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OSIGURANJE OD ODGOVORNOSTI ZA POVREDU PRAVA INTELEKTUALNE SVOJINE

STRUČNI RAD

Sažetak

Prava intelektualne svojine predstavljaju prava kojima se štite intelektualna dobra veoma značajna za pojedinca, a još više za privredu i društvo. Osiguranje od odgovornosti za povredu prava intelektualne svojine sve više dobija na važnosti za upravljanje neočekivanim rizicima postavljanja imovinskih zahteva trećih lica, kao i neovlašćene upotrebe prava intelektualne svojine. U ovom radu najpre analiziramo svojstva različitih prava intelektualne svojine i prednosti osiguranja od odgovornosti za povredu tih prava, a zatim šta može da bude predmet osiguranja ako se pođe od prava IS, principa i ugovora o osiguranju s ciljem da se izvrši razgraničenje razmatrane vrste osiguranja od odgovornosti u odnosu na IS. U nastavku se analizira sadržina pokrića u kontekstu specifičnih troškova u situacijama kada se osiguranik nalazi u svojstvu tužene strane, kao i onda kada preduzima mere za zaštitu i ostvarivanje sopstvenog prava IS.

Ključne reči: pravo, intelektualna svojina, osiguranje, troškovi, finansijska šteta

I Uvod

Intelektualna svojina (dalje u tekstu: IS) na različite načine utiče na titulare prava IS i nacionalnu ekonomiju, pogotovo kada se radi o naučno-tehnološkom

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razvoju i unapređivanju pojedinačnog i društvenog blagostanja. Stoga ne čudi što su SAD, početkom osamdesetih godina 20. veka, počele da sve informacije koje se dele na računaru putem interneta sistematski tretiraju kao pretnju po nacionalnu bezbednost SAD zbog eventualne povrede prava IS, čime se opravdavao nadzor i kontrola nad internetom i njegovim budućim razvojem.[3] Osim toga, tehnološki napredak u različitim oblastima takođe otvara različita pitanja nacionalne i međunarodne bezbednosti, a pogotovo u vreme sve bržeg razvoja i primene veštačke inteligencije.

U kontekstu tržišnih društvenih odnosa, ekonomska upotrebljivost IS sve više dobija na značaju. Kao proizvod inovativnog ljudskog duha, IS predstavlja osnovu slobodnog stvaralaštva pojedinca, duhovnog i materijalnog napretka društva. S druge strane, nesavesno prisvajanje i korišćenje tuđih zaštićenih intelektualnih dobara radi sticanja finansijske i druge koristi odavno je sankcionisano na različite načine. Stoga se u literaturi ističe sledeće: „Prava intelektualne svojine i zaštita IS obezbeđuju osnovno pravo zaštite novih ideja, novih procedura, novih proizvoda, a zatim i njihovog komercijalnog širenja bez ikakvog straha od gubitka, piraterije i nepotrebnog upuštanja lica ili preduzeća u sudske sporove."[4] Međutim, institucionalna zaštita prava IS u slučaju neovlašćenog korišćenja, nije moguća bez pokretanja odgovarajućeg postupka. Jedna grupa tih postupaka pokreće se i sprovodi po službenoj dužnosti (na primer, upravni postupak inspekcijskog nadzora i carinski postupak), druga, takođe po službenoj dužnosti (krivični postupak), dok se imovinski i neimovinski zahtevi ostvaruju u parničnom postupku na osnovu tužbe oštećenog lica i drugim merama. Najčešće do neovlašćenog korišćenja tuđeg zaštićenog intelektualnog dobra dolazi nesavesnim i voljnim postupcima štetnika, dok titular prava ostvaruje zaštitu na osnovu saznanja o nedozvoljenom ponašanju. Nesavesnost lica koje povređuje tuđe pravo IS upravo se ogleda u njegovom znanju da je ono što ekonomski koristi tuđe zaštićeno intelektualno dobro te da nije na zakonit način steklo pravo ekonomskog iskorišćavanja nematerijalnog dobra koje pripada drugom licu.[5] Ipak, mogući su slučajevi i nesvesne povrede prava IS, kada je ono posledica slučajnog – nenamernog poklapanja. Svesnost ili nehatnost povrede prava IS ne isključuje mogućnost postavljanja imovinskog zahteva protiv odgovornog lica,[6] ali se od tužioca – titulara IS očekuje da dokaže postojanje neovlašćene radnje odgovornog lica i njom prouzrokovanu štetu na osnovu konkretne uzročno-posledične veze. Zato nije bitno da se, u svim slučajevima, manifestuje namera lica u pripremanju i vršenju radnji kojima se krši IS. Ipak, pre ili tokom parnice, u slučajevima predloga za izricanje

[3] Sanja Jelisavac Trošić, *Dinamika razvoja intelektualne svojine u međunarodnim ekonomskim odnosima*, Institut za međunarodnu politiku i privredu, Beograd, 2023, 115.

[4] S. Jelisavac Trošić, 111.

[5] Vidoje Spasić, *Pravo intelektualne svojine*, Pravni fakultet, Centar za publikacije, Niš, 2024, 4–5; Slobodan Marković, Dušan Popović, *Pravo intelektualne svojine*, Pravni fakultet, Centar za publikacije, Beograd, 2023, 21.

[6] S. Marković, D. Popović, 276.

privremene mere, za pribavljanje ili obezbeđenje dokaza dovoljno je da stranka u postupku učini verovatnim da je njegovo pravo povređeno ili da će biti povređeno.[7]

Tužbom kao procesnim sredstvom pokreće se parnični postupak i zahteva sudska zaštita nekog prava IS. To znači da se ta vrsta zaštite pred sudom ostvaruje samo na osnovu volje titulara tog prava da pokrene tužbu i njome zahteva utvrđivanje povrede zakonom priznatog prava, zabranu radnji kojima se povređuje pravo, naknadu imovinske i neimovinske štete, kao i izricanje privremene mere oduzimanja odnosno isključenja iz prometa proizvoda kojima se povređuje pravo, kao i izricanje drugih mera i zabrana.[8] Autorsko delo predstavlja intelektualno dostignuće pojedinca iz kojeg on ostvaruje sva prava na tom delu, dok neki predmeti zaštite u okviru prava industrijske svojine, kao što su proizvodni postupak, nove mašine, industrijski proizvodi, industrijski dizajn i dr. po pravilu donose bitnu komparativnu prednost privrednog društva u pogledu tržišne i dodatne vrednosti. Jedna od najvažnijih posledica povrede prava IS ogleda se i u izgubljenoj dobiti. U autorskom pravu to je dobit privrednog subjekta ili dohodak građana, a u pravu industrijske svojine prihod koji se mogao upotrebiti za finansiranje daljeg istraživanja i razvoja te time podržati rast privrednog društva.

Iz gorenavedenog proizlazi da svako lice koje obavlja privrednu delatnost u formi preduzetnika ili privrednog društva (mikro, mala, srednja i velika društva) ili neku drugu delatnost u formi nedobitnih organizacija (građanskopravna udruženja, zadužbine, ustanove kulture i sl.) mogu da se pojave u svojstvu tužene strane (pasivno legitimisan) ili u svojstvu tužioca (aktivno legitimisan). Moguće su i druge vrste sporova povodom IS: spor povodom kršenja ugovora o prenosu prava ili prava iskorišćavanja (ugovor o licenci), ugovora o zakupu i zalozi. Poseban finansijski teret za titulara prava IS nastaje ako se njegovo pravo poništi, menja ili je predmet privremene zabrane korišćenja, prodaje stvari ili pružanja usluga.

Dobitne i nedobitne organizacije finansijski teret mogu da pokrivaju samostalno, svojim sredstvima, ali se u inostranoj poslovnoj praksi zaključivanje polise osiguranja pokazalo kao mnogo efektnije rešenje. U ovom radu najpre analiziramo svojstva različitih prava IS koja mogu biti predmet osiguranja i prednosti osiguranja od odgovornosti za povredu prava IS, zatim šta može da bude predmet osiguranja i sadržina pokrića, uzimajući u obzir specifične troškove u situacijama kada se osiguranik nalazi u svojstvu tužene strane, kao i onda kada preduzima mere za zaštitu i ostvarivanje sopstvenog prava IS.

[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.

II Svojstva različitih prava intelektualne svojine i prednosti osiguranja od odgovornosti za povredu tih prava

Polazeći od podele prava intelektualne svojine na autorsko pravo i srodna prava te prava industrijske svojine, u nastavku ćemo se kratko osvrnuti na glavna svojstva koja ta prava moraju ispunjavati kako bi uživala zaštitu i mogla biti predmet osiguranja.

Tako se pod autorskim pravom podrazumeva pravo na autorskom delu koje predstavlja originalnu duhovnu tvorevinu autora, izraženu u određenoj formi, bez obzira na njegovu umetničku, naučnu ili drugu vrednost, njegovu namenu, veličinu, sadržinu i način ispoljavanja, kao i dopuštenost javnog saopštavanja njegove sadržine. Autorskim pravom štite se moralna i imovinska prava, prava autora prema vlasniku primerka autorskog dela, prava autora na posebnu naknadu i pravo na naknadu za davanje na poslugu u skladu sa Zakonom o autorskom i srodnim pravima.[9] U srodna prava spadaju pravo interpretatora, pravo proizvođača fonograma, pravo filmskog producenta (proizvođača videograma), pravo proizvođača emisije i pravo proizvođača baze podataka. Za svako od srodnih prava su, prethodno pomenutim zakonom, propisani posebni uslovi zaštite.

Kada se radi o pravima industrijske svojine, uslovi koje ona treba da ispunjavaju kako bi bila priznata i uživala zaštitu regulisani su posebnim zakonima. Tako se prava autora na industrijski dizajn priznaju ako je on nov i ako ima individualni karakter, a štite se u skladu sa Zakonom o pravnoj zaštiti industrijskog dizajna.[10] U patentnom pravu predmet zaštite mora ispunjavati uslove inovativnosti, inventivnosti i industrijske primenljivosti. Pravna zaštita pronalazaka uređuje se Zakonom o patentima.[11] Za zaštitu nekog znaka žigom neophodno je da je podoban za razlikovanje u prometu robe odnosno usluga jednog od drugog fizičkog ili pravnog lica te da može biti prikazan u Registru žigova na način koji omogućava nadležnim organima i javnosti jasno i precizno utvrđivanje predmeta zaštite. Žig se štiti u skladu sa Zakonom o žigovima.[12] Kada se radi o imenu porekla, onda će predmet zaštite biti geografski naziv zemlje, regiona, ili lokaliteta porekla proizvoda, čiji su kvalitet i posebna svojstva isključivo ili bitno uslovljeni geografskom sredinom na određenom ograničenom području, uključujući prirodne i ljudske faktore. Geografska oznaka je oznaka koja identifikuje određeni proizvod poreklom sa teritorije određene zemlje, regiona ili lokaliteta sa te teritorije, gde se određeni kvalitet, reputacija ili druge karakteristike proizvoda mogu pripisati njegovom geografskom poreklu, pri čemu se oznaka porekla i geografska

[9] *Službeni glasnik RS*, br. 104/2009, 99/2011, 119/2012, 29/2016 - US, 66/2019.

[10] *Službeni glasnik RS*, br. 104/2009, 45/2015, 44/2018 – dr. zakon.

[11] *Službeni glasnik RS*, br. 99/2011, 113/2017 - dr. zakon, 95/2018, 66/2019, 123/2021.

[12] *Službeni glasnik RS*, br. 6/2020.

oznaka štite u skladu sa Zakonom o oznakama geografskog porekla.[13] Predmet zaštite topografije predstavlja originalni, inovativni rezultat intelektualnog napora stvaraoca koji nije opštepoznat u industriji poluprovodničkih proizvoda, kao i deo zaštićene topografije koji se može samostalno upotrebljavati, kao i uređaj (glavna stvar) što obuhvata poluprovodnički proizvod koji u sebi sadrži zaštićenu topografiju, ako se takav poluprovodnički proizvod ne može odvojiti od glavne stvari bez njenog oštećenja ili uništenja. Predmet i uslovi zaštite ostvaruju se prema Zakonu o zaštiti poluprovodničkih proizvoda.[14] Pravo oplemenjivača biljne sorte dodeljuje se ako je sorta nova, različita, uniformna, stabilna te ako ispunjava uslove za davanje imena sorte, u skladu sa odredbama Zakona o zaštiti prava oplemenjivača biljnih sorti.[15] O poslovnoj tajni kao predmetu osiguranja od odgovornosti za povredu prava IS više reči će biti u narednom poglavlju.

U vezi sa osiguranjem od odgovornosti od povrede prava IS treba imati u vidu autonomiju ugovaranja koja omogućava osiguravaču da svojim uslovima osiguranja odredi obim pokrića. To podrazumeva i njegovo pravo da iz osiguranja potpuno isključi ili ograniči svoju obavezu za odštetne zahteve za pojedina prava IS. Osiguranje od odgovornosti zbog povrede prava IS donosi višestruke prednosti. Po relativno skromnom iznosu premije osiguranja dobija potencijal finansijske zaštite od eventualnih troškova zbog povrede prava IS trećeg lica. Isto tako, osiguranje može da pokriva i troškove pokretanja protivtužbe, ali i tužbe radi zaštite sopstvenog prava IS. Na osiguraniku je da prepozna i razume sastavne delove svoje delatnosti i da, radi svake sigurnosti, osiguranjem finansijski zaštiti svoje interese u vezi s pravima IS. Osim pomenutog, ako se ugovori, osiguranjem se mogu nadoknaditi troškovi pribavljanja stručnog mišljenja o verovatnoći uspešnosti odbrane od odštetnih zahteva zbog povrede prava IS ili tužbe radi zaštite sopstvenog prava IS, troškovi advokatskog i drugog zastupanja, veštaka i odbrane pred sudom ili arbitražom, iznosi po presudama u slučaju izgubljenog spora itd.[16] Osim navedenog, u slučajevima sumnje da predstoji ili postoji verovatnoća da će neko treće lice započeti s povredom njegovog prava IS, titular može preduzeti odgovarajuće mere istrage i analize.[17] Troškove takvih mera mogu se pokriti ovim osiguranjem. Naime, troškove koje je imao titular IS, koji je istovremeno i osiguranik u odnosu osiguranja, osiguravač nadoknađuje u punom iznosu u okviru sume osiguranja. Jedini uslov je da su oni učinjeni razumno i uz saglasnost osiguravača.[18]

[13] *Službeni glasnik RS*, br. 18/2010, 44/2018 - dr. zakon.
[14] *Službeni glasnik RS*, br. 55/2013, 66/2019.
[15] *Službeni glasnik RS*, br. 41/2009, 88/2011.
[16] Marsh Commercial, Protecting your big ideas with intellectual property insurance, 28 August 2024, dostupno na adresi: *https://www.marshcommercial.co.uk/articles/intellectual-property-insurance.html#:~:text=IP%20insurance%20can%20help%20protect,copying%20or%20reproducing%20their%20work,* 12. 2. 2025.
[17] Arch Insurance, A Guide to Intellectual Property Insurance, Arch Capital Group Ltd. October 22, 2024, dostupno na adresi: *https://insurance.archgroup.com/a-guide-to-intellectual-property-insurance/,* 12. 2. 2025.
[18] Slobodan Jovanović, *Pravo osiguranja*, Pravni fakultet za privredu i pravosuđe, Novi Sad, 2016, 167.

III Šta može biti predmet osiguranja?

Predmet osiguranja opredeljuje se u skladu s relevantnim propisima o autorskom pravu i srodnim pravima, patentima, žigovima, pravnoj zaštiti industrijskog dizajna, geografskim oznakama porekla, topografiji poluprovodničkih proizvoda i zaštiti poslovne tajne te odredbama zakona i drugih propisa kojima se uređuje ugovor o osiguranju, a naročito opštim i posebnim uslovima osiguranja.

Pođe li se od jednog od principa ugovornog prava po kojem predmet obaveze mora biti moguć, dopušten, određen ili odrediv (ZOO, čl. 47), predmet obaveze osiguravača mora biti u skladu s javnim poretkom, prinudnim propisima i dobrim običajima. Zbog toga i pravni osnov obaveze osiguravača zavisi od ispunjenosti uslova, obaveza i zahteva propisanih zakonom ili onih što proizlaze iz dobrih običaja. U kontekstu teme ovog rada, zakone i podzakonske propise možemo svrstati u dve grupe: (1) zakone koji regulišu pojedine oblike prava IS i (2) zakone o pravu osiguranja – o ugovoru o osiguranju i o nadzoru nad delatnosti osiguranja.

Uobičajeno je da se predmet osiguranja vezuje za nastanak neke okolnosti, incidenta, događaja, činjenice, problema, radnje, propusta ili stanja stvari koji bi mogao dovesti do pokretanja tužbe ili postavljanja odštetnog zahteva protiv osiguranika ili, obrnuto, u slučaju kada osiguranik preduzima radnje radi zaštite svog prava IS prema trećem licu.

Predmet osiguranja može da bude isključivo odgovornost po osnovu prava IS koja ispunjava uslove propisane zakonom i uživa zakonsku zaštitu. Uslovi koje mora ispunjavati pravo IS zavise od vrste predmeta tog prava. Osim onih pomenutih u prethodnom poglavlju, podrazumeva se da predmeti zaštite prava IS moraju da ispunjavaju i druge zakonom propisane uslove. Takav zaključak proizlazi iz nekoliko pravila specifičnih za ugovor o osiguranju izvedenih iz opštih pravila ugovornog prava. Tako, pravo iz ugovora o osiguranju mogu posedovati samo ona lica koja su u času nastanka štete imala materijalni interes da se osigurani slučaj ne dogodi. To pravilo proizlazi iz činjenice da nije normalno da neko želi da pretrpi gubitak, jer bi u suprotnom to značilo odstupanje od regularnosti osiguranja i najčešće ukazivalo na osiguranikovu prevaru.[19] Dalje, iz gore istaknutog pravila o pravima IS očigledno je da prava kojima zakonom nije priznata pripadnost IS nekom licu, ne može biti predmet osiguranja. Prema opštim pravilima ugovornog prava, da bi se moglo zaključiti punovažno osiguranje, interes mora da bude dozvoljen zakonom, moralom i javnim poretkom društva.[20] Zakonitost prava IS dokazuje se rešenjem nadležnog organa o upisu u odgovarajući registar. To može biti rešenje o registraciji prava IS ili rešenje o upisu raspolaganja postojećim pravom (prenos, licenca, zaloga). U tom smislu treba razumeti i da se osiguranjem pokriva zloupotreba odnosno neovlašćeno iskorišćavanje prava IS osiguranika koje je zakonom priznato.

[19] S. Jovanović, 95.

[20] *Ibid.*, 89.

S druge strane, osiguranjem se ne pokriva nijedan slučaj, stanje, okolnost ili događaj za pokretanje tužbe povodom upotrebe prava IS na osnovu zakonom priznatih ograničenja tih prava.[21]

Predmet osiguranja može da bude samo ono što izričito nije isključeno iz pokrića. Uslovima osiguranja, koji predstavljaju odredbe ugovora o osiguranju, utvrđuje se definicija predmeta osiguranja čiji se gubitak, šteta ili troškovi u vezi s njim nadoknađuju iz osiguranja. U tome leži bitna razliku u odnosu na prava intelektualne svojine koja su šireg obuhvata od obima osiguravajućeg pokrića. Na primer, uslovima osiguranja mogu biti izričito isključeni odštetni zahtevi protiv zaposlenih zbog povrede poslovne tajne i odgovornost poslodavca prema zaposlenima zbog neosnovanog odštetnog zahteva zbog povrede poslovne tajne. S druge strane, osiguranje može pokrivati široku lepezu troškova zbog rizika izvedenih iz povrede prava IS. To mogu biti sporovi povodom povrede prava na privatnost, podataka o ličnosti, zatim troškovi upravljanja javnim odnosima itd. Jedna od karakteristika osiguranja od odgovornosti zbog povrede prava IS je upravo osiguranje finansijske štete u vidu nadoknade specifičnih troškova koji padnu na teret osiguranika.

Pored brojnih isključenih rizika, troškova i naknada, koje u ovom radu nećemo navoditi, lista isključenih rizika obuhvata druge vrste odgovornosti koje su ili mogu biti komplementarne ovom predmetu osiguranja. To su: odgovornost za proizvod („produktna odgovornost“) i eventualno druge vrste odgovornosti. Radi se o strogom razdvajanju odgovornosti koje bi mogle nastati iz raznih pravnih osnova, a sve radi toga da osiguravač može što efikasnije da kontroliše i prati pojedinačne tipove osiguranja. Osim toga, takva pravna tehnika sastavljanja uslova osiguranja obezbeđuje bolji pregled izvora opasnosti i potencijalnih obaveza osiguravača.

Predmet osiguranja od odgovornosti za povredu prava IS ne poklapa se sa osiguranjem od opšte odgovornosti iz delatnosti. Osiguranje od odgovornosti za povredu prava IS sprovodi se kao oblik osiguranja od odgovornosti, i to opšte odgovornosti iz delatnosti ili profesionalne odgovornosti. Predmet osiguranja od odgovornosti za povredu prava IS razlikuje se od osiguranja od opšte odgovornosti iz delatnosti u bar dva sledeća svojstva: prvo, u osiguranju od opšte odgovornosti iz delatnosti predmet osiguranja je građansko-pravna odgovornost osiguranika za prouzrokovanu štetu usled smrti, povrede tela ili zdravlja, odnosno oštećenja ili uništenja stvari trećih lica,[22] dok kod, u ovom radu, razmatranog tipa osiguranja to nije slučaj. Osiguranje od odgovornosti za povredu prava IS pokriva isključivo finansijsku štetu u vezi s tim odštetnim zahtevima i relevantnim troškovima. Drugo, osiguranje od opšte odgovornosti ne pokriva profesionalnu odgovornost koja nastane usled grešaka i propusta u obavljanju poslova što spadaju u profesionalnu delatnost (advokati, javni beležnici, posrednici u osiguranju itd.) Osiguranje od odgovornosti

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

[22] S. Jovanović, 289.

za povredu prava IS može da bude zaključeno kao osiguranje od profesionalne odgovornosti jer je predmet osiguranja vezan isključivo za neskrivljenu grešku ili nemar u obavljanju specifične delatnosti. Radi se o tzv. lakoj (običnoj) nepažnji (*culpa levissima*), jer gruba nepažnja (*culpa lata*) profesionalca u obavljanju svoje delatnosti nije prihvatljiva. Laki oblici nepažnje redovno će biti pokriveni osiguranjem, dok se gruba nepažnja nekada izjednačava s namerom, a nekada to nije slučaj.[23] Jednostavno, u obavljanju profesionalne delatnosti strana u obligacionom odnosu dužna je da u izvršavanju obaveza postupa s povećanom pažnjom, prema pravilima struke i običajima – tj. pažnjom dobrog stručnjaka. Od navedenog pravila, u srpskom pravu postoji, Zakonom o obligacionim odnosima propisan, izuzetak po kojem je osiguravač dužan da naknadi svaku štetu prouzrokovanu od nekog lica za čije postupke osiguranik odgovara po ma kom osnovu, bez obzira na to da li je šteta prouzrokovana nepažnjom ili namerno (ZOO, čl. 929, st. 3).

Standardna praksa osiguranja, koja je usklađena sa zakonskim pravilima, polazi od toga da se samo štetni događaji nastali bez namere osiguranika mogu pripisati njegovom nemaru, propustu, pogrešnoj izjavi volje ili lažnom predstavljanju bitnih činjenica prilikom zaključenja ugovora o osiguranju. Isto pravilo važi i u osiguranju od povrede prava IS. Osiguranjem je pokrivena isključivo nenamerna povreda prava IS i pogotovo ugovora o licenci.

Predmet osiguranja od odgovornosti za povredu **prava IS može biti faktički odnos u vidu poslovne tajne.** Poslovna tajna (*know-how*) u širem smislu odnosi se na bilo koju nejavnu informaciju koju pojedinci ili kompanije steknu u vezi s načinom ili lakšom upotrebom nečega u poslu. (Pojam je izuzetno širok i njegova priroda zavisi od znanja o kome je reč.) Uobičajeno, poslovna tajna opisuje znanje koje povećava koristi ili smanjuje teret korišćenja nečega. Ona može sadržati opis kreiranja proizvoda ili strateške karakteristike privrednog društva kao što je upravljanje poslovanjem.[24], [25] Prema prof. Spasiću, suštinu *know-how* u najvećoj meri čini tehnički aspekt, dok je poslovni sporednog karaktera.[26] Koliko su pronalasci i inovacije

[23] *Ibidem*. 92.

[24] Na primer: (1) Američko društvo za osiguranje *Lincoln National Life Insurance Company* nosilac je patenta naslovljenog kao „Metod i aparat za isplatu penzijskih prihoda", što je potvrđeno presudom Saveznog apelacionog suda SAD juna 2010. godine (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, dostupno na adresi: https://caselaw.findlaw.com/court/us-federal-circuit/1528628.html, 12. 2. 2025); (2) Skupovi podataka visoke rezolucije o odštetnim zahtevima su intelektualna svojina nemačke delatnosti osiguranja kroz poslovnu tajnu dugi niz godina. Zato ti podaci nisu dostupni besplatno javnosti od strane delatnosti osiguranja, što ne isključuje njihovo davanje u svrhu konkretnih istraživačkih projekata (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, dostupno na adresi: *https://www.law.cornell.edu/wex/know-how*, 12. 2. 2025.

[26] V. Spasić, 103.

važni, govori i podatak da su SAD i Japan, u godinama stagnacije privrednog rasta, patentima, *know-how*-ima i digitalnom ekonomijom uspele da pokrenu posustali privredni razvoj.[27]

U analiziranim izvorima pravne teorije o pravu IS, poslovna tajna predstavlja faktički odnos u sklopu delatnosti privrednog društva, zbog čega ne spada u pravo IS,[28] dok drugo mišljenje poslovnu tajnu svrstava u pravo srodno patentnom pravu.[29] Prva grupa autora takođe se približava prethodno navedenom drugom mišljenju, jer smatraju da pronalasci treba da se štite patentom, a prateća tehnička znanja koja ne ispunjavaju uslove patentabilnosti, da se štite kao poslovna tajna.[30]

U pravu osiguranja pomenuto razlikovanje je bez značaja jer je na osiguravaču da po principu autonomije volje u obligacionom pravu odluči da li će pružati pokriće i za povredu poslovne tajne – slučaj „nezakonitog pribavljanja, korišćenja i otkrivanja tuđe poslovne tajne", kako je definisano srpskim Zakonom o zaštiti poslovne tajne iz 2021. godine (dalje u tekstu: ZZPT)[31] i Zakonom o privrednim društvima.[32] Ipak, do povrede poslovne tajne može doći kršenjem zakona ili dobrih poslovnih običaja u koje spada i povreda obaveza iz sporazuma o poverljivosti ili drugih ugovora. Praktično podnošenjem odštetnog ili drugog zahteva povodom neovlašćenog korišćenja tuđe poslovne tajne nastaje osigurani slučaj. Ipak, osiguranik ili oštećeno lice koje postavlja imovinski zahtev prema osiguraniku treba da dokaže da se zaista radi o poslovnoj tajni. Pošto poslovna tajna nije predmet registracije u upravnom postupku, njeno postojanje zainteresovano lice – privredni subjekt mora dokazati na način propisan ZZPT i Zakonom o privrednim društvima (čl. 72–74). To može da se učini prezentacijom: internog akta o rukovanju poslovnom tajnom ili dokumenta sa oznakom „poslovna tajna" ili sličnom oznakom. U svakom slučaju, da li će sporno ponašanje predstavljati povredu poslovne tajne, zavisiće od toga da li podatak ispunjava zakonom propisane uslove da bi mogao biti smatran poslovnom tajnom. Sledstveno tome, podatak čije saopštavanje trećem licu ne bi moglo naneti štetu društvu, kao i podatak koji nema ili ne može imati ekonomsku vrednost da bi se njegovim korišćenjem ili saopštavanjem mogla ostvariti ekonomska korist i koji nije od strane privrednog društva zaštićen odgovarajućim merama u cilju čuvanja njegove tajnosti, ne može se smatrati poslovnom tajnom. Tako na primer, kada pronalazak ne ispunjava uslov industrijske (privredne) primenljivosti – patentabilnosti, onda ni poslovna tajna u vezi s njim nije podobna za sticanje bitne ekonomske koristi ili prednosti. Ovo zbog toga što je „korisnost informacije suštinski razlog što ona ima

[27] S. Jelisavac Trošić, 82.
[28] S. Marković, D. Popović, 309.
[29] V. Spasić, 99–107.
[30] S. Marković, D. Popović, 311.
[31] *Službeni glasnik RS*, br. 53/2021.
[32] *Službeni glasnik RS*, br. 36/2011, 99/2011, 83/2014 – dr. zakon, 5/2015, 44/2018, 95/2018, 91/2019, 109/2021, 19/2025.

svojstvo poslovne tajne".[33] Drugim rečima, „uslov korisnosti je zakonski uslov pravne zaštite pronalaska pa se po ekstenzivnoj analogiji proširuje i na know-how".[34] U tom smislu, licu koje se smatra oštećenim nije ni od kakve pomoći što je neki podatak proglasio poslovnom tajnom ako ovaj nije podoban da prouzrokuje štetu ili doprinese ekonomskoj koristi ili prednosti na tržištu. Time se stvara zakonska prezumpcija da su ekonomski bezvredni podaci oni koji nisu zaštićeni poslovnom tajnom. Ipak, treba imati u vidu da se radi o tvrdnji relativnog značaja, jer postoje brojni podaci koji su važni u privrednom društvu, ali oni nisu takve prirode da bi ih trebalo štiti poslovnom tajnom.

IV Šta je pokriveno osiguranjem

Iako se u ovom radu razmatrana vrsta osiguranja, prema opšteprihvaćenoj podeli osiguranja, svrstava u osiguranje imovine, ono prvenstveno pokriva različite troškove nastale usled odgovornosti za povredu nekog od prava IS.[35] Kao što smo ranije naveli, osigurana naknada pokriva isključivo „čisto" finansijsku štetu nastalu iz odštetnih zahteva zbog povrede prava IS i pravne odbrane od njih. S druge strane, ta vrsta osiguranja podrazumeva finansijsku zaštitu u slučajevima povrede IS, konkretnije, moralno-pravnih i imovinskopravnih ovlašćenja titulara prava IS.[36] Tako bismo za čisto finansijsku štetu, koja se pokriva ovom vrstom osiguranja, mogli reći da ona predstavlja materijalni gubitak koji je osiguranik prouzrokovao na teret trećeg lica činjenjem ili propustom, bez ugrožavanja njegovih stvari ili zdravlja. Po tome se ova vrsta osiguranja razlikuje od tradicionalnog osiguranja stvari i osiguranja lica od nezgode. Imajući prethodno rečeno u vidu, razlikujemo sledeće vrste pokrića:

(1) Naknada troškova zbog povrede tuđeg prava IS. Povreda prava IS pruža pokriće za troškove odbrane: advokatske, savetničke honorare, troškove i honorare veštaka ako su angažovani, sudske takse itd. Osim pomenutih troškova, osiguranom naknadom obuhvaćeno je i pokrivanje štete koju osiguranik biva dužan da plati trećem oštećenom licu na osnovu sporazuma o poravnanju, pravosnažne presude suda ili arbitraže. Tu spada i mogućnost nadoknade troškova pokretanja protivtužbe. Međutim, težnja osiguravača je da ima potpun uvid u sopstvene poslovne izloženosti, što obuhvata sve događaje i radnje koje osiguranik planira da preduzme, pa je prethodno pribavljena saglasnost na njih od osiguravača preduslov za isplatu osigurane naknade.[37]

(2) Naknada troškova odbrane sopstvenog prava IS. Nije redak slučaj da osiguraniku neko treće lice osporava vlasništvo nad pravom IS. Treće lice može

[33] S. Marković, D. Popović, 310.
[34] V. Spasić, 103.
[35] S. Jovanović, 291.
[36] V. Spasić, 65; S. Marković, D. Popović, 263.
[37] S. Jovanović, 40.

da bude konkurent na tržištu ili zaposlena lica i saradnici osiguranika. Naknađuju se troškovi usmereni na odbranu od zahteva za poništavanje ili opoziv prava IS zbog ranije registrovanog prava ili zbog toga što postoji prethodno stanje tehnike zbog kojeg postoji njegovo pravo da slobodno prodaje svoje proizvode ili pruža usluge.[38]

(3) Naknada troškova usled pokretanja tužbe radi izvršenja ugovora ili naknade za povredu prava IS. Ovo je obrnuta vrsta pokrića u osiguranju od odgovornosti zbog povrede prava IS, jer se radi o obavezi osiguravača da naknadi troškove ostvarivanja ugovornih prava osiguranika od trećeg lica – osiguranikove ugovorne strane. Ovo pokriće omogućava osiguraniku da pokrene odgovarajući postupak kako bi naterao njegovu ugovornu stranu da ispuni svoje ugovorne obaveze ili da plati naknadu štete zbog povrede ugovora u vezi s pitanjima IS. Pokriće bi se takođe moglo aktivirati zbog neplaćanja tantijema ili viška sume iznad određenog limita koji je trebalo da pripadne osiguraniku, povrede ugovorenih odredbi o teritorijalnim ograničenjima ili tehničkim oblastima primene itd.[39]

(4) Gubici zbog prekida rada nastali povredom prava IS. Prekid poslovanja je oblast odštetnog prava u razvoju u svetu osiguranja od odgovornosti zbog povrede prava IS. Nemogućnost ostvarenja planirane zarade dovodi do smanjenja prihoda i nepovoljnog rezultata poslovanja koje se može znatno sprečiti putem osiguranja od gubitaka zbog prekida rada.[40] Kao i u osiguranju imovine od požarnih rizika, reč je o dopunskom obliku pokrića koje se posebno ugovara i plaća dodatna premija, mada je moguće da ono bude obuhvaćeno već u osnovnom pokriću, što zavisi od ponude na tržištu osiguranja. Štetom usled prekida rada smatra se ona koja je nastala dejstvom osiguranog rizika iz osnovnog osiguranja,[41] tj. vrste osiguranja koje je tema u ovom radu. Ovo pokriće osmišljeno je radi proširenja obima osiguranja kako bi se osiguranik zaštitio od finansijskih gubitaka koje može da pretrpi ako mu se zabrani da prodaje svoje proizvode ili pruža usluge ili ako bi morao prestati da koristi određene proizvodne procese. Osiguranje gubitaka zbog prekida rada bi u ovoj vrsti osiguranja naročito bilo pogodno u slučaju kada protiv privrednog društva – osiguranika bude doneta presuda kojom se utvrđuje da njegovi proizvodi povređuju patente trećeg lica i izrekne zabrana nastavka upotrebe ili prodaje proizvoda koji povređuju pravo IS oštećenog lica.

[38] Arch Insurance, *A Guide to Intellectual Property Insurance*, Arch Capital Group Ltd. October 22, 2024, dostupno na adresi: *https://insurance.archgroup.com/a-guide-to-intellectual-property-insurance/*, 12. 2. 2025.

[39] Arch Insurance, *A Guide to Intellectual Property Insurance*, Arch Capital Group Ltd. October 22, 2024, dostupno na adresi: *https://insurance.archgroup.com/a-guide-to-intellectual-property-insurance/*, 12. 2. 2025.

[40] S. Jovanović, 271.

[41] *Ibidem*, 277.

V Zaključak

Intelektualna svojina na različite načine utiče na dobitne (privredni subjekti) i nedobitne organizacije (građanskopravna udruženja, zadužbine, ustanove kulture i sl.), a može i da značajno doprinosi unapređenju naučno-tehnološkog razvoja i podizanju materijalnog blagostanja. Svako lice koje iskorišćava neko pravo IS može da se pojavi u svojstvu tužene strane ili u svojstvu tužioca. Finansijski teret nastaje ako se njegovo pravo IS poništi, menja ili je predmet privremene zabrane korišćenja, prodaje stvari ili pružanja usluga.

Svojstva različitih prava intelektualne svojine proizlaze iz njihovih specifičnosti i zakonom propisanih uslova za njihovo priznavanje i zaštitu. Zakonske definicije i uslovi za sva prava IS pružaju institucionalni okvir pravne izvesnosti u pravnom prometu u kojem se ta prava koriste na zakonit način.

Kada se radi o osiguranju od odgovornosti zbog povrede prava IS, treba imati u vidu da je osiguranje, u mnogim slučajevima, adhezione prirode, što znači da osiguravač svojim uslovima osiguranja određuje obim pokrića. Ipak, osiguranje od odgovornosti zbog povrede prava IS donosi višestruke prednosti. To su: mali iznos premije za koju se dobija mnogo veća suma osigurane naknade, mogućnost osiguranja troškova pokretanja protivtužbe i tužbe radi zaštite sopstvenog prava IS, mogućnost osiguranja naknade troškova pribavljanja stručnog mišljenja o verovatnoći uspešnosti odbrane od odštetnih zahteva ili tužbe radi zaštite sopstvenog prava IS, troškovi advokatskog i drugog zastupanja, veštaka i odbrane pred sudom ili abritražom, iznosi po presudama u slučaju izgubljenog spora, troškovi istrage i analize kada postoji sumnja da će treće lice započeti sa povredom prava IS itd.

Osiguravajuće pokriće troškova koje mora da snosi osiguranik na osnovu presude suda ili arbitraže posle postupka koji je pokrenulo oštećeno lice biće obaveza osiguravača, ali ako osiguranik planira da sam napravi troškove u slučaju pokretanja tužbe za zaštitu svog prava IS, protivtužbe ili priznavanja obaveze na osnovu sporazuma o poravnanju, njihova naknada će biti uslovljena prethodnom saglasnošću osiguravača na pomenute pravne radnje.

U osiguranju od odgovornosti zbog povrede prava IS, kao i u drugim vrstama osiguranja, moguće je proširiti pokriće i na neke druge troškove kao što su oni koji su u vezi sa prekidom rada zbog povrede prava IS ili gubitkom spora posle odluke suda konačnog stepena odlučivanja.

Punovažnost ugovora o osiguranju i obaveze osiguravača uslovljene su prethodnom registracijom prava intelektualne svojine. To znači da se iz osiguravajućeg pokrića isključena sva prava IS koja nisu registrovana. Ipak, ovde treba imati u vidu da osiguravači prihvataju u osiguranje i autorska i prava srodna autorskim iako se ona ne registruju. Obaveza osiguravača takođe mora biti određena i/ili odrediva i dopuštena javnim poretkom, prinudnim propisima i dobrim običajima, pa zato osiguravač ne može punovažno da zaključuje ugovore o osiguranju materijalnih interesa na pravima IS koja nisu zakonom priznata.

Takođe su uočljive i razlike između osiguranja od opšte odgovornosti iz delatnosti i osiguranja od odgovornosti za povredu prava intelektualne svojine. Zbog toga je osiguranje od odgovornosti za povredu prava intelektualne svojine specifično i zahteva specijalizovana znanja u zaključivanju i administriranju takvog ugovora o osiguranju.

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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.

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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

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[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

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[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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