

Facades of Intellectual Property Rights in Insurance Protection

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Abstract: This paper examines the purpose of granting Intellectual Property Rights is fully serving the purpose or not. The concept of granting the IPR is not developed over one day and it is a gradual development that took centuries to come up to this stage. The awareness to protect Intellectual Property Rights is still in the nascent stage and only knows to the highly literate persons. The persons having basic knowledge is also having difficulties in getting intellectual property rights. After beating all the odds and being able to become the owner of the rights, the holder of the rights will be expecting in a comfort zone. In fact, getting the rights itself is not the end of the game and is considered to enjoy the benefits. As we all know the purpose of Intellectual Property Rights is to safeguard against infringements, and the owner of the rights should be able to fight against the infringer legally. Even otherwise the person who is the real owner will file suit against the person who had taken the intellectual property rights wrongfully or dishonestly. Does the rightful owner are ready to safeguard their interest and fight the litigation in the Indian Courts and International Courts is the real question and is there any remedy available to protect and safeguard the Intellectual Property Rights of the person?

Keywords: Intellectual Property Rights, Insurance, IP Insurance coverage, Protection, Litigation

Introduction of Intellectual Property Right Insurance

Insurance is a contract that pledges payment of an amount on the happening of the event insured against (Sinha 2012)¹ Many intellectual property rights transfer agreements will explicate IPR in detail. “Intellectual Property Rights” expedient to all patents, trademarks, trade secrets, trade names, service marks, internet domain names, design rights, database rights, rights in confidential information, rights in the invention, and all other similar rights which may subsist anywhere in the whole world but not limited to, any renewals or extensions thereof.²

Legal nature of IPRs

Intellectual Property Rights are of ‘incorporeal’ nature as they are neither seen nor touched and they are of personal moveable property form. They will attain legal authority with these special rights and remedies are available for breach or infringement. These rights are on par with any other civil rights through a private civil

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¹ Sinha, R. (2001). Insurance Patents: Indian Scenario. *Journal of Intellectual Property Rights*, 17 (3), 152-156.

² SEC.gov., 2007. Intellectual property transfer agreement
< <https://www.sec.gov/Archives/edgar/data/1383312/000119312507072385/dex104.htm>>

action against infringers. Even there are criminal remedies for some of these rights such as trademarks and copyrights against infringers³.

The Cost of IPR Litigation:

The appropriate forum is the civil court and this litigation needs a high technical knowledge and expertise due to expenses incurred either by the claimant or defendant is huge. The claimant should recover as costs and the defendant generally have to bear the expenses. Most of the major industries are having intellectual property rights as the main contributor of litigation.

Industry	Litigation type
Energy	Intellectual Property
Finance	Employment
Health Care	Contracts
Insurance	Employment
Manufacturing	Intellectual Property
Real Estate	Personal Injury
Real/Wholesale	Intellectual Property
Technology/Communications	Intellectual Property

Table1: Most costly types of litigation by industry⁴.

Among the risk management techniques insurance emerged as a successful mode and provide time and again in several sectors. In simple, “Insurance risk is coverage for exposures that have the potential for financial loss. Court has given different interpretations and in Griffin Systems Vs Washburn case is focused on the legal elements necessary for an enforceable contract. In India cost of patent litigation depends on the senior counsel engagement and on average it is estimated from INR 1.2 million to INR 2.5 million (\$22,000 to \$47,000). It is also possible to recover some part of expenses from the losing party if the Court award which was done in “Merck Sharpe and Dohme Corporation v Glenmark” and sometimes costs will also be imposed as done in “F Hoffman La Roche v Cipla Ltd,” RFA by imposing INR 500,000 on the losing party. Dollars spent on some of the important cases of Intellectual Property Rights are DCS Communications v. General Instruments, Honeywell v. Litton, Honeywell v. Minolta, Fonar v. General Electric, Polaroid v. Kodak and Stac Electronics v. Microsoft and the amount involved as expenses are

³ Squirepattonboggs.com. (2013). Civil And Criminal Remedies for Intellectual Property Infringement. [online]

<<https://www.squirepattonboggs.com/-/media/files/insights/publications/2013/11/civil-and-criminal-remedies-for-intellectual-pro/files/civilandcriminalremedies/fileattachment/civilandcriminalremedies.pdf>>

⁴ Fulbright.com. 2005. *Litigation Trends Survey*. [online]
 <<http://www.fulbright.com/mediaroom/files/FJ0536-US-V13.pdf>>

around \$ 2.4 Billion and the average cost for IP cases is \$ 2.8 Million and with 6% Compound annual growth in IP lawsuits in the USA.

Cost of litigation in the USA:

Amount spent on some of the important cases of Intellectual Property Rights are *DCS Communications v. General Instruments*, *Honeywell v. Litton*, *Honeywell v. Minolta*, *Fonar v. General Electric*, *Polaroid v. Kodak* and *Stac Electronics v. Microsoft* and the amount involved as expenses are around \$ 2.4 Billion⁵ and the average cost for IP cases is \$ 2.8 Million and with 6% Compound annual growth in IP lawsuits in the USA⁶. The 10 most litigious counties of Patent Litigation are the USA, UK, Germany, France, Italy, China, Japan, Canada, Netherlands and Australia⁷.

According to a survey conducted by American Intellectual Property Law Association annually, there is a huge amount spent in the litigation in court for patent infringement cases. According to the 2015 report, a table is prepared to mention the median costs of Patent Litigation.

Table 2: Median Costs of Patent Litigation

	Through discovery	Through trial, appeal
<\$ 1 M AT RISK	\$400K	\$600K
\$1M- \$ 10 M AT RISK	\$950K	\$2M
\$10M- \$ 25 M AT RISK	\$1.9M	\$3.1M
>\$ 25 M AT RISK	\$3M	\$5M

The owners of the intellectual property rights who have spent a lot of money in procuring the intellectual property rights have considered intellectual property insurance. Intellectual property insurance is a mode available to minimize the commercial risk to the extent of protecting its IPR's⁸. This IP insurance can be offensive or defensive are even both and will fill the gap that is not taken care of by the "Standard" policies.

Several Big Companies faced problems due to IPR Litigation:

Some of such important organizations are Napster, The Globe, Kodak, Path etc. Napster is an organization that is a pioneer in sharing digital files and songs through the internet ran into legal technical difficulties over matters of copyright infringement resulting in the closing of the company. TheGlobe.com a social networking service that had the first-day proceeds of gains in any IPO subject to history till date was hit by several

⁵ ibid

⁶ Sinha, R. (2001). Insurance Patents: Indian Scenario. *Journal of Intellectual Property Rights*, 17 (3), 152-156.

⁷ Will, D., 2012. IP Litigation in USA – Costs, Duration and Enforceability. [online] Wipo.int. Available at: <<https://www.wipo.int/export/sites/www/amc/en/docs/hillitigation11102012.pdf>> [Accessed 22 April 2021].

⁸ Sople, V., (2012). *Managing Intellectual Property*. 3rd ed. Mumbai: PHI Learning PVT Ltd, p.325

lawsuits, one patent infringement suit, six putative shareholder class-action lawsuits and others that resulted in the closing of the Company in 2008. Even the famous Kodak also had done a “Patent Peace” with super consortium through a deal that discouraged high-profile courtroom battles. The path that was established in 2010 and raised over \$70 million, fined around \$800,000 for securing & storing data from specific underage users without their permission.⁹

Different Scenarios where IP Insurance is necessary

The increase in the grant of Intellectual Property Rights is proportional to the rise in the case of IP Litigation and a graph showing the comparison is available. The main factors based on which the courts’ award are Attorney fees, Interest assessments, Lost profits, Punitive enhancement, Royalties, etc. Intellectual property rights are covered by insurance companies for the pursuing or raising defending claims for infringement, loss of protection or finding of infringement, cost of enforcement, validity or ownership, or fighting for contractual claims with third parties affected by such events. Even there are few litigations funding options that give scope for the cash flow support necessary in handling proceedings or even for dealing against the applications for security for costs¹⁰.

“Is IP legal expenses insurance the same as other types of insurance?”

Similar to the other products where there is a high risk, then obviously there will be a higher premium to be paid by the policyholders. Even most of the insurers avoid underwriting policies as sometimes the legal expenses will be so huge and even there will not be available re-insurers in the market. In IP insurance policies there will be several exclusions and excesses are determined. Generally, excesses will start around £1000. Co-insurance is also a form of “excess” and it will be borne by the insured based on the percentage of the cost of any claim¹¹.

Even though, if there are lawyers who agree for less cost but cost of enforcing patents and litigating should be accounted for from the litigant end only (Handy, 2020). These expenses include deposition costs, travel expenses, filing fees etc., during the initial phase and during the discovery phase the expert’s fee for the validity, necessary infringement and damages will be high and in addition to that local counsel fee is also a must. There is an alternative in the form of a Patent Assertion Entity

⁹ Willings, A., 2019. *34 Tech Brands That Spectacularly Went Bust or Disappeared from Existence*. [online] Pocket-lint.

<<https://www.pocket-lint.com/apps/news/143315-tech-brands-that-spectacularly-went-bust-or-disappeared-from-existence>>

¹⁰ Cipa.org.uk. n.d. Insurance for Intellectual Property | Chartered Institute Of Patent Attorneys. [online] Available at: <<https://www.cipa.org.uk/need-advice/insurance-for-intellectual-property/>> [Accessed 22 March 2021].

¹¹ Gov.uk., 2020. Intellectual Property Insurance. [online] Available at: <<https://www.gov.uk/guidance/intellectual-property-insurance>> [Accessed 23 March 2021].

(PAE) that monetize through litigation against the alleged infringers, licensing or sale to third parties by acquiring the rights from the IPR holders and keeping a percentage as a fee. Even you can directly participate in litigation as Pro Se' if you have the sound technical and legal knowledge, but it has its own disadvantage. In view of the huge financial risk involved, one should be well-equipped to make proper choices in dealing with the infringers.

Proper care of IP in Merges and Acquisitions:

In view of the advancement of technology, many companies' products once flourished will fade in no time with new technology advancement and lead to the bankrupt or get merged or acquired by the other companies. So, the consultants of merger and acquisition will give a lot of importance and priority will be given in their due diligence checklist.

IP Indemnity policy:

If a supplier (Licensor's) intellectual property is sold to a company (Licensee) and then if a third-party claim that the subject property is infringing his rights then, the licensor should indemnify the loss borne by the licensee and this is called intellectual property indemnification (IP Indemnity). Licensee should check the financial capacity of the licensor and whether there is substantial insurance coverage in the form of special IP insurance and insist on the same¹².

A typical IP indemnity coverage includes:

(1) indemnify by the licensor (2) defend the suit by the licensor, and (3) hold the buyer harmless from losses are associated with such certain claims.

Other factors that impact coverage and liability are Limitations of use, Limitations on liability, Geographic limitations, Multiple indemnitors, Remedial measures, Pre-existing threats and Choice of law.

Consequence of non-coverage of IP Insurance

If there is no proper Intellectual property insurance coverage, the general risks faced by the organisations or individuals are:

1. Brings a bad reputation about the products that are accused and brings down the claims.
2. The court litigation puts pushes from a strong position too weak and due to that, there will be a situation where the license will also be sold.
3. The reserves will be used for defending or in pursuit of the rights.

¹² Marell, L., 2020. *Understanding Intellectual Property Indemnity*. [online] Leslie S. Marell. Available at: <<http://marell-lawfirm.com/understanding-intellectual-property-indemnity/>> [Accessed 23 March 2021].