A Study of Commercialization of Intellectual Property Laws in India vis- a- vis Challenges and Opportunity

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Abstract

Intellectual property (IP) is an intangible property, where a person uses his own intellect, to create belonging, which is unique and distinctive from others, such as inventions, designs and symbols, literary and artistic works, names, and images used in commerce. The purpose of Intellectual Property Rights is to encourage new creations, artwork, and inventions, that might increase economic growth. Intellectual property includes copyright, trademarks, patents, industrial designs, geographical indicators, etc.

Today, IPR has value on the market in addition to being a legal asset. The final and most important step in the innovation process is marketing and commercialization, which is essential for the success of any invention or breakthrough. Therefore, the process of transforming an invention into a financially viable good, service, or method is known as commercialization.

From the perspective of intellectual property, the process of generating income through utilising one's intellectual assets is known as commercialization of IP. However, the procedure is intricate and requires a great deal of specific efficiency, expertise, and understanding.

The importance of the commercial value of Intellectual property can be sighted with an example of a movie getting leaked on the internet before its formal realise. Then a copyright theft case can be filed before the police like what happened to the movie named 'Udta Punjab' in 2016.

Keywords*: Intellectual Property, Intellectual Assets, Commercialisation, Competition Law.*

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I. Introduction

The Right to the Protection of moral and material interests resulting from any Scientific, Literary, or Artistic production of which he is the author balanced by the right, to share in scientific advancement and its benefits.

Any original work of the human mind, including those in the arts, sciences, literature, technology, or other fields, is considered to be the subject of intellectual property (IP). The term "intellectual property rights" (IPR) refers to the legal privileges granted to the inventor or creator to safeguard their work for a predetermined amount of time. These legal rights allow the inventor or creator, or his assignee, the sole right to fully exploit their idea or creativity for a specific amount of time. It is widely acknowledged that IP is essential to the modern economy.

Additionally, it has been unequivocally proven that the intellectual labour connected to invention deserves to be given the respect it deserves in order for it to serve the greater good. The price of research and development (R&D) has skyrocketed, and so have the capital needed to introduce new technologies to the market.

Since the stakes for technology developers have increased significantly, it is now imperative, at least temporarily, to safeguard information from unauthorised use in order to guarantee recovery of R&D and other related expenditures as well as sufficient earnings for ongoing investments in R&D. Since it gives the inventor or creator of an IP an exclusive right to exploit his invention or product for a specific length of time, IPR is a powerful weapon for protecting investments in time, money, and effort. By enabling healthy competition, industrial progress, and economic expansion, IPR thereby contributes to the economic development of a nation.

II. Evolution of Intellectual Property Rights

The laws and administrative procedures relating to IPR have their roots in Europe. The trend of granting patents started in the fourteenth century. In comparison to other European countries, in some matters, England was

technologically advanced and used to attract artisans from elsewhere, on special terms.

Italy is where copyrights were originally recognised. Since Venice was the first place in the world to create laws and institutions governing intellectual property, it can be said that Venice is where the IP system originated. Other nations soon followed. India's patent law dates back more than 150 years. The first was the 1856 Act, which had a 14-year patent period and was modelled on the British patent system. This was followed by other acts and changes.

The Patent Legislation was first introduced in India in 1856, establishing legal recognition for intellectual property. The statute was later annulled in 1857 and 1859. The Indian Patents and Designs Act, 1911, which replaced all prior laws pertaining to patents and designs, was introduced in 1911. A significant revision was made in 1945 after minor adjustments in 1920 and 1930. The Patent Act of 1970 and the Patent Rules of 1972 were eventually created after an independent committee was established to maintain a favourable patent system for the national interest.

Copyright Law in India has evolved in three phases, the First phase was in 1847 the Second phase was in 1914. Number of times the amendments were brought into this Act and finally in 1957. The Copyright Act 1957 was enacted by Independent India by which we are governed till date.

The Trademark Act of 1940 was the country's first trademark law statute. It was revised in 1943 and again in 1946. The Trade and Merchandise Act of 1958 thereafter took its place as the new law. A new Trademark Act thereafter went into effect in 1999. Trademark Rules 2002 govern the Trademark Act of 1999.

The Geographical Indications of Goods (Registration and Protection) Act, 1999 governs geographic indications in India.

Originally, only patents, trademarks, and industrial designs were protected as ‘Industrial Property’, but now the term ‘Intellectual Property’ has a much wider meaning.

III. What is the Commercialization of IPR?

Commercialization in simple words refers to introducing new products or services in the market. Around the world, several rules and regulations are made to ensure that Intellectual Property is commercialized and protected. The main motive of the commercialization of IPR is to encourage people to bring new ideas and creations into the market and make it marketable and profitable[3].

A. Types of IP Commercialization

IP Commercialization is divided into three categories such as:

i. Commercialization by the owner

An individual or business owner can independently commercialise their intellectual property. When the owner possesses the necessary marketing and commercialization knowledge, this form of commercialization occurs. Therefore, they hold the opinion that collaboration with any third-party organisation is not necessary for commercialization; if a company or an individual lacks the financial means to collaborate with another organisation; if the owner does not wish to share the specifics of their intellectual property with others; or if the owner does not wish to do so; then the owner may independently commercially exploit their intellectual property.

It could be quite risky, though, as the owners might not be IP experts and might overlook some legal requirements that are crucial for product commercialization. An IP specialist, on the other hand, is required to be familiar with both the legal and business environments, making them the best people to advise business owners.

The main barrier to this sort of commercialization is the lack of the requisite technical and financial resources to independently advertise your product.

ii. Commercialization by assignments

There are two legal vehicles by which owner may commercialize their intellectual property:

-To sale or assign the IP,

[3] R.M.K. Alam and M.N. Newaz, "Intellectual Property Rights Commercialization: Impact on Strategic Competition", 8(3) Business and Management Review 22 (2016).

-To license the IP
-Assignment:
In this sort of commercialization, the person or the business enlists the assistance of Assignment, an outside agency. It is one of the prevalent ways to commercialize intellectual property. 'Assignment' and 'sale' are terms that are frequently used interchangeably.

The IPR Owner assigns all or any portion of his rights during this assignment process to the organisation that will create, produce, and market the product and services. When IP is transferred to another party, the transferee receives all rights and obligations associated with the original IP owner. Selling a patent, trademark, or copyright to a third party so that they have absolute ownership over such IP is one illustration of an assignment. The assignor is the person who transfers possession, and the assignee is the person who receives possession.

Licensing

The licencing of intellectual property rights through one or more licencing agreements is another popular and useful method of commercialization. 'Licencing' denotes that the owner has given consent for another person to use their intellectual property (IP) for a certain time period and purpose, according to the agreed-upon terms and conditions.

The Concept of Licence is based on the Legal Maxim called "Nemo Dat Quod Non-Habet" which means that a licensor can only grant rights that he possesses under the law.

This type of Commercialization is a significant tool for the owners who do not have the resources or innovative strategy or experience to develop and market the product or service.

There are some challenges associated with licensing. For the effective use of licensing, the licensor has to disclose certain important features of the intellectual asset, which increases the danger of the proprietary information being lost.

Unlike in assignment, licensing usually does not require many compliance-oriented formalities to be completed.

Apart from licensing, there are various other methods of IP Commercialization with the intervention of third-party business transactions:

Franchising

The idea of franchising is broad and essentially includes the idea of licencing. In franchising, the owner not only permits the use of the intellectual property by the other entity, but also permits them to utilise the owner's whole business ecosystem.

The ability to grow a business into new market segments and the ability to raise more capital without suffering personal financial loss are two benefits of franchising.

It has several drawbacks as well, such as reputational risk, misuse of trade, and being more complicated than licencing.

Mergers and acquisitions

A merger essentially involves the legal combination of two business entities into one, whereas an acquisition happens when an entity buys another piece of property. In both cases, assets and liabilities are combined into one single company.

Even more general than franchising, mergers and acquisitions include the intellectual property owner either being merged into a larger company or being acquired by another company. In this process, the acquiring company not only consumes the owner's intellectual property but also absorbs the former's complete organisational structure.

Joint ventures

The only distinction between a joint venture and a merger is that in a joint venture, the owner of the intellectual property retains ownership.

It is a contract between two or more entities that commits them to working together on a shared goal for a set amount of time before parting ways once the goal of the agreement has been achieved.

iii. Commercialization by business partnerships

Creating a company partnership is the final method of commercialising intellectual property. In this kind of commercialization, the owner of the IPR signs a business contract with a third party who acts as an investor and aids in turning the IP into sellable goods or services.

India has only recently adopted this idea. In general, IP owners favour designing their own products or endorsing them directly through assignment to others. However, collaboration between IP owners and corporate entities will be crucial for long-term viability.

IV. Other Important Aspect Related to Commercialization of IPR.

Having discussed first part of our discussion on commercialization of IPR let's pave our way to some other important aspect related to commercialization of IPR

A. Valuation

The paradox of valuation is that while most corporations are aware of the potential value of their intellectual property, they consistently fail to accurately estimate its worth. Peter Drucker famously observed, "If you can't measure it, you can't manage it." With more accurate values, investors can optimise their IP portfolios and boost their returns. There are several ways to value intellectual property, including the replacement cost method, market value method, fair value method, and tax valuation method. According to these methods, IP valuation will help informing judgements about IP development or acquisitions.

B. IP Audit

The first and foremost objective of IP audit is to ascertain the existence of IP. An IP audit should identify all the IP generated by particular department of an organization

C. IP Due Dilligence

In general, IP due diligence aims to: Identify and locate IP assets, then evaluate the nature and scope of the IP to assess its benefits and distribute risks associated with ownership or use of the relevant IP assets; in particular, it aims to ascertain whether the relevant IP is free of encumbrances for its intended business use(s). Determine any issues with or obstacles to the proposed transfer, hypothecation,

or securitization of the IP assets. Determine the costs associated with the transfer of the IP assets under consideration and divide them between the two parties.

D. IPR Enforcement

The most significant part of IPR commercialization as well as the main area of worry in this last section of discussion, namely IPR enforcement. When engaging in an IP transaction, it's crucial to consider both the asset's viability and marketability as well as its capacity for IP protection and enforcement. Once a new product is put out for sale and becomes popular, it's possible that competitors will try to produce cheaper products with the same or similar features. Inadequate financial pressures may result from this. Therefore, it is crucial that parties have access to IPR that is effectively enforced.

V. Competition Law v. IPR Law

Relationship between competition law in India and intellectual property law:

These laws frequently appear to be at odds with one another. In order to promote innovation, it is required to establish monopolies under intellectual property law, while competition law aims to do the opposite. However, both laws are actually complementary rather than antagonistic. Because the two laws' core objectives—promoting both innovation and fair competition—are the same. For instance, if a pharmaceutical company develops a cancer treatment, it is almost certain that other companies will do the same, and there will so be sustained competition.

VI. What are the Issues in Commercializing of IP[4] ?

A. Financial Challenges

The level of financial investment required to file patents and pursue prosecution and litigation stands in the way of commercialization. First, it locks out the most promising players and startups, favoring large organizations.

In spite of the fact that these organizations talk about innovation, they rarely realize their objectives. Not only are they inherently slow and political, but they

[4] https://medium.com/@seventh.ai/barriers-to-ip-commercialization-714c16d7472b/ last accessed 11.10.2023

are also too busy maintaining multiple product lines to dedicate time to walk the talk.

Essentially, companies that have the resources to get IP protection don't follow through with commercialization. And those that have the will and potential to commercialize often cannot afford it. Few realize the good they can accomplish with patent pending protection, which as Seventh.ai outlines, is not only cost-effective but also easy to implement and highly beneficial.

B. Litigation Issues and Prevalence of Trolls

Frivolous infringement is among the top issues in patenting which has in recent times become synonymous with trolls and litigation. Inventors and innovators who file patents and commercialize their IP have to contend with legacy institutions that are at times out to slow them down.

In some cases, traditional players resort to issuing lawsuit threats which scare smaller players out of the innovation race. Young companies cannot bear high litigation costs and will at times even agree to pay out of court settlements, which spells out death for them anyway.

C. System Barriers

A majority of companies today are tech companies, a sector which is inherently dynamic and fast-paced. However, the patenting system is far from efficient and is characterized by slow bureaucratic and approval processes.

Early stage projects and startups fail to see the value of filing applications for patents in view of the grim reality that they will likely die out before the patent, if ever, issues.

D. Filing for the Wrong Reason

A majority of patent applicants have a legal orientation, i.e. filing with the main purpose of plugging portfolio holes. While it makes sense, given the litigious nature of the space, it often leads to the creation of low quality patents. Filing a poor patent sets the pace for inevitable failure in commercialization.

Moreover, filing IP strictly for defensive purposes leads many companies to sit on those "paper" patents. Among the undesirable effects of this trend is the fact that it prevents actual products from ever entering the market. And in turn, this stems the tide of natural innovation progression.

E. Flood of Low Quality Patents

Closely related to the above point is the prevalence of low quality patents. According to Bruce Berman, CEO of Brody Berman Associates, a frequent contributor to WIPO Magazine, a good patent has to meet at least these two main criteria: First, it has to have a high likelihood of standing up to litigation, a measure whether the patent is valid or invalid. Second, the concept behind it has to hold the potential of generating revenue (in terms of protecting profit margins or generating direct licensing revenue) to a particular holder at a given time.

The reality on the ground tells a different story, with most patents failing on both counts. As a result, they open the door to potential patent troll abuse and fail to commercialize.

F. University IP Commercialization Failure

Universities spend quite a bit on R&D, and have been known to produce high quality patents. The impact of technology transfer on the US economy speaks for itself. More than 5,000 startups have been created in the past 30 years, and between 1996–2013 technology transfer has contributed $518 billion to the US's GDP. However, two main obstacles stand in the way of potential commercialization.

But could they have done better? The main issue is, university technology is typically far too early to suit target industries. Secondly, some universities place too many restrictions in terms of ownership of the patent and demand heavy equity stake (up to 70%) in the companies that have developed the IP in the first place. Such harsh restrictions can seriously cripple a startup, and most founders opt to forgo dealing with a university tech transfer as a result.

It is a huge loss to a university tech transfer for two reasons: 1. The startups that developed the IP in question are likely in the best shape to take the underlying products to market and validate the patent value and 2. That single patent would be very difficult to license otherwise.

Typically, it all rests on a single patent, which is usually the case based on a university's budget, and unless it is the first and critical patent in the development of a drug at the heart of a new medical breakthrough, single patents are effectively unlicensable.

VI. National Intellectual Property Rights (IPR) Policy 2016[5]

Finance Minister Arun Jaitley unveiled India's National Intellectual Property Rights (IPR) Policy in 2016. The goal of the policy is to promote intellectual property rights (IPRs) as a tradeable financial asset, while also fostering entrepreneurship and innovation and defending the general welfare.

The policy suggests conducting a study to see whether an IPR exchange could increase commercialization and value for intellectual property. Such a distinct IP market may promote growth in IP-driven industries by bringing together investors and IP owners/users. IP commercialization in India will reach its full potential if this IPR strategy is applied correctly and developed into a workable and effective solution.

VII. Conclusion

Due to a lack of understanding of the IPR system, businesses underutilize their intellectual property. IPR awareness is crucial because it is a

With time, we have come to realise how important intangible assets have grown to be as a sector of the economy. IPR is already included in the knowledge industry's strategic options. The most important factor for establishing a long-term economic foothold is assessing the potential of IP and capitalising on its genuine value.

Despite the fact that IP protection is available everywhere in the globe in a variety of ways, including registration, filing, licencing, and abuse-barring, most owners conveniently fail to recognise the value of their assets and fail to protect them. Any market entity that catches you off guard might wreak havoc on your finances and reputation, which would be disastrous for the institution's development. The process of registering and protecting IPRs is expensive and time-consuming. But because these actions establish the groundwork for IPR commercialization, they are fundamental in nature.

The world has actually become smaller due to globalisation and the development of digital technologies, increasing the need for protection. Building an IP asset is just as important as protecting its ownership, management, and

[5] India’s National Intellectual Property Rights (IPR) Policy last accessed 11.10.2023

commercialization. It's past time for corporations to grasp the advantages of these rights and make use of them.