

# ***Intellectual Property Rights and Commercial Issues in the Indian Context***

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## **ABSTRACT**

There is increasing awareness of intellectual property rights, both commercially and legally. Owners and creators of intellectual property rights will usually seek to exploit those rights for their economic benefit.

India has moved from being an agricultural economy to a knowledge economy in past decade and a half. The Indian doctors, scientists and engineers have created their mark across the globe and India. This is one of the main reasons why India is at the forefront of IT Outsourcing and off-shoring revolution too. This shows that Indians are not bad when it comes to knowledge, talent and skills. Intellectual property rights are provided as a protection and incentive to the creators, whose creativity could otherwise be freely used by others. The society expects the creators to make their work available in the market where this work can be bought and sold.

And for this reason, certain limits are built in the rights granted to the creator, in terms of time and space, by the state. Rights are granted for fixed period of time and protect only the fixation of creativity in material form.

A knowledge-based product requires protection so that the investments made by companies in Research and Development may be justified. It has been seen that developing countries, including India, provide a very weak intellectual property protection.

It is less known by the people due to lack of awareness on different aspects of IPR. It is essential to know about the laws, rules and regulations under IPR. Governments of different countries have taken up various strategies to make their citizens aware of it.

## **Key words:**

Intellectual Property Rights, copyright and related rights, trademarks, geographical indications, industrial designs, patents, integrated circuit layout-designs and protection of undisclosed information.

## **1. INTRODUCTION:**

Intellectual property plays an important role in an increasingly broad range of areas, ranging from the Internet to health care to nearly all aspects of science and technology and literature and the arts. Understanding the role of intellectual property in these areas many of them still emerging often requires significant new research and study. To promote informed discussion of the intellectual property, education and awareness in this field is important.

Today, possession of land, labour and capital are just not enough for a country to succeed. Creativity and innovation are the new drivers of the world economy. The policies adopted by a country shall determine the nations well being and further as to how it is developing the trapped intellectual capital. An effective intellectual

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property system is the foundation of such a strategy. Within knowledge-based, innovation-driven economies, the intellectual property system is a dynamic tool for wealth creation providing an incentive for enterprises and individuals to create and innovate; a fertile setting for the development of, and trade in, intellectual assets; and a stable environment for domestic and foreign investment.

## **2. IMPORTANCE OF INTELLECTUAL PROPERTY RIGHTS (IPR)**

Intellectual property protection is the key factor for economic growth and advancement in the high technology sector. They are good for business, benefit the public at large and act as catalysts for technical progress. Whether IPRs are a good or bad thing, the developed world has come to an accommodation with them over a long period. Even if their disadvantages sometimes outweigh their advantages, by and large the developed world has the national economic strength and established legal mechanisms to overcome the problems so caused. Insofar as their benefits outweigh their disadvantages, the developed world has the wealth and infrastructure to take advantage of the opportunities provided. It is likely that neither of these holds true for developing and least developed countries. (Extracts from Report on Commission on IPR London September 2002).

There is increasing awareness of intellectual property rights, both commercially (e.g. through the recognition that innovation and design can create specific demand, influence consumer preference and generate ongoing product/brand loyalty) and legally (including the ability to secure monopoly use rights for inventions or unique works, and through registration and enforcement of statutory rights).

Owners and creators of intellectual property rights will usually seek to exploit those rights for their economic benefit. This can include immediate and ongoing benefits, such as trading or license revenues, as well as ultimate benefits (trade sale, IPO or otherwise) on exit.

Steps taken in the formation and structuring of the business will often be essential to realizing both immediate and ultimate benefits: the terms of intellectual property licenses granted, for example.

This paper discusses some important considerations when commercializing intellectual property.

### **Identify and secure the intellectual property**

The first step - and it is a critical one - is to identify the IP that will (or might) arise in the course of the venture, and to assess how that IP is to be defined and protected, used for commercial gain, and then (in most cases) transferred - whether by sale or license - for gain on exit.

Most ventures will own copyright and trade marks, ventures giving rise to inventive business solutions might well have patentable rights and specific protection is available for innovative functional designs under the Registered Designs Act.

The IP to be 'captured' will often include valuable know-how accumulated within the venture, and proprietary information (ie. information that the venture is entitled to regard as its property, generally being secret and the product of the venture's work effort) which can include customer lists, operating manuals and the like.

Future improvements to the IP can arise from a variety of sources, including licensees/franchisees, manufacturers, contractors and employees. Business contracts should, where appropriate, secure rights to own/use these improvements.

Businesses choosing not to secure their IP at the outset risk losing any possible monopoly rights through public disclosure, and have greatly diminished ability to protect the IP in the event of challenge or misappropriation. Whilst this may not greatly alter the operating profits in the venture (at least initially), the loss of proprietary control over the IP will be felt when attempting to exit the venture, to form collaborative arrangements (including raising capital), or even in the defection of key employees or contractors.

### **Ownership structure**

It is similarly important to get ownership and trading structures 'right' from day one. For example, the costs incurred in seeking to recover/preserve key IP when post-trading disputes arise with business partners (including opportunistic profiteering) will greatly exceed the set-up costs foregone. Indeed, proper structures can prevent the motivation for such disputes arising at all.

The separation of IP ownership from trading risks is highly desirable, where possible. Tax efficiency is also an

important objective, particularly in the case of registered IP rights.

## **Commercial Strategy**

The strategy for making commercial gain from IP will vary depending on the specific circumstances, including:

- The product/industry type;
- Market dynamics and entry/exit barriers;
- Capital requirements and sources;
- Risk appetite;
- Immediate/long term objectives, notably exit strategy;
- Revenue streams and costs;
- Tax implications (including transfer pricing for cross-border ventures);

Depending on the particular venture, a strategic evaluation may lead to differing structures (e.g. licensing, franchising, joint venture, partnership).

**In most commercial IP structures, key issues between business partners (apart from monetary commitments) will include:**

- (a) Exclusivity;
- (b) Territory;
- (c) Marketing (e.g. the duty to generate demand/turnover in the territory);
- (d) Financial reporting and data availability (including audit rights);
- (e) Duration and termination;
- (f) IP registration/filing/protection obligations and costs;
- (g) Performance obligations;
- (h) IP warranties and indemnities (if any);
- (i) Quality standards;
- (j) Representations to consumers;
- (k) Relative contributions to the business model;

Careful consideration should be given the support provided to licensees, to ensure that there are real incentives to achieve objectives set. Having the business structure and documentation well prepared is essential, but it is also vital to ensure that licensees are motivated and do not become disenfranchised or disinterested in the venture.

## **The various tools of IPR that are used to protect innovations are:**

- **Copyright:** is concerned with protection of creative works that are musical, literary, artistic, lectures, plays, art reproductions, models, photographs, computer software, etc.
- **Patent:** pertains to pragmatic innovations and aims to protect inventions that are novel, non-obvious and useful.
- **Trademark:** is related to commercial symbols and concern to protect distinctive marks such as words/signs including personal names, letters, numerals, figurative elements (logos); devices; visually perceptible two or three dimensional signs/shapes or their combinations; audible signs (sound marks) e.g. the cry of an animal or laughing sound of a baby; olfactory marks (smell marks), use of certain fragrance.
- **Industrial Designs:** protects novel nonfunctional features of shape, configuration, pattern, ornamentation or composition of lines or colours, applied to any article either two or three dimensional or in both forms by any industrial process or means whether manual, mechanical or chemical, separate or combined which in the finished article appeal to and are judged solely by the eye.
- **Geographical Indications (GI):** are defined as that aspect of industrial property, which refers to the country or to a place of origin of that product. Typically, such a name conveys an assurance of quality and distinctiveness of the product, which is essentially attributable to the fact of its origin in that defined geographical locality, region or country.
- IPR has to be renewed from time to time to ensure the protection of the rights from any infringement.

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- Intellectual Property Rights are always territorial. Globalization and rapid proliferation of technology has elevated the importance of intellectual property rights. The intangible nature of intellectual property and the world wide consistency of standard practices create a challenging environment for businesses wishing to protect their innovations, brands and design etc.

## **Indian Patent (3rd Amendment) Act, 2005 and Its Impact**

Several changes have been made in the Indian Patent Act through third amendment and there are comprehensive provisions in the amended Act to deal with the various issues especially concerning price and availability of medicines. The most significant feature of this amendment is the introduction of a product patent regime covering the area of pharmaceuticals replacing the hitherto existing process patent regime. It simply means product patent applications have to be examined and accepted in India from January 1, 2005. Broadly, the new patent regime provides for: Extension of product patent protection to all fields of technology (i.e., drugs, food and chemicals).

Deletion of the provisions relating to Exclusive Marketing Rights (EMRs), which would now become redundant, and introduction of a transitional provision for safeguarding EMRs already granted.

Introduction of a provision for enabling grant of compulsory license for export of medicines to the countries, which have insufficient, or no manufacturing capacity, to meet emergent public health situations (in accordance with the Doha Declaration on TRIPs and Public Health (Kotti, 2005).

- Addition of a new proviso to circumscribe rights in respect of mailbox applications so that patent rights in respect of the mailbox shall be available only from the date of grant of patent, and not retrospectively from the date of publication.
- Modification in the provisions relating to opposition procedures with a view to streamlining the system by having both pre-grant and post-grant opposition in the patent office.
- Strengthening the provisions relating to national security to guard against patenting abroad of dual use of technologies (Baker, 2005).
- Clarification of the provisions relating to patenting of software related inventions, when they have technical application to industry or are in combination with hardware.
- Rationalization of provisions relating to time lines with a view to introducing flexibilities and reducing the processing time for patent applications, and simplifying and rationalizing procedures.

## **Indian Drug Industry:**

The US government has urged India to take effective action to ensure stronger protection intellectual property rights including unfair commercial use of data submitted by drug makers to obtain marketing approval for drug products in India.

The US continues to “urge India to improve its IPR regime by providing stronger protection for copyrights and patents, as well as effective protection against unfair commercial use of undisclosed test and other data generated to obtain marketing approval for pharmaceutical and agrochemical products,” stated an annual report on IPR protection by US trading partners placing India among the 10 countries in Priority Watch List.

A new Drugs & Cosmetics Amendment Bill with stringent provisions such as a maximum penalty of life imprisonment and a fine of not less than Rs 10 lakh for those engaged in manufacturing spurious and fake drugs was passed by the Parliament in November 2008. The new law also prescribe punishments for the trade. The law has provision of making the offences cognizable and non-bailable.

Similarly, India is also proposing to implement laws to punish clinical research firms, if they are found breaching the standard practices and rules for testing new drugs in humans, with severe penalties including 10 years of imprisonment and cancellation of licence.

## **Early resolution of IPR infringement in India**

Although, the legislation provides ample protection to the IP holder, its practical implementation is not easy. The disputes regarding infringement of IP become a subject matter for adjudication by the various authorities that are appointed for this purpose which eventually ends up in a very time consuming and expensive affair.

The provisions of the IP Acts itself or through relevant provisions of CPC provide that a suit may be instituted for granting injunction against any person who infringes the IPR of any other person.

The suits for infringement of IPR in India are invariably initiated for seeking injunction or restraining orders against the infringer, which usually takes a long time to be adjudicated. Therefore, it is evident that the establishment of a right, granted by a statute through the registration is not an easy task before the civil courts in India.

However, recently the Hon'ble Supreme Court of India has realized the problem that is faced by the IP holders owning bonafide registration under the said Act or otherwise being the lawful claimant of the IP right, for violation of the IP rights due to the delay caused by the courts in granting appropriate relief which the IP right holder is entitled to, under the provisions of the Act.

In a recent judgment, of Shree Vardaman Rice and General Mills Vs Amar Singh Chawala the Hon'ble Supreme Court of India has observed that the matters before the court such as that of IPR matters including Trade Marks, Patents, Copyrights and Design, if any dispute has come up before the courts through suits filed by the Plaintiff, the courts in India should decide the IPR dispute on day to day hearing basis.

### **Software Patent Laws in India**

Software creates unique problems, because it is so easy to duplicate and the copy is usually as good as the original (although many a times plagued with computer virus). This fact, that the copy is as good as original, however, does not legitimize piracy. Till now, if software, per se, needed to be protected, the inventors would have to get a copyright on its code.

### **CONCLUSION:**

Today possession of land, labor and capital are just not enough for a country to succeed. Creativity and innovation are the new drivers of the world economy. The policies adopted by a country shall determine the nations well being. Development of a country's intellectual Capital is the most important task in these regards. An effective intellectual property rights system lies at the core of the countries development strategies. Within knowledge based, innovation driven economies, the intellectual property system is a dynamic tool for wealth creation, providing an incentive for enterprises and individuals to create and innovate a fertile setting for the development of, and trade in, intellectual assets, and a stable environment for domestic and foreign investments. Although India has complied with the obligations of TRIPS by amending the IP laws, certain issues are still needed to be taken care of. And there is a need for a constant thinking over the core issue of IP protection, in order to respond to situations arising out of global competition.

There is strong need to make Indian industry more aware of Patents and the impact of new regulation. In fact, awareness is needed among the various stakeholders. It will not be in order if the knowledge of IPR is restricted to the Law faculty. Instead there should be a greater awareness amongst the commerce, science and humanities students for which the subject be appropriately introduced through well designed syllabus at graduate level. IPR can be made a compulsory subject in college law courses and in universities. In short, India will have to invest liberally to enhance skills and knowledge base of scientists through structured in-house and external professional training programme.

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