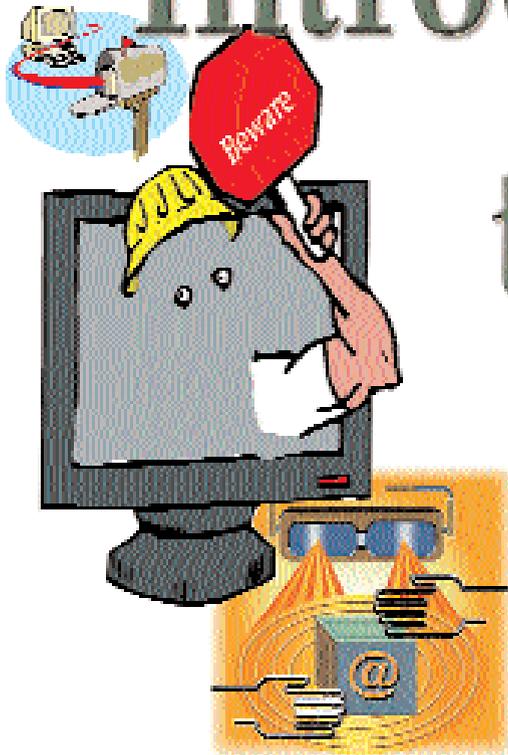


Introduction to IPRs



Sudhir Garg

Intellectual Property Rights (IPRs) are a special category of Industrial Assets, which should be safeguarded very meticulously. It is possible to take all precautions for tangible assets but the intangible assets such as IPRs are a bit difficult to guard. The Chartered Accountants can play a big role in efficient operation of IPRs.

An enterprise possesses various types of assets and the assets are used for achieving the objectives of business and to facilitate the conduct of business smoothly, efficiently and in a cost-effective manner. Intellectual Property Rights are intangible assets, which should be protected from misuse by others just as any enterprise would protect its tangible assets like its plant and machinery of stocks or receivables. IPRs represent a special category of assets, capable of being exploited on an industrial scale. Often, IPRs are referred as negative rights. IPRs are rights over the labour, skill or effort put in by its inventor or author or the employer of such an inventor or author.

IPRs pertain to various subjects and are broadly categorized in five categories -- Patents, Designs, Trademarks, Copyrights and Geographical Indication. Other forms of IPRs have also come into existence like rights over integrated circuits, plant breeder's rights, domain names, plant varieties, database rights etc but they have not yet gained much prominence.

Patents: These rights represent the rights recognized

and granted by the Government for a new invention, which is capable of an industrial application.

Designs: These rights are in relation to physical existence of a product, capable of industrial application, which can be perceived by only one sense -- that is vision.

Trademarks: This is a mark, which distinguishes a particular product from other product of same class, type or variety.

Copyrights: These rights relate to genuine work of art, literature, drawing, etc. which should be original and new. It need not be an invention. Such work should only be a form of expression.

Geographical Indication: This relates to a product or

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Role of Chartered Accountants in IPRs

Chartered Accountants can also play a role in smooth and efficient operation of IPRs. All forms or IPRs are such that the author or inventor of IPR is a different person while the commercial or industrial use of the IPR is done by another person. However, to exploit the invention on industrial scale or to manufacture a product on the design created by an expert, large scale publication of say a book written by an author, a businessman or an enterprise is needed. **A CA can help the author or inventor and the**

industry to decide the correct monetary consideration for the transfer or license of invention or new creation.

At the time or transfer of business, be it merger, demerger, sale, lease, etc IPRs are those invisible properties which shall have their own value. They could be valued as part of goodwill or separately. Patents, Trademarks, Designs all have commercial value at the time of transfer of business. Therefore, **CAs can help the seller to realise correct worth of his**

business. In the event of infringement, CAs can help in estimation of damages, which may be recovered in civil suit.

IPRs are a new subject and yet there are no defined and universally accepted methods of valuation. Whenever valuation of IPR is thought of, normal principles of valuation like cost incurred or discounted cash flow techniques are tried but no set method has evolved so far. So a CA shall have to use his best judgment while arriving at value of IPR.

an art, which has a very close and intricate nexus with geographical region where it is found. It is usually found in a community and is not confined to one person.

We shall now discuss the salient features of each type of IPR.

Salient features of Patents

Patent is a monopoly right granted by the Government to an inventor for a fixed period of time. The basic intention of granting monopoly rights is to encourage inventions. Unless an inventor is assured of fruits of his hard work and creation or invention, a person would not be inclined to undertake scientific research.

To get a patent, the inventor has to prove that his invention is a novelty, non obvious and has a utility. By novelty it means it should be an entirely new concept or idea. Non-obvious means that information underlying the patent should be such that a person well versed in the science should not be able to infer it in the normal course. And utility means that the invention should be capable of industrial application. Manufacture of goods on industrial scale should be possible.

Patent is to be applied for by the inventor together with his employer. It could be a University, a research Institute or a company. This is because although an invention would be done by a scientist, but it is the

employer organization which is investing in invention by hiring the said scientist, paying his salary, paying for his research work, etc. In the patent, names of both the scientist and the organization shall be entered.

Patent allows an inventor or a person, who lawfully obtains the rights, to use the patent for a maximum period of 20 years. Upon expiry of the term of patent, the patented knowledge or information comes under public domain and anybody is entitled to work on that new technology. Till such time the patent is in force, nobody can steal the formula or use the information or make or copy a similar thing. It is pertinent to mention that once a patented product is in the market, a reverse engineering is always possible. Reverse Engineering is illegal. In case the owner of a patent comes to know that his patent is being circumvented by virtue of reverse



engineering, he can bring a civil suit for injunction against such a person.

By virtue of the patent, the owner of a licensee gets exclusive marketing rights for the entire term of the patent. Since the owner or licensee of the patent is charging some money against sale of goods, the price of patented goods are higher and thus an owner of patent is able to reward himself for the invention.

Under TRIPS of WTO, patent can be granted

both for a product as well as for a process. The process patents are more in force in India as well as in the world. Process patent is granted in respect of food items or

medicines or drugs manufactured from a chemical process. In respect of drugs, the entire world has a system of developing alternate drugs or substitutes of patented drugs. It may be very costly to take a lawful license of a patented drug, but the world over tremendous scientific research goes in developing those drugs or medicines for which patents have been granted. These alternately developed drugs are known as Generic Drugs. All big companies in the world, including companies like Ranbaxy Laboratories, Dr Reddy's Laboratories, etc. manufacture those drugs which have been patented long ago and either their patents have expired or are just going to expire in near future. And by developing such alternate drugs, these companies are able to sell drugs worth millions or even billions of dollars. Viagra and its substitutes are classic examples of this.

Obtaining A Patent: An application for grant of patent has to be made to the office of Patent Controller. Every member country, which is a signatory to WTO, has set up an office of Patent Controller in his country. The invention has to be explained in sufficient detail to enable the office of patent controller to examine the veracity of claims made by the inventor. Priority is fixed from the date the application is filed with patent controller. Once the application is filed, particulars of the application are published in Official Gazette after 18 months. Anybody who wishes to oppose the application is given an opportunity and he can file his objection in next four months from the date of publication.

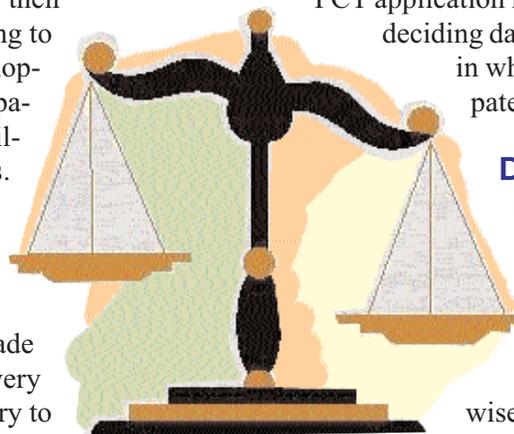
In case the objections are of no worth, the patent office takes up the examination of the application. All details would have to be supplied and if it is

Often referred as negative rights, IPRs are broadly categorized in five categories -- Patents, Designs, Trademarks, Copyrights and Geographical Indication. IPRs are the rights over the labour, skill or effort put in by its inventor or author or the employer concerned.

found that the invention is new, non obvious and has a utility, the patent can be granted.

There is also a system of filing simultaneous applications

in other countries. An Inventor may desire to file his patent application in a number of countries. So he may file a PCT application in his home country. PCT stands for Patent Convention Treaty. All countries are member of PCT. Once a PCT application is filed in the home country, the date of filing of application is treated as date of filing of application in other countries as well. Although separate application for grant of patent shall have to be submitted in all those countries, where the inventor wants his patent protection to extend to, but for fixing the priority of application, date of filing of PCT application in the home country shall be the deciding date. An inventor is free to decide in which countries would he like his patent protection to extend.



Designs: Designs are a form of IPR which relate to new design of a product and which appeals only to the vision of a person. A bottle made with a particular and peculiar design could convince an otherwise illiterate customer to purchase it, without necessarily reading the label etc. Maruti 800 or an Ambassador car can be identified from a distance and one does not need to look at its logo to be convinced about their identity. The design enables an industry or a trade to sell its articles with minimum possible effort on the part of its customers. This form of IPR also helps in furthering the objective of a business to be able to reach its customers with minimum effort from both sides.

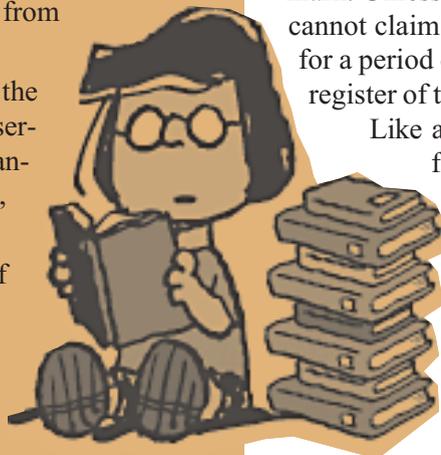
Trademarks: A customer buys any consumer product or even an industrial product mainly on the basis of its brand names. A brand assures a level of quality as also price reasonableness. While brand and its loyalty

are built by the customers, preservation of reputation and image of the brand is the prime responsibility of the owner of the trademark. Trademark distinguishes a product from other products in the same class.

Like trademarks there are service marks. Service marks assure about the quality of services offered. Trademarks or service marks are capable of graphical presentation. These could be a design, logo, label, some words, a colour scheme or any representation, which conveys something about the product for which the trademark has been created.

The Trademark Act lists certain grounds on the basis of which the grant of trademark may be refused. These are listed below:

- (a) Mark must be capable of distinguishing goods or services of one person from those of another.
- (b) Marks should not consist exclusively of customary marks or indications, which are commonly understood by the people.
- (c) Marks should not consist of exclusively of shape of goods resulting from nature of goods themselves.
- (d) Marks should not refer to the characteristic of goods or services like kind, quality, quantity, intended purpose, value, geographical origin etc.
- (e) Phonetic equivalent of marks already registered.
- (f) It should not consist of a shape, which gives substantial value.
- (g) It should not have religious susceptibilities of any class or section of people of India
- (h) It should not comprise or contain scandalous or obscene matter
- (i) It should not be of the nature as to deceive the public or cause confusion
- (j) Emblems or names prohibited should not be used.
- (k) Any trademark similar to earlier trademark used for similar goods or services.
- (l) Another important ground for refusal is that well-known foreign brands also cannot be copied or imitated.



The term of a copyright is 60 years. A peculiar feature in case of copyrights is that although a licensee may have acquired rights under a proper license agreement, he cannot tamper with the work in any manner.

Those brands may not be registered in India yet those brands are not available for grabs. Examples could be Nike, Reebok and Mercedes.

Trademarks being an intangible property consist of only rights and actionable claims such as exclusive use of trademark in relation to his goods or services. It also restrains others from illegally using the mark. Unless one has an intention to use the mark he cannot claim any rights therein. If a mark is not used for a period of five years, it can be removed from the register of trademarks registry.

Like any other IPR a Trademark can be transferred and licensed. A proper license agreement should be entered into to define the rights and liabilities of the parties. Normally while assigning a trademark, the owner of trademark must ensure that the quality of product is not compromised or else it might lose its entire value.

Thus it can be inferred that a trademark, which has been developed over a period of time, is a very valuable asset of a business as it enables a business to convey assurance of quality and price with minimum effort. It also assures a customer that goods, bearing a particular trademark, have a certain quality and he would not be cheated. The owner of a Trademark is able to grow his business and earn profits by virtue of a Trademark whose reputation may have been built over a period of time.

Copyrights: Copyrights means exclusive rights to do or allow others to do certain acts in relation to original literary, dramatic, musical work or a computer programme, artistic work, cinematographic film or sound recording. The law of copyright rewards the author and owner of copyrights exclusive rights to reproduce the works for the benefit of public. The right encourages

authors, composers and artists, etc. to create more and more original work. The emphasis is on the word original. It need not be inventive. Copyright is concerned with expression of thoughts. By virtue of this right, the owner of copyright shall be able to make copies and sell it or distribute it in public.

Any work published in India or abroad is eligible for copyright protection. Necessary written prior permission is required to reproduce an original work of someone else.

Coming to the various species of copyrights, any original story, a book, a song, a poem or essay, article, etc. are covered in copyright. A dramatic work means any recitation, a choreographic work or entertainment in a dumb show. It is a work, which is capable of being physically performed. Musical work is defined to mean a work consisting of music and includes graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with music. A song in a film is written by a lyric, music is composed by a music composer, recording is done by sound recordist and its picturisation is a cinematographic film. Song per se is not entitled to any copyright protection while all activities, which go to make a song popular, are individually entitled to copyright protection.

Artistic work may include a painting, a sculpture, a drawing/diagram/ map/chart/plan/photograph, etc. Architecture trademarks, logos and labels are also entitled to copyrights protection. A particular category of IPR could be covered for multiple classes. A trademark design also

enjoys copyright protection.

Registration of a copyright is not compulsory in India. As soon as any work is created, copyrights are created. For all other category of IPRs, registration with concerned government authority is a must. Registration provides great evidentiary value. In case of trademarks, a dispute over a particular mark can be resolved as to who got the mark registered first. Otherwise, both parties have to prove as to who started using the mark first.

Like any other IPR, copyright can be assigned, transferred or licensed. A proper agreement is entered into defining rights and duties of each party. In such an agreement, the compensation payable by the licensee to the owner in the form of premium and royalty are clearly agreed to.

There is a peculiar feature in case of copyrights. Although a licensee may have acquired rights under a proper license agreement and may have also paid agreed amounts to the owner, yet the licensee is not permitted to add or delete a word or modify or add or delete a punctuation mark. In other words, even after acquiring the rights, the licensee cannot tamper with the work in any manner.

The term of a copyright is 60 years. Copyright is also a bundle of rights and separate rights can be assigned to different persons. Copyright can be distinguished from an immovable property in as much as future copyrights can be assigned or transferred while future property cannot be transferred under Transfer of Property Act.

Both civil and criminal remedies are available for infringing copyrights. Copies illegally made

Patent allows an inventor or a person, who lawfully obtains the rights, to use the patent for a maximum period of 20 years. Upon expiry of the term of patent, the patented knowledge or information comes under public domain and anybody is entitled to work on that new technology.

by infringing copyrights can be all confiscated and handed over to the owner of copyrights.

Conclusion

IPRs are a special category of Industrial Assets, which should be safeguarded very meticulously. It may be possible to take all precautions for tangible assets, such intangible assets like IPRs are a bit difficult to guard. IPRs are negative rights by virtue of which the owner precludes the rest of the world from using it without his permission or license. IPR is an actionable claim and can be enforced in a court of law.

India is awaking to the realities of emerging new World Trade Order. Though our country is fully capable of dealing with IPR matters, these are all outdated and are not synchronized with WTO regime now coming in. But one thing can be said for sure that the IPRs would encourage people who have talents to create new things, whether scientific or literary, for the benefit of mankind. ■