



# Intellectual Property (IP) Insurance

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## **What types of IP insurance are available?**

IP insurance is designed to cover the legal costs of enforcing and/or defending the IP rights covered by the policy. Some policies will also cover issues such as contractual disputes involving the IP rights, unjustified threats actions, and even the costs associated with recalling infringing products.

There are two types of IP insurance: so-called “after the event” (or ATE) insurance and “before the event” (or BTE) insurance. ATE insurance is taken out after the claim to be insured has already commenced. BTE insurance is broadly similar to other types of insurance policy, such as motor or home and contents insurance, for example, and is taken out before any claim has commenced.

## **What IP rights can be protected?**

Policies are available that cover all registered and unregistered IP rights including patents, trade marks and designs.

## **Is IP insurance right for me?**

Not necessarily. Whether IP insurance is appropriate will depend on a variety of factors. In the case of BTE insurance, it will be a question of balancing the cost of the insurance premiums against the risk that you might become involved in legal action. But having IP insurance can allow SMEs in particular to take action when they might not otherwise be able to do so because of their financial position.

Having insured IP rights can act as a deterrent and provide reassurance for investors and licensees because they know that the insured party has the ability to enforce or defend the IP rights.

## **How does BTE insurance work?**

The insured party pays an annual premium and if a qualifying claim arises (for example, if the IP rights are infringed or challenged) the policy will typically cover the legal costs that are reasonably and properly incurred up to the amount insured under the policy.

## **How much does IP insurance cost?**

For BTE insurance the cost of the premiums will depend on the type of cover and the amount of cover required. Factors which the insurer will typically take into consideration include the geographic coverage of the policy, the IP rights being insured, the types of legal action to be covered by the policy and where they can be heard (e.g., in the High Court, the Intellectual Property Enterprise Court (IPEC)), the relevant industry sector in which the insured party operates, and its previous dispute history and patent risk management practices.

A typical premium might be 1.5-5% of the amount insured. A typical excess might be 5-20% of the amount insured. The level of the excess can sometimes be selected by the insured party but will have an impact on the premiums.

As might be expected, if a claim is made it can affect future premiums and the insurer might, in some situations, refuse to renew the policy.

The cost of ATE insurance will be specific to the particular circumstances, but premiums are typically much more expensive (e.g., 40-50% of the amount insured) to reflect the increased risk to the insurer. Sometimes the premium for ATE insurance can be deferred until after the trial in the hope that it can be paid from any damages awarded to the insured party, but in many IP disputes the aim is to obtain an injunction to stop continued infringement rather than to recover substantial damages.

### **Will IP insurance cover all claims?**

Insurers will only cover claims that have a reasonable chance of success. Most policies require an opinion to be obtained from a suitably qualified person, such as a patent attorney or IP barrister, and will only cover the claim if the percentage success is greater than 50% (or sometimes higher, depending on the policy wording). The qualified person does not always need to be independent and the opinion can sometimes be provided by the insured party's own advisor.

BTE insurance will not cover a legal action that has already commenced, or a dispute which the insured was aware of, or should have been aware of, before the policy was taken out.

Other exclusions may apply and will be detailed in the policy.

### **Can the insurer affect how the legal action is conducted?**

Yes. Generally, there will be some loss of control over the conduct of the legal action because the insurer will want to try and mitigate its financial exposure wherever possible.

For example, depending on the policy wording, the consent of the insurer might be needed to conclude a settlement agreement with the other party. The insurer may also require the insured party to use a particular legal representative, e.g., patent attorney, solicitor or IP barrister. This can be problematic if the legal representative selected by the insurer is not familiar with the background to the dispute.

### **How do I obtain IP insurance?**

Advising on insurance is regulated by the Financial Conduct Authority (FCA) and we cannot provide advice on any specific policies. The British Insurance Brokers' Association ([www.biba.org](http://www.biba.org)) will be able to direct you to a specialist IP insurance broker who will help you to select a policy that fits your particular commercial needs.

But please do not hesitate to contact us if you have any general questions.