

Intellectual property law: providing protection for intangible business assets

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ABSTRACT

India is crucible for entrepreneurship and innovation. It's the entrepreneurial ventures that drive real innovation and growth, thus encouraging creativity to introduce new products, solutions, and business models. The country is poised to leapfrog into an era of new ventures across industries on the back of growing aspirations and supportive policy makers. Intangible assets such as software, patents and databases are likely to be critical to the lifeblood of a company. If a company has gone to the trouble of seeking and obtaining a patent, then it will know the process and how important patents are to protect that company's innovation. Patents are granted territory by territory and give a monopoly to working/selling that patented product or process. An intellectual property rights strategy is an effective instrument that can facilitate a successful business. Intellectual Property Rights (IPR) themselves are essential for determining the success of a business. In this scenario, the significance of IPR for a startup cannot be over-emphasized. More often than not, startups are hotspots of innovation and emerging technologies. Streamlining the system of protection of their innovations will be an essential value addition to their business strategy. Intellectual property rights may be in the form of patents, trademarks, design, or copyright. In whatever form, IPR can be capitalized upon to improve the finances as well as the credibility of a company in the economy. IPR is intangible property, which means that care must be taken to protect these invaluable assets at the business's inception. Recognizing this, the Government launched the Scheme for Facilitating Startups Intellectual Property Protection (SIPP) in India.

Keywords - Intellectual property rights patents, trademarks, design, or copyright

Intellectual Property Rights

Intellectual property is a broad categorical description for the set of intangible assets owned and legally protected by a company or individual from outside use or implementation without consent. An intangible asset is a non-physical asset that a company or person owns. The

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concept of intellectual property relates to the fact that certain products of human intellect should be afforded the same protective rights that apply to physical property, which are called tangible assets. Most developed economies have legal measures in place to protect both² forms of property. Intellectual property is a category of assets that are intangible. This means that they cannot be held and don't necessarily have a physical presence. These assets are created using human intellect. Intellectual property can take many forms and includes things like artwork, symbols, logos, brand names, and designs, among others.

Companies are diligent when it comes to identifying and protecting intellectual property because it holds such high value in today's increasingly knowledge-based economy. Also, producing value intellectual property requires heavy investments in brainpower and time of skilled labor. This translates into heavy investments by organizations and individuals that should not be accessed with no rights by others.

Extracting value from intellectual property and preventing others from deriving value from it is an important responsibility of any company. Although it's an intangible asset, intellectual property can be far more valuable than a company's physical assets. It can represent a competitive advantage and, as a result, is fiercely guarded and protected by the companies that own the property.³

Intellectual property rights are the rights given to each and every person for the creation of new things according to their minds. IPR usually give the creator a complete right over the use of his/her creation for a certain period of time. Intellectual property rights are the legal rights that cover the benefits given to individuals who are the owners and inventors of work and have created something unique with their intellectual creativity or capability. Every person related to areas such as literature, music, invention, etc., can be granted such rights, which can then be used in their business practices by them. The creator/inventor gets complete rights against any misuse or use of work without his/her prior information. However, the rights are issued for a limited period of time to maintain equilibrium.

³ www.investopedia.com/terms/i/intellectualproperty.asp

Types of Intellectual Property Rights:

Copyright

Copyright is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.

Patents

A patent is an exclusive right granted for an invention. Generally speaking, a patent provides the patent owner with the right to decide how – or whether – the invention can be used by others. In exchange for this right, the patent owner makes technical information about the invention publicly available in the published patent document.

The following cannot be patented:

- Frivolous Invention: Invention that harms public order/Morality/ health of animals, plants & humans
- Methods of agriculture or horticulture
- Traditional Knowledge
- Computer Program
- Inventions related to Atomic Energy
- Plants & Animals
- Mere discovery of the scientific principle

Trademark

A trademark is a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises. Trademarks date back to ancient times when artisans used to put their signature or “mark” on their products.

Industrial property

An industrial design constitutes the ornamental or aesthetic aspect of an article. A design may consist of three-dimensional features, such as the shape or surface of an article, or two-

dimensional features, such as patterns, lines, or color. Industrial property can usefully be divided into two main areas:

One area can be characterized as the protection of distinctive signs, in particular trademarks (which distinguish the goods or services of one undertaking from those of other undertakings) and geographical indications (which identify a good as originating in a place where a given characteristic of the good is essentially attributable to its geographical origin).

- The protection of such distinctive signs aims to stimulate and ensure fair competition and to protect consumers, by enabling them to make informed choices between various goods and services. The protection may last indefinitely, provided the sign in question continues to be distinctive

Other types of industrial property are protected primarily to stimulate innovation, design, and the creation of technology. In this category fall invention (protected by patents), industrial designs, and trade secrets.

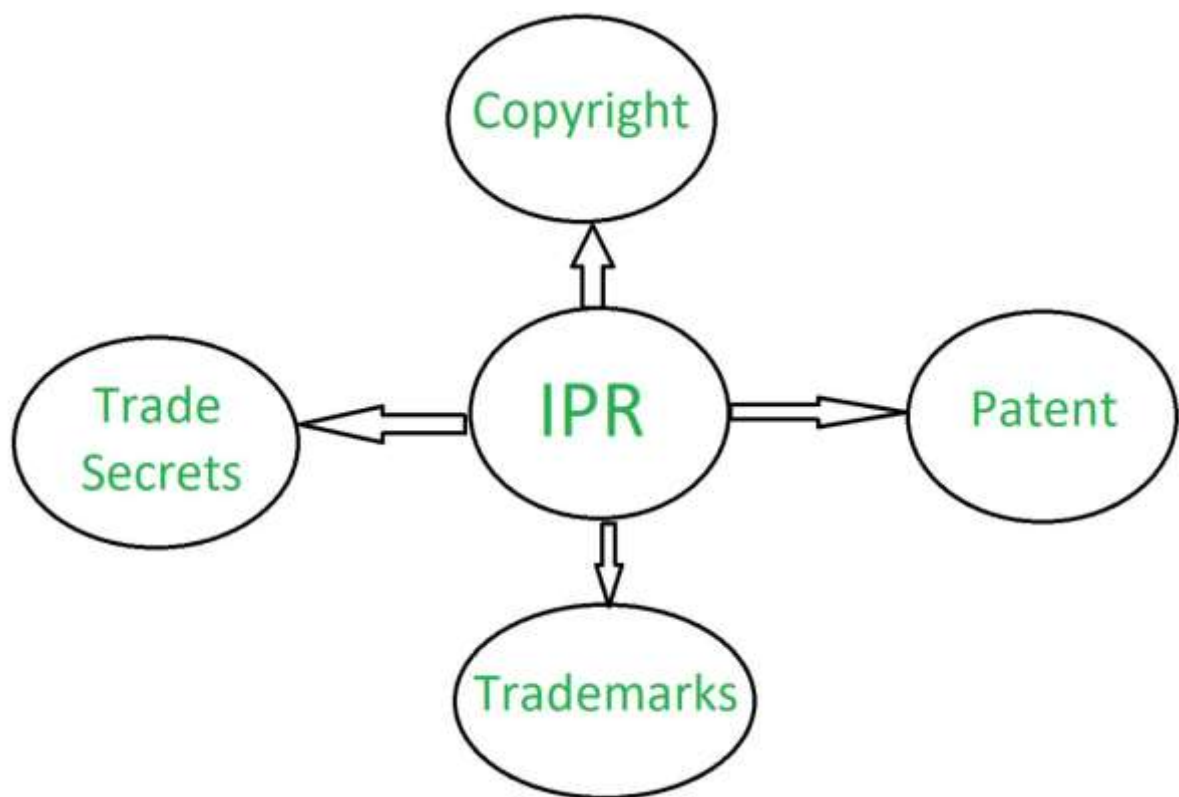
- The social purpose is to protect the results of investment in the development of new technology, thus giving the incentive and means to finance research and development activities.
- A functioning intellectual property regime should also facilitate the transfer of technology in the form of foreign direct investment, joint ventures, and licensing.
- The protection is usually given for a finite term (typically 20 years in the case of patents).

Geographical indications

Geographical indications and appellations of origin are signs used on goods that have a specific geographical origin and possess qualities, a reputation, or characteristics that are essentially attributable to that place of origin. Most commonly, a geographical indication includes the name of the place of origin of the goods.

Trade secrets

Trade secrets are IP rights on confidential information which may be sold or licensed. The unauthorized acquisition, use, or disclosure of such secret information in a manner contrary to honest commercial practices by others is regarded as an unfair practice and a violation of the trade secret protection.



On April 26 every year we celebrate World Intellectual Property Day to promote discussion of the role of IP in encouraging innovation and creativity. This year, World Intellectual Property Day 2022’s theme focuses on IP and Youth innovating for a Better Future. It explores how these innovative, energetic, and creative minds are driving positive change.⁴

⁴ www.intepat.com/blog/intellectual-property-rights/

India and Intellectual Property Rights

Acts Dealing with Intellectual Property Rights in India:

1. The Copyright Act, 1957
2. The Patents Act, 1970
3. The Trade Marks Act, 1999
4. The Geographical Indications of Goods (Registration and Protection) Act, 1999

India adopted the National Intellectual Property Rights (IPR) Policy as a vision document to guide the future development of IPRs in the country.

- The Department of Industrial Policy & Promotion (DIPP) under the Ministry of Commerce has been appointed as the nodal department to coordinate, guide, and oversee the implementation and future development of IPRs in India.
- The 'Cell for IPR Promotion & Management (CIPAM)', set up under DIPP, is to be the single point of reference for the implementation of the objectives of the National IPR Policy.

The campaign 'KAPILA', which stands for Kalam Program for Intellectual Property Literacy and Awareness campaign, was launched on 15th October 2020. The day was launched in honor of the 89th birth anniversary of former President Dr. APJ Abdul Kalam.

India is a member of the World trade organization's Trade-Related Aspects of Intellectual Property (TRIPS) Agreement.

India is also a member of the following important WIPO-administered International Treaties and Conventions relating to IPRs.

- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for Patent Procedure
- Paris Convention for the Protection of Industrial Property
- Convention Establishing the World Intellectual Property Organization
- Berne Convention for the Protection of Literary and Artistic Works
- Patent Cooperation Treaty
- Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks- Madrid Protocol
- Washington Treaty on Intellectual Property in respect of Integrated Circuits
- Nairobi Treaty on the Protection of the Olympic Symbol
- Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms
- Marrakesh Treaty to facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities.⁵

⁵ martin kretschmer, "the relationship between copyright and contract law", journal of intellectual property law, vol.18, 2010

Evergreening of Patents

Patent evergreening is the technique of modifying medications to extend their patent period and hence their profitability. The Indian Patents Act of 1970 included numerous measures to prohibit the nefarious practice of “evergreening” patents. The evergreening of patents is a topic of concern as it indirectly affects the cost of many life-saving drugs. Evergreening a patent is a corporate, legal, business, and technological method for extending an issued patent’s term in a jurisdiction that is about to expire to keep payments from them by obtaining new patents. Inventions involving new forms of a known substance are not eligible for patent protection under Section 3(d) of the Indian Patent Act 1970 (as modified in 2005) unless there are significant differences in the material’s qualities that affect its efficacy. This indicates that the Indian Patent Act forbids the evergreening of patents. Evergreening is the process by which businesses apply for a patent extension with minor product or process adjustments just before the first patent, which has a 20-year lifespan, expires. For a brief amount of time, patents grant their owners market exclusivity. In the case of medicines, this exclusivity should endure for the length of the primary patent’s validity, which is normally 20 years and refers to the medicine’s active pharmaceutical ingredient (API). The price of medicines will drop significantly once patent exclusivity is lifted. Pharmaceutical companies are compelled to come up with innovative strategies to extend their exclusivity due to the fear of this drastic drop in income. Evergreening, sometimes known as secondary patenting, is a technique used by businesses to prevent the entry of generic competitors. Obtaining additional patents on the original drug’s modifications, such as new dosages, new forms, new releases, or new combinations, is known as secondary patenting or “evergreening.”

Indian Patent Act and Evergreening

The fundamental tenet of our nation’s patent law is that a patent can only be issued for an invention that is both novel and useful.

Patenting incremental advances, sometimes known as “evergreening,” is prohibited by Section 3(d) of India’s patent legislation.

According to The Patents Act of 1970’s Section 3(d), “the mere discovery of a new form of a known substance or the discovery of any new property or new use for a known substance or of the use of a known process, machine, or apparatus is not patentable” unless the known process produces a new product or uses at least one new reactant.

- The Supreme Court affirmed this clause in 2013 when it rejected Novartis' request to have its cancer medication Glivec patented. Evidence of improving
- therapeutic efficacy is required under Section 3(d).
- The clause forbids patents for novel applications and novel traits of substances already known to exist.
- Since Glivec was essentially a modified version of imatinib in the Novartis case, the patent for Glivec was denied in accordance with section 3(d) of the Patents Act.
- According to Section 2(1)(ja), the product in question must have a technical improvement over the prior model that is not obvious to a person of ordinary skill.
- Patents for mixtures of well-known compounds are only permitted, according to Section 3(e), if there is a synergistic effect.
- No exclusivity over treatment modalities may be asserted, thanks to Section 3(i).

Protecting Intellectual property Rights

India is crucible for entrepreneurship and innovation. It's the entrepreneurial ventures that drive real innovation and growth, thus encouraging creativity to introduce new products, solutions, and business models. The country is poised to leapfrog into an era of new ventures across industries on the back of growing aspirations and supportive policy makers.

It's raining startups in every corner of the world and each firm is trying to establish an image in the minds of the consumers. While the new-age ventures focus on growth and profitability, there is also a need to protect the intellectual property assets owned by the entity. However, for these people having chosen to endure the entrepreneurial journey and pursue their dreams, the market is growing at a faster clip.

With rising competition, organizations are developing innovative strategies to develop more business and attract investments from numerous venture capitalists and private equity firms. The startups focus on upgrading their business models in a bid to cater to diverse needs of the consumer, thus contributing to the constantly evolving dynamic business environment. The current wave of startups has reached a scale where the game-changing players are battling it

out for leadership slots. The startups face unique challenges but they have to think about succession planning regardless of any growth stage.

A patent is a form of intellectual property that refers to protection of an invention for a limited period of time, wherein the inventor can exclude others for making or selling a product or service. There are treaties and bodies for defining, protecting and enforcing intellectual property rights. The IP space is considered niche and nascent in India. Intellectual property is intangible and has to be protected through intellectual property rights such as copyrights, patents, trademarks.

A well-defined intellectual property strategy should be in place to protect the intellectual property from potential infringers in the marketplace. Corporate bigwigs such as Google, Apple, and Microsoft spend billions of dollars in research and development and ensuring that the inventions are protected adequately. The success of high-profile Indian startups including the likes of Flipkart, Snapdeal, etc. which are relatively weak on making investments in intellectual property. Certainly, creating and maintaining a robust IP portfolio involves time and cost. It has been witnessed from the current market scenario that most of these startups are introducing novel solutions to serve their customer base and not focusing on getting their ideas/technology patented. But every startup needs to plan and think for success and scale up rapidly.

A strong patent portfolio helps the innovators to protect their assets and ensure success in the long term. In order to survive in the fiercely competitive market, new-age startups should ensure that their IP portfolio is rich in innovation, diverse, and allow them to outdo the competitors.

Developing and protecting intellectual property can help startups gain competitive advantage and earn additional source of revenue through licensing. The new-age ventures have to develop intellectual property portfolio in order to attract investors, thus building credibility in the market. It is pivotal to identify the IP assets owned by the company and benefits in obtaining for securing such protection over time.⁶

⁶ vera franz, "back to balance: limitations and exceptions to copyright", g  lle krikorian and amy kapczynski (eds.), access to knowledge in the age of intellectual property, 1st ed. 2010,

Some of the steps that startups should embrace to protect their intellectual property:

1. Startups should invest time and resources to get their ideas/solutions patented with PTO in order to exclude others from using patented invention. As patents are country-specific and limited to a particular territory, they should first apply for the patent in the domestic market and then build a strategy for to apply for patent in international markets.
2. They should invest time in developing intellectual property and educating themselves for the need to understand the basics of intellectual property including trademarks, designs, patents, and trade secrets.
3. Minimize the cost and work by outsourcing patent-related task to attorney who specializes in intellectual property and will assist in filing patent application in single/multiple jurisdictions. The attorney can help in developing the patent document describing the method and use of the invention and also incorporating the claims which helps the inventor to obtain a patent.
4. Identify potential infringers of the particular technology and earn revenues through licensing and cross-licensing negotiations.
5. Enter into well-drafted non-disclosure agreements (NDAs) while disclosing the invention to others.
6. Ensure the employee agreements, licenses, technology transfer agreements are in place to protect critical information leak/breaches.
7. Assess international patents if the key competitors exist beyond the respective country. For instance, a patent granted in India will not protect the organization in countries such as Europe, the US, China etc.
8. Conduct a Freedom-to-operate (FTO) search in order to launch a particular product and service in other country.
9. Perform patentability searches in order to invalidate the patent in the marketplace.
10. The company should conduct landscape search in order to locate potential competitors and their activities. They are crucial to determine technological advancements for In-licensing and Out-licensing in the respective filed of technology.

11. Think about the future and devise patent strategy in line with business goals and the need to be legally protected.⁷

CONCLUSION

Many organizations fail to understand the need to protect their intellectual property assets and the value offered by them at the time of mergers and acquisitions. Thus, not taking an appropriate action can pose a threat to the success of the organization in the future. Intellectual property plays a vital role in protecting and monetizing innovation. In this competitive world, it is critical for organizations to understand intellectual property and stay abreast of the current technologies, innovation, knowhow, and thus, need to revisit their existing IP strategy.

The laws and the corresponding judicial opinions, thus, underwent necessary changes. Copyright law has always been concerned with the fulfilment of two objectives, i.e., the protection of exclusive rights of creators or copyright owners and the guarantee of access of copyrighted works to users for certain permissible dealings without the authorization of copyright owners. These two objectives are considered essential for maintenance of the balance between securing the private interests of the creators or copyright owners on one hand, whereby they are assured exclusivity of commercial exploitation of their works for a definite period time, and on the other hand, securing the public interest whereby users of copyrighted works can benefit from the existing creative works. However, since the inception of copyright, copyright law had been primarily concerned with ensuring that copyrighted works are not „copied“ or otherwise exploited to the disadvantage of the copyright owner, and the second objective was fulfilled by way of creating exceptions to the general rule of safeguarding the exclusive rights of copyright owners. With the massive changes in the technologies facilitating copying, format shifting, distribution and communication of works, starting from the invention of the printing press and culminating in the emergence and rampant development of digital technologies, copyright enforcement became a challenge.⁸

⁷ supra n.8, p.34.

⁸ v.k. ahuja, law of copyright and neighbouring rights-national and international perspectives, 2nd ed.2015

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