



# Intellectual property insurance guide



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# What is intellectual property?

Intellectual property (IP) is a broad term used to describe the legal rights arising out of intangible creations and assets, like a product or process, a piece of software, a brand or even a customer database.

The most common forms of IP include:

## Patent

Patents apply to innovations. In order to qualify for a patent, something has to be new and unique. Patents are registered rights that prevent others from making, using or selling an invention.

## Design right

Design rights protect the ornamental or aesthetic creation of an object, unlike a patent which can protect the way the object works. In the US, however, designs are protected by design patents.

## Trademark

A trademark is a recognisable word, name or symbol which identifies and distinguishes products or services. Trademarks don't have to be registered, but there is often greater protection when they are.

## Copyright

Copyright protects artistic creation, like paintings, compositions, architectural work and also software code. Copyright protection is automatic from the moment of inception and grants the original creator exclusive rights for use and distribution.

## Trade secrets

Trade secrets are a confidential piece of information which provides a company with a competitive edge. This is an extremely broad definition, encompassing everything from sales methods, to supplier lists, to secret ingredients or manufacturing processes.

Other types of IP include database rights (protecting the collection and arrangement of data) and plant variety rights (providing control and protection to plant breeders over new strains of plants and seeds).

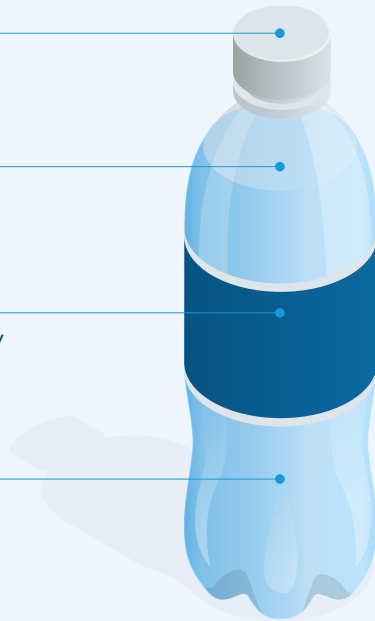
Intellectual property rights enable a company to invest in and reap the benefits of their creativity, innovation and branding, and prevent others from copying what they have developed. You might be surprised at how many IP rights can exist in a single product.

The screw cap may be patented

The recipe could include trade secrets

The logo, name or imagery is subject to copyright and trademark

The shape of the bottle could be subject to design or trademark protection



## Did you know?

### Global rights

IP rights are granted nationally or regionally – there isn't a global body that can grant global rights. Since there are no automatic global rights, you may be able to sell a product in one country without infringing, but be found to infringe as soon as you cross the border. Since there is a cost involved in filing and maintaining IP rights, many rights holders will select to only keep the rights in territories where they are likely to see a financial benefit of the product or service.

There are  
**over 200,000**  
US patents for  
a smartphone

The first  
registered UK  
trademark  
was in 1876 for  
Bass Beer



There is no such thing as a  
new idea. It is impossible.

Mark Twain

**Chewing gum**  
was first patented  
in 1869

**Pringles,  
Toblerone &  
Hersheys Kisses**  
all have their shapes  
trademarked

# The value of IP

Think about Apple's iPhone, Coca-Cola's coke, Louis Vuitton's iconic handbags, or even Lady Gaga's provocative images. Whether software or song lyrics, intellectual property offers all sizes of businesses a competitive advantage and is often what sets them apart.

Decades ago, the value of a business was largely determined by its tangible assets, such as buildings, machinery, IT and other physical capital. As technology has revolutionized nearly every industry, and consumers are presented with more choice than ever before, IP has become one of the most critical assets for today's modern businesses.

Intangible assets, including IP, now make up anywhere from 70 to 80 percent of a typical company's balance sheet<sup>1</sup>.

Recent studies show that intangible assets contribute twice as much to the total value of manufactured goods sold than other forms of tangible capital<sup>2</sup>.

Businesses are also investing more in intellectual property - like research and

development, software, branding and design - than they are in physical assets, creating more value in IP.

IP can also present a valuable revenue stream for businesses who sell or license IP rights to other companies.

Intellectual property is highly relevant to companies of all sizes and in all industries.

It is no longer unique to sectors like life science, technology or creative industries. Sectors with IP exposures include energy, manufacturing, automotive, packaging, design, advertising companies and mining. Any industry which relies on a supply chain could also have multiple IP infringement risks and contractual exposures.

<sup>1</sup> [www.businessweekly.co.uk/blog/business-weekly-guest-blog/rise-intangible-asset-business](http://www.businessweekly.co.uk/blog/business-weekly-guest-blog/rise-intangible-asset-business)

<sup>2</sup> [www.telegraph.co.uk/business/2017/02/13/companies-failing-see-value-intellectual-property](http://www.telegraph.co.uk/business/2017/02/13/companies-failing-see-value-intellectual-property)

# Understanding IP risk

The biggest IP exposure a small or medium-sized enterprise (SME) will often face is a claim of infringement by another company, rather than a direct threat to their own IP. Many businesses assume they're immune to this risk because they hold some form of IP rights (i.e. a patent, copyright or trademark) or because they simply don't understand what constitutes infringement.

## How does a company infringe on another's intellectual property?

Infringement can arise out of a business activity – i.e. the import, sale or manufacture of a product – or the delivery of a service.

It doesn't matter whether a business holds IP rights or not. Holding a patent, copyright or trademark doesn't protect a business from infringing on someone else's IP.

Given the volume of IP rights in existence, it's nearly impossible to guarantee that a company isn't infringing on someone else's IP. IP rights also often overlap, and patents rarely cover an entire product. For example, a business may think that it holds the IP rights for a pen, but may lack the rights to the cap, the ink or the spring.

### Did you know?

#### Patent trolls

SMEs are often targeted by non-practicing entities (NPEs), more commonly known as 'patent trolls'. Over 80 percent of patent infringement actions against SMEs in the United States are patent troll-related, according to Unified Patents report in Q3 2018. These entities, which hold patents only to assert them against others, seek license fees in return for settling the claim.

### The number of IP disputes recognised publicly represents just the tip of the iceberg.

Globally, IP disputes are on the rise, but many of them are raised out of court. In fact, many claims take the form of cease and desist letters or an invitation to license the IP from the claimant party, rather than a court filing. As a result, the frequency of disputes is likely to be much higher than court records suggest.

Even claims that start in court often settle out of court, which means that the settlement may be confidential. The severity of these claims is then often unknown to the public.

Smaller businesses can present an easy target for IP infringement claims because they lack the resources to properly address or defend them. Many SMEs could struggle to survive an IP dispute. Consider what would happen should the business face an injunction preventing them from selling their product? Or if they were required to pay significant damage or royalties to the rights holder? The cost of simply defending a claim can be significant for a small business even if they believe they are not infringing.





## How does a policy work?

IP insurance provides cover for claims alleging infringement of IP rights, including patents, trademarks, copyright and trade secrets. It can also provide cover for contractual indemnities, the enforcement of IP rights and the costs associated with loss of IP rights or loss of profits. The insurance will only cover claims which the insured was not aware of at inception

Typical IP policy covers include:

### Defense

This part of the policy will cover the costs of defending against allegations of infringement by a third party and can also cover the out of court settlements, or damages awarded by a court, as a result of the claim. Defense costs are often substantial due to the complexity of IP litigation and expertise required by lawyers.

Aside from infringement allegations, the defense cover can also include claims of entitlement by employees and certain elements of contract breach arising out of IP. Directors and officers are also automatically included should a claim involve both the company and the director.

### Contractual indemnity

For many companies, their main exposure arises out of their obligations under contracts, typically with customers or licensees. For instance, a supplier's customer may insist that the supplier warrants that the product does not infringe on IP rights, otherwise the customer will refuse to buy the product.

Ideally, the supplier should negotiate to minimise this contractual risk, but the balance of power between the parties may not allow for such negotiation, and in some sectors it is more or less standard to provide non-infringement indemnities. IP insurance will cover the insured if a claim is made against them, but also if a claim is made against their customer, or further down the line of contracts if it is a complex supply chain. This section can insure a single contract exposure or a number of contracts and exposures. It is particularly relevant for companies operating in traditional supply chains (e.g. automotive).

### Pursuit of infringers

This section covers the enforcement of intellectual property that is owned by or licensed to the insured, as long as the claim has reasonable prospects of success and is commercially justified. This includes the legal costs of negotiating with the alleged infringer or taking court action, as well as the costs of defending a counterclaim if the infringer claims that the right should not be valid. If an infringer alleges that the insured is actually infringing on their rights, then this type of linked claim may also be covered by the insurance.

### Loss of IP rights

If the insured's registered right is invalidated as a result of a covered infringement claim, then the policy can cover the costs that the insured incurred in registering and maintaining the right up until the point that it was invalidated.

### Loss of future profit

While defense cover will typically cover historical damages or settlements arising out of a covered claim, this clause provides cover for the loss that may be incurred after final disposition, for example, if the company is prevented from selling a product due to the infringement.

## Did you know?

### IP in traditional policies

Traditional policies may provide an element of IP cover, but they typically miss or offer restricted cover for things like claims arising out of patents (in the US, for example). They may also lack access to specialized claims handlers and relevant external providers. While standalone IP insurance policies are typically more expensive than a traditional E&O policy, the coverage provided for IP claims is broader, and designed for the catastrophic event that can result from an IP dispute.

## Policies in action: Claims examples

### **A non-practising entity dispute (with contractual indemnities)**

A B2B software firm developed a platform for consumer interaction and analytics. The platform is supplied to customers under an annual user licence containing an indemnity to meet the costs associated in addressing IP infringement allegations.

A non-practising entity (NPE), also known as a patent troll, contacted two of the firm's customers alleging they were infringing on a patent relating to basic technology contained in the firm's platform. If true, this would impact the firm's ability to license their platform as well as their customers' right to use it commercially, crippling their business.

The customers forwarded the allegation to the software firm, who notified their insurance claims team immediately. After arranging a legal representative and receiving legal advice, the firm negotiated a global licence for its entire customer database, and the NPE agreed not to knowingly sue any of the firm's customers.

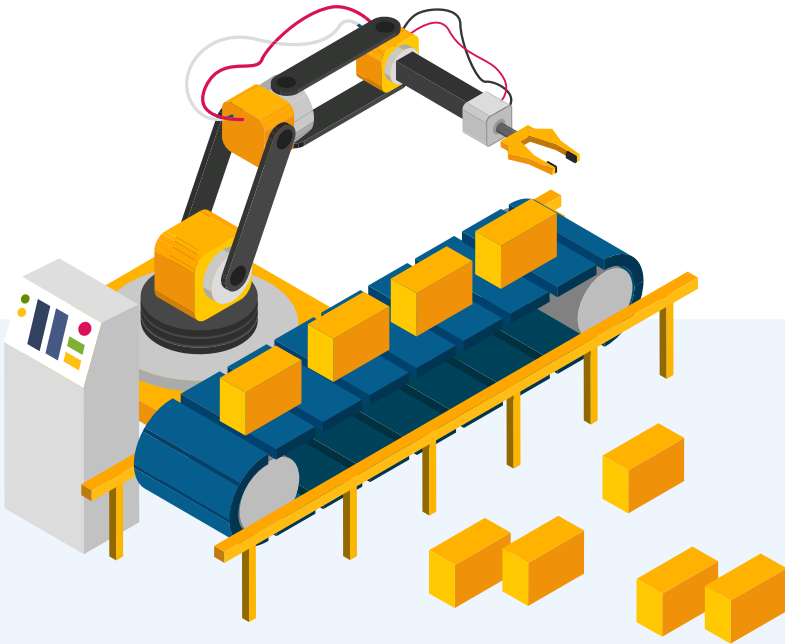
In this instance, the firm's IP insurance policy would cover the legal costs associated with responding to the infringement allegation as well as the settlement payment.

### **Contracts and supply chains**

A plastics manufacturer provides components to a variety of children's toy producers. As part of its contract, the plastics company agrees to indemnify its customers in the event an IP infringement claim is brought against them.

After releasing a popular new toy car, one of the toy producers was accused of patent infringement by a larger competitor seeking to stifle competition. The toy producer referred the claim to the plastics manufacturer who was obligated to handle it under their contract.

Despite being likely to succeed in defending the claim, the plastics manufacturer wanted to avoid ongoing litigation and reassure its other customers that there was no further risk of infringement. To resolve the claim, the plastics manufacturer agreed to obtain a license for the IP from the competitor. Under its IP insurance policy, the company's legal fees and the cost to obtain the license would be covered.



### The grey area of infringement

A small manufacturer provides products to customers in the heavy industrial sector. A competitor recently filed a lawsuit alleging that the manufacturer's products infringed several of their patents.

The manufacturer had a strong defense to the infringement allegations and could additionally argue that some of the competitor's patents were actually invalid. On the advice of legal counsel, they attempted to settle the dispute outside of court. Unfortunately, the competitor wasn't persuaded by the manufacturer's arguments which made a settlement agreement initially impossible. The dispute proceeded to court.

Only after lengthy litigation - and facing the prospect of having their patents invalidated as a result - did the competitor agree to discuss a settlement. In the end, the manufacturer managed to avoid paying any fees to the competitor, but its legal costs had reached millions of dollars, which could wipe out their profit for the year and impact future R&D initiatives.

Luckily, the manufacturer's IP insurance policy would cover all legal costs associated with defending the infringement allegation.

# Selling IP insurance

Businesses who seek coverage for product liability, product recall, E&O, or those that operate in the technology, manufacturing, energy, media or life science sectors will likely have an IP exposure. Many companies have IP exposures but do not actually realise they can buy insurance for it. Simply bringing up the topic of IP insurance can set a broker apart.

**Rather than wait for a client to request IP insurance, here are a few questions you can ask to start the conversation:**

- How much do you invest in intellectual property or other intangible assets?
- Is IP critical to the success of your business?
- How similar is your product or process to others in your sector?
- Have other companies in your sector faced IP claims in the past?
- Have you ever conducted a clearance search or a freedom-to-operate analysis?
- Do you know what you would do if you received an IP claim?

## Did you know?

### **Clearance search and freedom-to-operate**

Clearance searches and freedom-to-operate analyses are forms of due diligence that a company may perform before they develop or invest in IP or new products. It usually involves identifying existing IP in a particular industry or sector and assessing the risk of the company's product, process or service infringing on it.



What would hurt your  
business more?

1

Losing the right to conduct a  
business activity (injunction)?

2

Spending months or years  
in ongoing litigation?

3

Paying a share of your sales  
as a license fee?

## Common misconceptions

IP insurance can appear more complicated than it really is. Here's how to address the most common objections we've seen.



### Only large corporations need to worry about IP risks...

Actually, SMEs are the most common target for patent trolls and they may also find themselves in the crosshairs of large competitors who want to stymie competition and who have more established IP portfolios by virtue of their size and age. IP can present a classic David versus Goliath scenario, and without sufficient resources, the smaller organization can face more dire consequences.

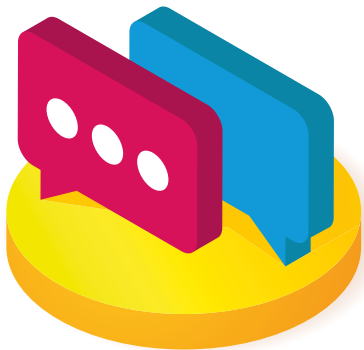


### I don't / do have a patent, so I can't infringe...

A claim of infringement has nothing to do with the defendant's own IP, but rather the IP of the claiming party.

Remember, infringement is the result of a business activity. Holding an IP right (patent, copyright, trademark) doesn't protect you from infringing on someone else's IP, nor does lack of IP rights indicate that you can't infringe.

IP rights often overlap and rarely cover an entire product or process. Sometimes patents are granted to different parties for the same thing, and there are cases where an awarded patent will later be invalidated.





### **I came up with the idea myself, so I can't be infringing on anyone's IP...**

While it may be true that a business developed an idea from scratch, most inventions today are a 'next step' innovation rather than an entirely new idea. Sometimes multiple parties in a sector will come up with the same solution to a problem without realizing it.

Just because a company develops something in-house, doesn't mean it can't infringe on another party's IP rights. Just because you aren't aware of someone else's IP, it also doesn't mean you aren't infringing.

Even if a business feels confident that it is not infringing, it doesn't mean that someone won't allege that they are, and it is important to be able to defend such allegations.



### **I'm not a tech company, so why do I need to worry about IP?**

IP is valuable in most, if not all, sectors. If it is valuable to your business, then it is probably valuable to your competitors and is worth protecting! The automotive and energy sectors are obvious examples of areas that share the patent or trade secret risk with tech companies.

Food and beverage, agriculture and chemical industries have similar risks. For companies in fashion, homeware and other consumer sectors, trademark, copyright and design are often important.

Many sectors have exposures related to technology even if they aren't a tech company themselves. Simply using technology in a business could result in infringement.



All information in this booklet is correct as of 01 March 2019. We take great pride in our professional expertise on IP insurance and as such would like to state that certain content within this guide is liable to become outdated due to the fast-paced nature of the insurance market.

CFC is a specialist insurance provider and a pioneer in emerging risk. With a track record of disrupting inefficient insurance markets, we use proprietary technology to deliver high-quality products to market faster than the competition while making it easier for brokers to do business. Our broad range of commercial insurance products are purpose-built for today's risks, and we aim to give our customers everything they need in one, easy-to-understand policy.

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