instead of or in addition to a standard M&A insurance policy.

- **Enforcement Coverage:** The insured person benefits from this policy by not having to take precautions to defend their rights. If the insured files a lawsuit against the infringers for copyright, trademark, and patent infringement, the insurance company will pay the litigation expenses. Additionally covered by this policy are the damages that the insured has previously filed for infringements related to the theft of trade names, titles, copyrights, trademarks, patent infringement, trade libel, breach of implied contract, etc. This is similar to that of India's Enforcement coverage.

Protection of IP by Insurance Coverage in the United States of America

The United States of America has the Insurance Policy for the intellectual property risks. There is no specific legislations for the insurance coverage for the Intellectual Property. It is one of the preventive measures which the IP owner can get or claim. It is not mandated that every IP owner has to claim insurance coverage. If it is protected by insurance, then the business will be benefited as it will not affect the capital of the business. In the USA, they are providing Insurance coverage even to computer related IP infringement. It is called as "New Technology Intellectual Property Policy". They are of 2 kinds.

1. Multi Media Liability Insurance Policy
 2. Media Liability Insurance Policy
- **Multi Media Liability Insurance Policy:** This Policy covers the damages caused to the owner of the Copyright or Trademark by any third party distributing, producing, or exhibiting the contents of Intellectual Property Owner without permission/consent.
 - **Media Liability Policies:** If the policyholder advertises his Intellectual Property assets in a website and any 3rd party defames or commits any misappropriation to the advertisement which causes damages. This type of insurance is provided by large number of insurers.

Case Laws:

The United States of America made a statement that, based on 3 ingredients the courts will be concluding to hear and decide the cases relating to the insurance coverage for the intellectual property risks and infringement. Based on the *Language of the policy, Allegations Raised, and depending upon the claim amount*, the cases will be decided.

In the case of *Finn vs National Union Fire Insurance Company of Pittsburgh*¹; The policyholder is a Uni scribe professional services provides printing services. It was hired by a law firm for litigation purposes which involves in analyzing the sensitive documents which contains client's confidential trade secrets. While the documents were in Uni scribe's possession a relative of a Uni scribe employee obtained the document and leaked them to a hacker website. The Insurer, National Union, argued that, an IP exclusion for "Any claim

¹ Finn vs National Union Fire Insurance Company of Pittsburgh 453 Mass. 690 (2008).

arising out of any misappropriation of trade secret” precluded coverage. The supreme judicial court of Massachusetts held that no coverage is granted to the insured.

Further, in the case of *Woodspring Hotels vs National Union Fire Insurance Company of Pittsburgh*²; The plaintiff company filed a lawsuit that, its former employees as being hired by the national union company, acquired its company’s confidential and competitive secrets. It pleaded for an Insurance claim where the language of the policy is “For Misappropriation of Confidential Information as well”. However, the Insurance company was not ready to provide a claim, but the Delaware superior court stated that the language of the policy is simple and plain which includes trade secret misappropriation. Therefore, coverage is provided to the Intellectual Property Claims in this case.

Protection of IP by Insurance Coverage in China

China has insurance for the patent scheme. It encourages people to invent even if they fail in the invention, the insurance company will reimburse the money. They make to provide a good economy. By the end of 2022, through statistics and reports submitted by the “*Intellectual Property Development and Research Center with the China National Intellectual Property Administration*”, it was found that insurance protection has been provided to around 46,000 patents, trademarks, geographical indications, and designs. IP insurance is provided as a scope of IP finance to protect intellectual properties from risks that cause damage to enterprises, corporates, etc., For all the criteria for IP affairs, the insurance is being provided which extends to the Creation, Protection, and Application of the IP³. China has 4 levels of the People’s Court which are The District Court the 1st level in the hierarchy, then the Intermediary Court, and the Higher Court (I.E.) The Provincial Court is at the 3rd level in the hierarchy, and the topmost court is the Supreme Court. The case relating to the intellectual property claims will be filed in the appropriate court similar to that of the civil litigation.

Protection of IP by Insurance Coverage India

There is no specific legislation for insurance coverage for intellectual property in India. The 161st report of the “*Department-related Standing Committee on Commerce*”, stresses the future of legislation regarding insuring intellectual property. The committee suggests that the insurance industry participates in covering or protecting Intellectual Property’s increasing financial losses to reduce monetary risks, by amending “The Insurance Act” to incorporate insurance for valuable intellectual property.

India follows the footsteps of the USA, where specific insurance policies will be available to enterprises to ensure protection from claims arising out of misappropriation, theft, misuse, or infringement of any intellectual property.

² *Woodspring Hotels vs National Fire Insurance Company of Pittsburgh* N17-09-274 EMD CCLD, 2018 Del. Super. LEXIS 186.

³ Report of Intellectual Property Development and Research Center.

Types of Insurance Coverage for Intellectual Property Infringement by India:

There are 4 types of Insurance Coverage for the risks arising to the Intellectual Properties of the company. They are as follows;

1. Infringement Defense Coverage
2. Commercial General Liability Insurance
3. Coverage for Enforcement of IP Rights
4. Media Liability Insurance

Infringement Defense Coverage: If a company has insurance in IP, then if a lawsuit is filed against this company from an enterprise for Intellectual Property infringement, then for the defense cost such as *defensive attorney's fee, lawsuit cost, damages, and compensation* will be undertaken by the insurer. This insurance company will be providing insurance only during the period of policy. If the policy is expired or is not yet renewed then the insurer will not undertake the amount for defense.

Commercial General Liability Insurance: It covers the personal and advertising injuries. It covers the harm incurred by the company due to the advertising strategies of any company. If a company makes any advertisement to create unfair competition in the market by providing inappropriate information about other companies, the damage incurred by the insured will be undertaken by the insurer. The claim will be incurred due to the misappropriation of the information.

Enforcement of IP Right: This policy helps the insured from taking precautionary measures to enforce their rights. The Insurance company will be undertaking the litigation costs if a lawsuit has been filed by the insured against the infringers for copyright, trademarks, and patent infringement. This policy also covers the damages claimed by the insured for past infringements about the misappropriation of slogans, titles, copyrights, trademarks, patent infringement, trade libel breach of an implied contract etc., But this policy does not cover those litigations that have been filed to defeat reputation of the third party (I.E.) filing a suit against the person who has not done any infringement that is considered as “**Offensive Litigation**”.

Media Liability Insurance: This insurance will protect the enterprise relating to media and enterprise company about its use or creation of non-patentable intellectual property rights. During the period of the insurance, if the policyholder's creative works have been infringed or used wrongfully by any third party, then the insurance policy will cover the cause of actions that arise due to any one or more of the following causes. They are;

- Copyright Infringement
- Trademark Infringement
- Theft of non-copyright ideas
- Breach of implied contract relating to a third party's submission of an idea
- Invasion of the privacy rights
- Submission of an idea or other creative content to the policyholder

- Defamation
- Trade Libel

Lag in India in comparison with the other Countries

1. India has no Insurance coverage for the Computer Related IP infringement
2. No Provisions for the jurisdictional claim for insurance like that of the United Kingdom

Conclusion

By making a comparative analysis with the other countries, it is understandable that there is no specific provision for insurance coverage for IP infringement even in IP laws in India. After the 161st committee's report, there is a plan to amend the Insurance Act by enacting laws for IP risks. There is no cases filed in India in comparison with the USA. This insurance coverage is at its emerging stage. There is a need to amend the provisions relating to IP infringement, so that, the profits of the companies will not be at stake and as a matter of encouragement to the IP owner to create new inventions so that, the market economy of India will also be increased, there is a need to enforce laws for insurance coverage for IP assets.