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Assistant professor Ozren Uzelac, PhD¹
Professor Slobodan Jovanović, PhD²

LIABILITY INSURANCE AGAINST INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS

PROFESSIONAL PAPER

Abstract

Intellectual property rights are legal rights that protect intellectual assets, which hold significant value for individuals and even greater importance for the economy and society as a whole. Liability insurance against the infringement of intellectual property (IP) rights is becoming increasingly relevant as a mechanism for managing unforeseen risks arising from third-party proprietary claims and from unauthorized use of intellectual property rights. This paper first examines the nature and scope of various intellectual property rights, alongside the advantages of liability insurance in cases of infringement of such rights. It then explores what may constitute the subject-matter of insurance coverage, based on the nature of intellectual property rights, general insurance principles, and contractual frameworks. The aim is to distinguish this specific type of liability insurance within the broader context of IP protection. Finally, the paper examines the scope of insurance coverage in relation to specific costs incurred when the insured appears as a defendant in legal proceedings, as well as when the insured takes actions to protect and enforce their intellectual property rights.

Keywords: *law, intellectual property, insurance, litigation costs, financial loss*

¹ Corresponding Author, Assistant Professor at University of Novi Sad, Faculty of Economics, email: ozren.uzelac@ef.uns.ac.rs

ORCID: <https://orcid.org/0000-0001-6991-1644>.

² Full Professor, Faculty of Business Economics and Entrepreneurship, Belgrade, email: slobodan.jovanovic224@gmail.com

ORCID: <https://orcid.org/0000-0003-0929-2516>.

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I Introduction

Intellectual property (hereinafter: IP) impacts the rights holders of IP and national economies in various ways, particularly in the context of scientific and technological development and the advancement of both individual and societal well-being. It is therefore not surprising that, in the early 1980s, the United States began systematically treating all information shared via the internet as a potential threat to national security, justifying such a position by the possibility of IP rights infringement. This rationale served to legitimize oversight and control of the internet and its future development.³ Moreover, technological progress across different sectors raises various national and international security concerns, especially in the current era of rapid development and implementation of AI.

In the context of market-oriented social relations, the economic utility of IP has become increasingly significant. As a product of the innovative human mind, IP forms the foundation of individual creative freedom and society's spiritual and material progress. Conversely, the unauthorized appropriation and use of another's protected intellectual creations for financial or other gain has long been subject to legal sanctions. As noted in the literature: "Intellectual property rights and the protection of IP secure the fundamental right to safeguard new ideas, new procedures, and new products, as well as their commercial distribution without fear of loss, piracy, or unnecessary involvement of individuals or enterprises in litigation".⁴ However, institutional protection of IP rights in cases of unauthorized use is not possible without initiating appropriate legal proceedings. One group of such proceedings is initiated and conducted ex officio (e.g. administrative procedures involving inspection oversight or customs process); another group is also initiated ex officio but falls within the criminal prosecution. Property and non-property claims, however, must be pursued through civil litigation initiated by the injured party and supported by other legal remedies. Unauthorized use of another party's protected intellectual property most often arises from deliberate and bad-faith conduct by the infringer, while the rights holder seeks legal protection upon becoming aware of the infringing behavior. The infringer's bad faith is particularly evident in their awareness that the subject of their economic use is a protected intellectual asset belonging to someone else, and that they have not lawfully acquired the right to profit from another's intangible asset.⁵

Nevertheless, instances of unintentional infringement of intellectual property rights are also possible, particularly when the violation results from accidental

³ Sanja Jelisavac Trošić, *Dinamika razvoja intelektualne svojine u međunarodnim ekonomskim odnosima*, Institute of International Politics and Economics, Belgrade, 2023, 115.

⁴ *Ibid.*, 111.

⁵ Vidoje Spasić, *Pravo intelektualne svojine*, Faculty of Law, Center for Publications, Niš, 2024, 4–5; Slobodan Marković, Dušan Popović, *Pravo intelektualne svojine*, Faculty of Law, Center for Publications, Belgrade, 2023, 21.

or coincidental overlap. Whether the infringement was willful or negligent does not exclude the possibility of asserting a financial claim against the responsible party.⁶ However, the burden lies with the plaintiff, the intellectual property rights holder, to prove the existence of the unauthorized act committed by the liable party and the damage caused as a direct consequence of that act. Therefore, it is not necessary, in all cases, to demonstrate the infringer's intent when preparing for/or carrying out acts that constitute a violation of IP rights. Nonetheless, before or during litigation, in cases involving motions for provisional measures or the collection or preservation of evidence, it is sufficient for the party to demonstrate that an infringement has likely occurred or is likely to occur.⁷ A civil lawsuit serves as the procedural instrument by which litigation is initiated and judicial protection of an IP right is requested. This means that such protection before a court is realized solely on the basis of the rights holder's decision to bring an action, through which they request the court to establish the infringement of a legally recognized right, to prohibit further infringing conduct, to award compensation for economic and non-economic damage, and to issue provisional measures such as the seizure or removal from the market of infringing goods, along with other legal remedies and prohibitions.⁸ A copyrighted work constitutes the intellectual creation of an individual, who thereby holds all associated rights, while certain protected subject matter under industrial property law, such as manufacturing processes, new machinery, industrial products, and industrial design, typically provides a significant comparative advantage to a business entity in terms of market competitiveness and added value. One of the most consequential outcomes of IP infringement is lost profit. In the case of copyright, this may reflect the income of a commercial entity or an individual, while under industrial property law, it may concern revenue that could have been allocated to further research and development, thereby supporting the company's growth.

From the above, it follows that any legal entity engaged in economic activity, whether as an entrepreneur or as a business organization (micro, small, medium, or large enterprise), as well as non-profit entities (e.g. civil associations, endowments, cultural institutions, etc.), may appear as either the defendant (passively legitimized) or the plaintiff (actively legitimized) in IP disputes. Other types of disputes may also arise in the IP domain, including breaches of agreements involving the transfer or licensing of rights, lease agreements, or security interests. A particularly burdensome financial consequence for the IP rights holder may occur if their right is revoked, modified, or becomes subject to a temporary ban on its use, the sale of goods, or the provision of services.

Profit and non-profit organizations may bear these financial burdens independently, through internal resources; however, in international commercial practice,

⁶ S. Marković, D. Popović, 276.

⁷ V. Spasić, 257–258, 262, 266; S. Marković, D. Popović, 277.

⁸ V. Spasić, 256–282, 476–484; S. Marković, D. Popović, 269–278.

obtaining an insurance policy has proven to be a significantly more effective solution. This paper first analyzes the characteristics of various IP rights that may be subject to insurance, along with the benefits of liability insurance against IP infringement. It then examines the scope of insurable subject matter and the content of insurance coverage, taking into account specific costs incurred both when the insured acts as the defendant in litigation and when the insured undertakes legal actions to protect and enforce their IP rights.

II CHARACTERISTICS OF DIFFERENT INTELLECTUAL PROPERTY RIGHTS AND THE ADVANTAGES OF LIABILITY INSURANCE AGAINST INFRINGEMENT OF SUCH RIGHTS

Starting from the division of IP rights into copyright and related rights, and industrial property rights, this section will briefly examine the main characteristics these rights must possess to enjoy legal protection and be eligible as the subject of insurance.

Copyright refers to the legal right pertaining to an original intellectual creation of the author, expressed in a specific form, regardless of its artistic, scientific, or other value, purpose, length, content, form of expression, or whether its public communication is permitted. Copyright protection encompasses both moral and economic rights, the author's rights in relation to the owner of a physical copy of the copyrighted work, the right to special remuneration, and the right to compensate for the public lending of works, under the Law on Copyright and Related Rights.⁹ Related rights include the rights of performers, phonogram producers, film producers (videogram producers), broadcasting organizations, and database producers. Each of these related rights is governed by specific conditions for protection, as prescribed under the aforementioned legislation.

When it comes to industrial property rights, the conditions they must meet in order to be recognized and enjoy legal protection are regulated by specific legislation. Thus, the rights of the author of an industrial design are recognized if the design is new and possesses individual character, and are protected in accordance with the Law on the Legal Protection of Industrial Design.¹⁰ In patent law, the subject matter of protection must satisfy the requirements of novelty, inventiveness, and industrial applicability. The legal protection of inventions is governed by the Law on Patents.¹¹ For a sign to be protected as a trademark, it must be capable of distinguishing the goods or services of one natural or legal person from those of

⁹ *Official Gazette of the Republic of Serbia*, Nos. 104/2009, 99/2011, 119/2012, 29/2016 – Constitutional Court decision, 66/2019.

¹⁰ *Official Gazette of the Republic of Serbia*, Nos. 104/2009, 45/2015, 44/2018 – other law.

¹¹ *Official Gazette of the Republic of Serbia*, Nos. 99/2011, 113/2017 – other law, 95/2018, 66/2019, 123/2021.

another, and it must be capable of being represented in the Trademark Register in a manner that enables the competent authorities and the public to clearly and precisely determine the subject matter of protection. A trademark is protected in accordance with the Law on Trademarks.¹² As for designations of origin, the subject of protection includes the geographical name of a country, region, or locality from which a product originates, where the quality and specific characteristics of that product are exclusively or essentially attributable to the geographical environment of a defined area, including both natural and human factors. A geographical indication refers to a sign that identifies a product as originating from the territory of a particular country, region, or locality, where a given quality, reputation, or other characteristic is essentially attributable to its geographical origin. Designations of origin and geographical indications are protected in accordance with the Law on Indications of Geographical Origin.¹³ The subject matter of topography protection includes the original, innovative result of the author's intellectual effort, which is not commonly known in the semiconductor industry, as well as any part of the protected topography that may be used independently, and the device (main item) that incorporates a semiconductor product containing the protected topography, provided that the semiconductor product cannot be separated from the main item without damaging or destroying it. The subject matter and conditions for protection are governed by the Law on the Protection of Semiconductor Products.¹⁴ The plant breeder's right is granted if the variety is new, distinct, uniform, and stable, and if it meets the requirements for variety denomination, in accordance with the provisions of the Law on the Protection of Plant Breeders' Rights.¹⁵ The issue of trade secrets as a subject of insurance against liability for infringement of intellectual property rights will be discussed in more detail in the following chapter.

In relation to liability insurance against infringement of IP rights, it is important to bear in mind the principle of contractual freedom, which allows the insurer to define the scope of coverage through its terms and conditions. This includes the insurer's right to completely exclude or limit liability for indemnity claims arising from specific IP rights. Liability insurance against IP infringement offers multiple advantages. For a relatively modest premium, it provides potential financial protection against costs that may arise from infringing a third party's IP rights. Moreover, such insurance may cover the costs of filing a counterclaim, as well as initiating legal proceedings to protect the insured's IP rights. It is the responsibility of the insured to identify and understand the integral elements of their business activity and, for greater certainty, to ensure financial protection through insurance in connection

¹² *Official Gazette of the Republic of Serbia*, No. 6/2020.

¹³ *Official Gazette of the Republic of Serbia*, Nos. 18/2010, 44/2018 – other law.

¹⁴ *Official Gazette of the Republic of Serbia*, Nos. 55/2013, 66/2019.

¹⁵ *Official Gazette of the RS*, Nos. 41/2009, 88/2011.

with IP rights. In addition to the above, if agreed upon, insurance coverage may also extend to costs of obtaining expert opinions regarding the likelihood of success in defending against claims for IP infringement in bringing an action to protect one's IP rights. It may also cover legal and other representation costs, expert witness fees, and the cost of defense before courts or arbitration panels, as well as judgment amounts in the event of an unsuccessful dispute, etc.¹⁶ Furthermore, in cases of suspected or likely infringement of an IP right by a third party, the right holder may initiate appropriate investigative and analytical measures.¹⁷ The costs of such measures may also be covered by the insurance. Namely, the costs incurred by the IP right holder, who is also the insured party under the insurance contract, shall be reimbursed by the insurer in full, within the limits of the insured sum. The only condition is that such costs were incurred reasonably and with the consent of the insurer.¹⁸

III What May Constitute the Subject-Matter of Insurance

The subject-matter of insurance is determined in accordance with the relevant regulations on copyright and related rights, patents, trademarks, legal protection of industrial design, geographical indications of origin, topographies of semiconductor products, and trade secret protection, as well as the provisions of laws and other regulations governing insurance contracts, particularly the general and specific terms and conditions of insurance.

Based on one of the fundamental principles of contract law, according to which the object of an obligation must be possible, lawful, permissible, defined or definable (Law of Obligations, Art. 47), the object of the insurer's obligation must also conform to public order, mandatory legal provisions, and good customs. Hence, the legal basis for the insurer's obligation depends on the performance of conditions, duties, and requirements prescribed by law or derived from good customs. In the context of this paper, the legal and subordinate regulations can be classified into two groups: (1) laws governing specific forms of IP rights, and (2) laws relating to insurance law, namely, the law on insurance contracts and the law on the supervision of insurance activities.

It is common for the subject-matter of insurance to be linked to the occurrence of a particular circumstance, incident, event, fact, issue, action, omission, or

¹⁶ Marsh Commercial, *Protecting your big ideas with intellectual property insurance*, 28 August 2024, available at: <https://www.marshcommercial.co.uk/articles/intellectual-property-insurance.html#:~:text=IP%20insurance%20can%20help%20protect,copying%20or%20reproducing%20their%20work>, accessed on 12 February 2025.

¹⁷ Arch Insurance, *A Guide to Intellectual Property Insurance*, Arch Capital Group Ltd. 22 October 2024, available at: <https://insurance.archgroup.com/a-guide-to-intellectual-property-insurance/>, accessed on 12 February 2025.

¹⁸ Jovanović, Slobodan, *Pravo osiguranja*, Faculty of Law for Business and Judiciary, Novi Sad, 2016, 167.

state of affairs that could lead to the initiation of legal proceedings or the submitting of a compensation claim against the insured party, or, conversely, in cases where the insured takes action to protect their own IP right against a third party.

The subject-matter of insurance may exclusively be liability arising from IP rights that meet the conditions prescribed by law and enjoy statutory protection. The requirements that an IP right must meet are determined by the nature of the subject matter to which the right pertains. In addition to those mentioned in the previous chapter, it is understood that the objects of IP rights protection must also satisfy other conditions prescribed by law.

This conclusion follows several specific rules applicable to insurance contracts, which are derived from the general principles of contract law. Thus, only those persons who, at the time the damage occurred, had a material interest in preventing the insured event from happening may hold rights under an insurance contract. This rule arises from the fact that it is not normal for someone to desire to suffer a loss, as such would constitute a deviation from the regularity of insurance and typically indicate fraud on the part of the insured.¹⁹ Furthermore, from the above-mentioned rule concerning IP rights, it is evident that rights not legally recognized as belonging to any person cannot be the subject of insurance. According to the general rules of contract law, for a valid insurance contract to be concluded, the interest must be permitted by law, morality, and the public order of society.²⁰ The legality of IP rights is demonstrated by a decision of the competent authority regarding registration in the relevant register. This may be a decision on the registration of the IP right or the registration of a disposition of an existing right (such as transfer, license, or pledge). In this sense, insurance coverage extends to misuse or unauthorized exploitation of the insured's legally recognized IP rights. On the other hand, insurance does not cover any case, condition, circumstance, or event leading to litigation due to the use of IP rights based on legally recognized limitations of those rights.²¹

The subject-matter of insurance can only be that which is not explicitly excluded from coverage. The insurance terms, which constitute the provisions of the insurance contract, define the subject of insurance whose loss, damage, or related costs are compensated under the insurance. This represents a significant difference compared to IP rights, which have a broader scope than the extent of the insurance coverage. For example, the insurance terms may explicitly exclude damage claims against employees for breach of trade secrets, as well as the employer's liability towards employees for unjustified damage claims arising from breach of trade secrets. On the other hand, insurance may cover a wide range of costs arising from risks related to IP infringement. These may include disputes concerning violations of

¹⁹ S. Jovanović, 95.

²⁰ *Ibid.*, 89.

²¹ V. Spasić, 68–69, 141, 203–204, 415; S. Marković, D. Popović, 75–78, 140–141, 168, 182–183, 192, 200, 208.

privacy rights, personal data, and costs related to managing public relations, among others. One of the defining features of liability insurance against IP infringement is precisely the coverage of financial losses in the form of compensation for specific costs borne by the insured.

In addition to numerous excluded risks, costs, and indemnities, which will not be detailed in this paper, the list of excluded risks encompasses other types of liabilities that may be complementary to this subject of insurance. These include product liability and potentially other types of liability. This reflects a strict separation of liabilities that may arise from various legal grounds, all aimed at enabling the insurer to control and monitor individual types of insurance more effectively. Furthermore, such a legal drafting technique for insurance terms provides a clearer overview of sources of risk and the insurer's potential obligations.

The subject-matter of liability insurance arising from infringement of IP rights does not coincide with general liability insurance arising from business activities. Liability insurance against infringement of IP rights is conducted as a form of liability insurance, specifically either general business liability or professional liability insurance. The subject-matter of liability insurance against infringement of IP rights differs from general business liability insurance in at least two respects: First, in general business liability insurance, the subject of insurance is the insured's civil liability for damage caused by death, injury to body or health, as well as damage to or destruction of third-party property,²² whereas in the type of insurance considered here, this is not the case. Liability insurance against infringement of IP rights exclusively covers financial losses related to such claims for compensation and associated costs. Second, general liability insurance does not cover professional liability arising from errors and omissions committed in a professional capacity (such as lawyers, notaries public, insurance brokers, etc.). Liability insurance against infringement of IP rights may be concluded as professional liability insurance because its subject is exclusively tied to non-intentional error or negligence in the conduct of a specific professional activity. This concerns so-called slight (ordinary) negligence (*culpa levissima*), since gross negligence (*culpa lata*) on the part of a professional in the performance of their duties is unacceptable. Minor forms of negligence are regularly covered by insurance, whereas gross negligence is sometimes equated with intent, and sometimes it is not the case.²³ Simply put, when performing professional activities, a party in an obligational relationship is required to act with increased diligence, in accordance with professional standards and customary practices, i.e. with the diligence of a good expert. There is, however, an exception under Serbian law, prescribed by the Law of Obligations, whereby the insurer is obliged to compensate for any damage caused by a person for whose actions the insured is liable on any basis, regardless

²² S. Jovanović, 289.

²³ *Ibidem*, 92.

of whether the damage was caused negligently or intentionally (Law of Obligations, Article 929, paragraph 3).

The standard insurance practice, which aligns with statutory provisions, is based on the principle that only harmful events occurring without the insured's intent can be attributed to their negligence, omission, misrepresentation of will, or false representation of material facts at the time of concluding the insurance contract. The same rule applies to insurance against infringement of IP rights. The insurance exclusively covers unintentional infringement of IP rights, and particularly breaches of licensing agreements.

The subject-matter of liability insurance against infringement of IP rights may include a factual relationship in the form of a trade secret. Trade secrets (*know-how*), in a broad sense, refer to any non-public information acquired by individuals or companies regarding the method or easier use of something in business. (The concept is quite broad, and its nature depends on the specific knowledge involved.) Generally, a trade secret describes knowledge that increases benefits or reduces the burden of using something. It may include descriptions of product creation or strategic characteristics of a business enterprise, such as business management.^{24, 25} According to Professor Spasić, the essence of *know-how* primarily consists of its technical aspect, while the business aspect is secondary.²⁶ The importance of inventions and innovations is further demonstrated by the fact that the United States and Japan, during years of economic stagnation, succeeded in reviving sluggish economic growth through patents, *know-how*, and the digital economy.²⁷

In the analyzed sources of legal theory concerning IP law, trade secrets represent a factual relationship within the business activities of a company and therefore do not fall within the scope of IP law,²⁸ while another view classifies trade secrets as rights related to patent law.²⁹ The first group of authors also approaches

²⁴ For example: (1) The American company *Lincoln National Life Insurance Company* holds a patent titled *Method and Apparatus for the Payment of Pension Benefits*, confirmed by a ruling of the United States Federal Court of Appeals in June 2010 (*Lincoln National Life Insurance Company v. Transamerica Life Insurance Company* (2010), United States Court of Appeals, Federal Circuit, Nos. 2009-1403, 2009-1491, Decided: June 23, 2010, available at: <https://caselaw.findlaw.com/court/us-federal-circuit/1528628.html>, accessed on 12 February, 2025); (2) High-resolution datasets on claims are intellectual property of the German insurance industry, protected as trade secrets for many years. Therefore, these data are not freely available to the public by the insurance industry, although they may be provided for specific research projects (GDV, *Comment of the German Insurance Association (GDV) on the Consultation on the renewed sustainable finance strategy*, ID-number 6437280268-55, 14/07/2020, 57).

²⁵ S. Marković, D. Popović, 309–310; Legal Information Institute, *know-how*, Cornell Law School, available at: <https://www.law.cornell.edu/wex/know-how>, accessed on 12 February, 2025.

²⁶ V. Spasić, 103.

²⁷ S. Jelisavac Trošić, 82.

²⁸ S. Marković, D. Popović, 309.

²⁹ V. Spasić, 99–107.

the latter opinion, as they believe that inventions should be protected by patents, while accompanying technical knowledge that does not meet patentability criteria should be protected as trade secrets.³⁰

In insurance law, the aforementioned distinction is irrelevant, as it is ultimately up to the insurer, based on the principle of autonomy of will in law of obligations, to decide whether to provide coverage for infringement of trade secrets - specifically in cases of "illegal acquisition, use, and disclosure of another's trade secret", as defined by the Serbian Trade Secret Protection Act of 2021 (hereinafter: ZZPT)³¹ and the Company Law.³² However, infringement of a trade secret may occur through violation of the law or good business practices, which include breaches of obligations under confidentiality agreements or other contracts. Practically, the filing of a claim for compensation or other form of compensation regarding unauthorized use of another's trade secret constitutes an insured event. Nevertheless, the insured or the injured party asserting a proprietary claim against the insured must demonstrate that the information in question indeed qualifies as a trade secret. Since a trade secret is not subject to registration in an administrative procedure, its existence must be proven by the interested party - a business entity, in accordance with the ZZPT and the Company Law (Articles 72–74). This can be done by presenting: an internal regulation governing trade secret management or a document marked "trade secret" or with a similar designation. In any case, whether the disputed conduct constitutes a trade secret infringement depends on whether the information meets the statutory criteria to be considered a trade secret. Consequently, information whose disclosure to a third party would not cause harm to the company, as well as information that does not or cannot have economic value enabling economic benefit through its use or disclosure, and which is not protected by the company through appropriate confidentiality measures, cannot be regarded as a trade secret.

For example, when an invention does not meet the requirement of industrial (commercial) applicability, i.e., patentability, then the trade secret related to it is not suitable for generating significant economic benefit or competitive advantage. This is because "the usefulness of information is essential reason why it possesses the characteristic of a trade secret".³³ In other words, "the condition of usefulness is a statutory prerequisite for legal protection of an invention and, by extensive analogy, it extends to *know-how*".³⁴ In this sense, a person claiming to be injured gains no legal advantage from merely designating certain information as a trade secret if that information is not capable of causing harm or generating economic

³⁰ S. Marković, D. Popović, 311.

³¹ *Official Gazette of the Republic of Serbia*, No. 53/2021.

³² *Official Gazette of the Republic of Serbia*, Nos. 36/2011, 99/2011, 83/2014 – other law, 5/2015, 44/2018, 95/2018, 91/2019, 109/2021, 19/2025.

³³ S. Marković, D. Popović, 310.

³⁴ V. Spasić, 103.

benefit or competitive advantage in the market. This creates a legal presumption that economically worthless information is that which is not protected as a trade secret. Still, it should be borne in mind that this is a claim of relative significance, as numerous data are important to a business entity that are not of a nature to warrant protection as a trade secret.

IV WHAT IS COVERED BY INSURANCE

Although the type of insurance examined in this paper is, according to the widely accepted classification of insurance, categorized as property insurance, it primarily covers various costs arising from liability for infringement of IP rights.³⁵ As previously noted, the insured compensation exclusively covers the “pure” financial loss resulting from claims for damages due to IP infringement and the legal defense against such claims. On the other hand, this type of insurance entails financial protection in cases of IP infringement, specifically the moral-legal and proprietary rights of the IP rights holder.³⁶ Thus, the pure financial loss covered by this insurance can be described as a material loss caused by the insured at the expense of a third party through acts or omissions, without endangering their property or health. In this respect, this type of insurance differs from traditional property insurance and accident insurance for individuals. Bearing the above in mind, we distinguish the following types of coverage:

(1) Reimbursement of costs due to infringement of a third party’s intellectual IP rights. Infringement of IP rights provides coverage for defense costs: attorney fees, advisory fees, expert witness fees if engaged, court fees, etc. In addition to these costs, the insured compensation also covers damages the insured may be required to pay to a third injured party based on a settlement agreement, a final court judgment, or an arbitration award. This includes the possibility of reimbursing costs related to filing a counterclaim. However, the insurer aims to have full insight into its exposure, which encompasses all events and actions the insured plans to undertake; thus, prior consent from the insurer is a prerequisite for payment of the insured reimbursement.³⁷

(2) Reimbursement of costs for defending the insured’s IP rights. It is not uncommon for a third party to challenge the insured’s ownership of an IP right. The third party may be a market competitor or employees and associates of the insured. Covered are costs related to defending against claims for annulment or revocation of the IP right due to a previously registered right or because of a prior state of the art allows free use of the products or services concerned, are reimbursed.³⁸

³⁵ S. Jovanović, 291.

³⁶ V. Spasić, 65; S. Marković, D. Popović, 263.

³⁷ S. Jovanović, 40.

³⁸ Arch Insurance, *A Guide to Intellectual Property Insurance*, Arch Capital Group Ltd. 22 October, 2024, available at: <https://insurance.archgroup.com/a-guide-to-intellectual-property-insurance/>, accessed on 12 February, 2025.

(3) Reimbursement of costs arising from filing a lawsuit to enforce a contract or claim for infringement of IP rights. This is the reverse form of coverage in liability insurance against IP infringement, as it concerns the insurer's obligation to cover the costs of enforcing the insured's contractual rights against a third party - the insured's contractual counterparty. This coverage allows the insured to initiate appropriate proceedings to compel their contractual partner to fulfill their contractual obligations or pay damages for breach of contract related to IP matters. Coverage could also be activated in cases of non-payment of royalties or excess amounts above a specified limit due to the insured, breach of agreed territorial restrictions, technical fields of application, and so forth.³⁹

(4) Losses due to business interruption caused by IP rights infringement. Business interruption is an emerging area of liability insurance against IP infringement. The inability to realize planned earnings leads to reduced income and unfavorable business results, which can be significantly mitigated through business interruption loss insurance.⁴⁰ Similar to property insurance against fire risks, this is a supplementary form of coverage that is contracted separately and requires an additional premium. However, it may sometimes be included in the basic coverage, depending on the insurance market offer. Loss due to business interruption is understood as loss resulting from the insured risk under the basic insurance,⁴¹ i.e. the type of insurance addressed in this paper. This coverage is designed to extend the scope of insurance to protect the insured from financial losses suffered if they are prohibited from selling their products or providing services, or if they must cease using certain production processes. Business interruption insurance would be particularly suitable in this type of insurance if a judgment is rendered against the insured company, determining that its products infringe a third party's patents and imposing a ban on the continued use or sale of products that violate the IP rights of the injured party.

CONCLUSION

Intellectual property (IP) affects both commercial entities (business entities) and non-profit organizations (civil law associations, endowments, cultural institutions, etc.) in various ways, and it can significantly contribute to the advancement of scientific and technological development as well as the improvement of material welfare. Any entity exploiting an IP right may appear either as a defendant or as

³⁹ Arch Insurance, *A Guide to Intellectual Property Insurance*, Arch Capital Group Ltd., 22 October, 2024, available at: <https://insurance.archgroup.com/a-guide-to-intellectual-property-insurance/>, accessed on 12 February, 2025.

⁴⁰ S. Jovanović, 271.

⁴¹ *Ibidem*, 277.

a plaintiff. Financial burdens arise if their IP right is annulled, altered, or subjected to a temporary injunction prohibiting the use or sale of goods, or provision of services.

The characteristics of different IP rights stem from their specific nature and the statutory conditions for their recognition and protection. Legal definitions and requirements for all IP rights provide an institutional framework of legal certainty in legal transactions where these rights are lawfully exercised.

Regarding liability insurance against infringement of IP rights, it must be noted that such insurance is often of an adhesion nature, meaning that the insurer determines the scope of coverage through the insurance terms. Nevertheless, liability insurance against IP infringement offers multiple advantages. These include: a relatively low premium securing a much higher insured sum; coverage for costs associated with initiating counterclaims and lawsuits to protect one's IP rights; coverage for expenses related to obtaining expert opinions on the likelihood of successfully defending against compensation claims or lawsuits; costs of legal representation, expert witnesses, and defense in court or arbitration; amounts awarded in judgments if the dispute is lost; and investigative and analytical costs incurred when there is suspicion that a third party will infringe on IP rights, etc.

The insurer is required to cover costs that the insured must bear following a court or arbitration award after proceedings initiated by the injured party. However, if the insured plans to incur costs independently for filing a lawsuit to protect their IP rights, filing a counterclaim, or acknowledging obligations based on a settlement agreement, reimbursement of such costs will be conditional upon the insurer's prior consent to these legal actions.

In liability insurance against IP infringement, as in other types of insurance, it is possible to extend coverage to include additional costs such as those related to business interruption due to IP infringement or losses resulting from an unfavorable final court decision.

The validity of the insurance contract and the insurer's obligations are conditioned upon the prior registration of the IP rights. This means that coverage excludes any IP rights that are not registered. However, it is important to note that insurers also accept copyright and related rights in insurance coverage, even though these rights are not registered. Furthermore, the insurer's obligation must be definite and/or determinable and permitted by public order, mandatory regulations, and good practice; therefore, insurers cannot validly enter into insurance contracts for material interests in IP rights that are not legally recognized.

Differences are also evident between general liability insurance arising from business activities and liability insurance against infringement of IP rights. For this reason, liability insurance against IP infringement is specific and requires specialized knowledge in drafting and administering such contracts.

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