



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

EDITORIAL TEAM

EDITORS



Megha Middha

Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr. Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

SECURITIZATION OF INTELLECTUAL PROPERTY- THE NEW ERA OF CREDIT LENDING MARKET (REQUIRED SOCIO-LEGAL CHANGES)

AUTHORED BY - KRITI VARDHAN PANDEY

ABSTRACT

The global as well as the Indian economy is very rapidly transforming into a knowledge-based economy with higher contribution of the service sector in the overall GDP & startups being the drivers of this change globally. In India the service sector now contributes more than 53% to the overall Indian GDP, the central challenge with a knowledge based and service sector dominated economy is that it has very minimum physical assets which makes it really tough for the banks to lend with the ongoing physical assets backed financing trend of the lending institutions.

This paper tries to dwell into the existing lacunas in the physical & tangible asset backed lending and tries to provide how securitisation of Intangible assets like Intellectual properties can help in filling this financing void for the startups, the service sector and the new age knowledge-based businesses as the growth in the value of Intangible assets has been exponential with its global value increasing ten folds in just a span of last 25 years.

This paper further makes a thorough comparative analysis of the Intellectual property financing across different countries globally and from the European as well as the Asian subcontinent, it also lays down various key suggestions for the Government to work upon in sectors like Valuation of the Intellectual properties, Maximising value of Intellectual property, reducing transaction and overall financing costs & relevant policy & legislation changes required to ensure making Intellectual Property & intangible asset financing a viable option for businesses in India.

Keywords: Intangible assets, Intellectual Property assets, commercialisation of IPR, Knowledge based Economy.

INTRODUCTION

The credit lending market in India is highly driven by physical asset backed lending which was a viable exercise in a physical product manufacturing extensive economy but the Indian economy now has higher domination of the service sector, and the service sector unlike other sector's require very little physical assets.

Moreover, India is also the third largest startup market¹ and for new businesses like startups & other small businesses their value is derived from what they invent and create, these startups and MSMEs contribute more than half of the total employment globally and more than 90% of the total business worldwide², which makes it even more integral for the existing lending behaviour to change in order to keep pace with the changing dynamics of the Indian economy. Also, the SaaS (software as a service) companies are increasing at an exponential rate in India as well as globally.

Amidst all these challenges commercialization & securitization of intellectual property can prove as a positive catalyst to ensure best outcomes & to fill the existing financial void to ensure easy availability of finance for the businesses to sustain & grow.

CURRENT LEGAL FRAMEWORK ON SECURITISATION OF INTELLECTUAL PROPERTY

The current Indian legal framework is affirmative in case of securitization and commercialisation of intellectual property and intangible assets as the Government of India came out with National IPR policy in 2016 to commercialise IPRs. Moreover, the Indian banking system has already enacted key provisions for acceptance of intangible assets as collateral via Section 2(1)(t) of the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002* (SARFAESI) which defines the expression property, and it specifically includes intangible assets in the said definition.

¹ StartupIndia, Department of promotion of Industry and Internal Trade, available at <https://www.startupindia.gov.in/content/sih/en/international/go-to-market-guide/indian-startup-ecosystem.html>.

² Small and Medium Enterprises (SMEs), Improving SMEs access to finance and finding innovative solutions to unlock sources of capital, available at <https://www.startupindia.gov.in/content/sih/en/international/go-to-market-guide/indian-startup-ecosystem.html>

NATIONAL IPR POLICY

The National IPR policy is one of a kind & first policy by the Government of India to commercialize Intangible assets esp. Intellectual property and has stated the same in its objectives in national IPR policy, 2016. The said policy also suggests the following reforms

Awareness of IPR: promotion & outreach

The office of the Controller General of Patents, Designs & Trademarks (CGPDTM) in collaboration with the Cell for IPR promotion & management (CIPAM) along with various other industrial associations are undertaking various awareness initiatives with more than hundred such awareness & promotion programs being conducted every year.

The government is also eyeing for the inclusion of Intellectual Property in curriculum of colleges, universities & high schools.

Rajiv Gandhi Institute for Intellectual Property Management (RGNIIPM) is too conducting various IPR promotion & public training programs.

Legislative & legal framework

New legislations like Administration of Copyright & Semiconductor Integrated Circuits Layout Designs Act under Department for promotion of Industry & Internal trade (DPIIT) being included in the Indian institutional IPR framework.

Furthermore, new Trade Mark Rules, 2017 along with amended Patent rules for keeping MSMEs at par with the startups & streamlined process for statement furnishing under sec.146 of the Patents Act.

Accession to treaties of WIPO & pilot PPH program with Japan too included.

Generation of IPR'S

The government has digitalised the whole application filing process with options to check real time application status, with online application fee payment window & regular updates for efficiency & transparency.

Subsidized & discounted fees for application filing by startups & SMEs along with financial support for IP generation by Startups Intellectual Property Protection (SIPP) scheme.

Expedient examination for grant of patents & for registration of the trademarks for key categories with high emphasis on startups, SMEs, Women entrepreneurs, and disbursal of license within time bound manner.

Initiative to set up Technology & Innovation Support Centres (TISC) with support from IP facilitation centres & WIPO in universities to help prospective & potential applicants.

Adjudication & Enforcement

Modified & focussed initiatives by CIPAM to counter counterfeiting of Intellectual properties
Capacity enhancement initiatives for state level officials along with specific workshops by WIPO.
Specific training programs & tool kits for police officers.

Administration & Management

Focussed & uniform practices throughout the country to streamline the complete process & timely disposal of IP applications.

Industry focussed automation & re-engineering of IP processes.

Increased emphasis upon digitalization with hearing through video conferencing, online filing, E- communication & digital issue of certificates.

Increased manpower in IP offices with posts & designations increased three to six times in relative departments.

Bilateral agreements with stakeholders & enhanced cooperation with WIPO in matters of international PCT applications & e- PCT filings.

Steps taken for modernization of IP offices & updated websites of the said offices.

Commercialization of IPR

Income tax deductions allowed on incomes & royalties received on IPRs to make IPR commercialization more lucrative.

“Patent Box” initiative introduced by Finance act, 2016 to tax patent revenues differently than the other commercial revenues & gains.

DIFFERENT MODES OF SECURING FINANCE & ITS LIMITATIONS

Since long the businesses have had two sources of finance: Equity & Debt but both has its own limitations & drawbacks as under the equity finance an enterprise secures finance by shedding off its ownership rights but after a certain level it's impossible for an enterprise to further dilute its ownership as it can lead to losing control over the enterprise or having very limited to no say in decision making.

This is exactly where the debt financing comes into picture wherein the company pledges its physical assets to secure finance from the banks and other financial & lending institutions, this method of financing though is lucrative for its ease of access & lower average cost of capital yet is not viable for every organisation esp. for such organisations which have higher intangible assets and very little hard assets to pledge for such debt financing.

What is intangible asset finance & its potential?

Intangible assets are non-physical assets held by an enterprise such as Goodwill & intellectual property. These Intangible assets can be used to get finance either by securitising them or by transferring rights to profits or cash flows generated by such intangible assets, it can also be used as a key indicator of company's value & can assist in checking financing viability and making financing decisions.

The intangible assets are gaining prominence as intangible assets make almost up to 90% of value of companies in S&P 500, in year 2021 global brand value touched 12.5 trillion dollars with a stagnant 14% increase in just 2 years of time³, also intangible assets including intellectual property add on an average twice as much value than the tangible assets⁴.

Challenges associated with intangible asset finance & prospective solutions

Intangible asset including Intellectual Property financing is still at a very nascent stage with various challenges & roadblocks including legal & structural hardships like the following: -

1. Lack of understanding of intangibles in investors & institutions

The number of investors & financing or lending institutions which accept intangible asset backed financing in India is very limited due to the lack of proper understanding of intangibles in terms of cash generating potential, forecasting etc.

As, this mode of financing is relatively very new and the investors & institutions have almost no experience in lending against intangible assets which makes them even more sceptical about the same.

To resolve these issues & to overcome with these challenges few countries have worked mutually with the local entrepreneurs & businesses by supporting the credit & financing

³ WIPO (2022). Global Innovation Index 2022, 15th Edition: What is the future of innovation-driven growth? Top 5,000 brands (% of GDP), source: Brand Finance database (<https://brandirectory.com/>); and International Monetary Fund, World Economic Outlook Database, October 2021, available at (<https://www.imf.org/en/Publications/>

⁴ WIPO (2017). World Intellectual Property Report 2017: Intangible Capital in Global Value chains, available at <http://wipo.int/publications/en/details.jsp?id=4225>

decision making process as in the case of Japan.

Japan changing perspectives

The Patent Office's IP Finance Promotion Project, in Japan⁵ introduced in 2015, has led to various regional lending & financing institutions driving optimistic changes by intellectual property focussed initiatives in awareness, knowledge & capacity building has led to a substantial increase in use of Intellectual property information by 25% among regional business lenders.

2. No clear & established valuation mechanism

The intangible assets lack a uniform, clear & established valuation mechanism with discrepancies & difference between the accounting & the market value of these assets, also the lack of available information & the terms of transactions involving intangible assets are also not readily available, these problems further make the valuation tough.

Also, in matters of cross border transactions there is no homogenous framework of valuation of intangible assets across economies which possess a significant roadblock in securitisation & commercialization of intangibles & intellectual property.

Initiative to create valuing standards for intangible assets

The international valuation standards council has issued relevant guidance on the valuation standards of intangible assets in ivs 210⁶.

Moreover, the royal institution of chartered surveyors also provided a guidance note in March 2020 regarding the valuation of intellectual property which covered different sub groups of intellectual property assets for instance technology related IP artistic related IP and brand related IP⁷.

INITIATIVE TO SUPPORT PROFESSIONAL VALUATION SKILLS

Singapore

Singapore chartered valuer and appraiser program offered in the year of 2016 was integrated to increase valuation capability it is one of a kind and first business valuation certificate in the Asian

⁵ Umbrella term broadly used to refer to initiatives introduced on the webpage <https://chizai-kinyu.go.jp/>

⁶ IVSC (2020). International Valuation Standards, including IVS 210, pp. 63-79.

⁷ RICS (2020). "Valuation of intellectual property rights".

subcontinent that helps regional valuation professionals to reform their practices in line with international valuation standards.

Jamaica

The Jamaican intellectual property office (Jipo) is leading an intrinsic effort to build capacity for the IP valuation in Jamaica; it also along with the partnership of UK bankers led to the establishment of Jamaica's first IP valuation association.

3. Very high transaction costs

While intangible assets backed financing hold a promising future but it's still at a very nascent stage with very small volume of transactions as compared to the other types of financing methods and with the existing complexities and challenges associated with the due diligence and valuation of these assets makes the overall transaction cause very expensive as well as very time consuming which makes this option very less attractive.

The policy makers across various countries have started unique initiative trying to reduce transaction costs by offering subsidies for IP valuation along with subsidised interest rates and additional tax benefits for lenders & borrowers.

Financial and sectoral regulators do not promote the use of intangible assets as collateral.

The financial and sectoral regulators have a key responsibility to ensure better functioning and overall stability of the financial system, these regulators require the banks and financial institutions to hold a certain specified amount of capital to cover the risks associated with a particular lending, the amount of capital to be held depends upon the degree of risk involved and these regulations makes it really impossible for the banks to lend against intellectual property or intangible assets as the risk profile is relatively high than the physical assets.

But these regulatory constraints may lead to better opportunities for other type of lenders to support the intangible asset backed financing, the alternative lenders such as debt funds can fill this void as they have significantly less regulatory compliances as compared to the banks.

4. Liquidation challenges for Intangibles as there is lack of Secondary Markets

The secondary markets ensure better liquidity and exchange of any security or commodity but it's not the case for the intangible assets as there is no secondary market which severely impacts the

overall liquidity of these intangible assets.

The contributing reasons for the same is that the intellectual property financing transactions are still very private and hardly any information is available in the public.

But there are efforts to bridge this gap.

State initiative's, development banks and specialised insurance offers schemes that can significantly change the overall risk allocation.

For instance, the collateral protection insurance shall address the banks concerns of being stuck within an illiquid asset in which the insurer can ensure recoverability of a particular portion of the collateral value and significantly limit the overall risk of the banks.

Furthermore, the development banks can also play an integral role in IP financing considering the lack of lenders in the market as the development banks have higher risk tolerance and significant ability to even cater for smaller deals.

Global examples

Republic of Korea

In the Republic of Korea IP backed lending has been led by two state owned banks industrial Bank of Korea and Korean development Bank in addition to the bank guarantee these institutions also facilitate access to finance for intangible asset intensive companies and the Korean development Bank also runs IP recovery fund of 60 million Us dollars⁸.

Canada

In Canada the development banks have played the key role in improving the IP backed financing in the country as the development banks supported the growth of small businesses and to call smaller transactions compared to other landers for instance a division of the development Bank of Canada **BDC** capital created a direct investment fund specifically for IP back financing structures with an overall budget of 160 million Canadian dollars the first round of investments has also concluded in the year 2022⁹.

⁸ OECD (2022). Secured lending for SMEs: Making effective use of registries and intangibles, 51 et seq.

⁹ BDC (2022). "World IP Day: BDC Capital's IP-Backed Financing Fund celebrates a busy year helping Canadian companies grow", available at <https://www.bdc.ca/en/bdc-capital/intellectual-property-backed-financing>

Jamaica

In Jamaica the Caribbean partnership facility which is a private sector initiative jointly funded by the commonwealth and development office Caribbean development Bank government of Canada and the inter-American development Bank has funded capacity building for IP valuation¹⁰.

Additionally, one more IDBI project in Jamaica is working for combining access to capital funding with incubation services to completely assist evolving SMEs for arranging grants for innovations & adoption of digital technologies.¹¹

Republic of China

The People's Republic of China is currently the largest government supported intellectual property market, China has insured direct subsidies to borrowers, credit guarantees and other relevant schemes to promote IP back financing. China is the first country to encourage sale and lease back models as a base for securitization.

DIFFERENT MODELS OF BUSINESS FOR IPR BACKED

DEBT FINANCE

If the intellectual property assets have good liquidity and better prospects it can be considered as a great collateral for financing and can also assist in challenging scenarios of financial distress, few of the alternative business models for IPR financing are as follows.

IPR as risk mitigator

An active IPR is considered as a source of future cash flow by the investors and can prove to be an integral factor in making lending decisions and can ensure that debt servicing is relatively easier.

IPR backed securities

Under this mechanism the IPR along with the rights over its royalties and income flow is transferred to a special purpose vehicle which then issues security against it, this leads to separation of a security from the respective intellectual property assets which helps in getting

¹⁰ Andrew Laidley (2021). "Over 300 trained in intro to IP valuation", Jamaica Observer, available at www.jamaicaobserver.com/business/over-300-trained-in-intro-to-ip-valuation

¹¹ Boosting Innovation, Growth and Entrepreneurship Ecosystem (BIGEE). <https://thinkbiggee.com/>

favourable risk rating and later the securities can also be issued in capital market for fundraising.

IPR sale and leaseback

Under the initiative the IP assets are acquired by the lessor or a bank from the owner of the intellectual property for a lump sum amount and then its leased back to the previous owner in lieu of some leasing fee and after the end of the leasing period the lessee gets the option to repurchase the IP asset.

IP backed loans

The intellectual property backed loans can be forwarded by respective firms in the market by putting the IP assets and the relative rights associated with it as collateral with the funding institution.

WIPO ACTION PLAN

The World Intellectual Property Organisation (WIPO) introduced three stream action plans on Intangible assets finance which are as follows: -

1. Raising the profile of intangible assets finance

WIPO has stressed the integration of leaders & professionals from various fields of business, finance and IP from private & public sectors.

It has also vouched for establishing Expert Consultative Groups (ECGs) for streamlining intangible assets finance. These groups will collectively contribute in solving the challenges & technical & operational roadblocks in IP finance.

Furthermore, concept of finance related forums suggested to raise complete awareness about the challenges, roadblocks & potentials involved in intangible assets finance.

2. Revealing ground reality

Since the IP financing sector currently lacks better disclosure & information especially for the investors, policy makers, institutions & other stakeholders, WIPO is working on evidence-based analysis by series of country reports to reveal actions of governments, policy makers & commercial actors.

The first such report was launched in 2021 Unlocking IP- backed Financing: Country perspectives Singapore's journey.

3. Equipping participants & stakeholders in IP assets finance & valuation

WIPO stresses about the need of providing practical tools for businesses to relatively

improve chances of using intangible assets.

A facilitating service for sourcing of valuation experts which could be used by investors & lending institutions to ascertain uniform & certain value of intangible assets including intellectual properties, this can also assist in underpinning programs by development banks & the government.

CONCLUSION

The potential of the service sector and startups in a knowledge based economy is exponential and it has full chances of driving India to a 5 trillion economy in the near future though without intangible asset and intellectual property financing it would be hard for the startups, medium sector enterprises and service sector to grow and thrive considering with the primitive way of funding it will hardly qualify to get finance considering these sectors and institutions have very less physical assets. Lack of finance has been the central reason for failure of the majority of startups as 65% of total failed startups in India described lack of proper financing option a central reason for their business failure.

Moreover, securitization and commercialisation of intellectual property assets is a growing practice in all the major & advanced economies and for a rapidly developing economy like India it becomes even more crucial to keep pace with the ongoing changing dynamics of the global economy.

IJLRA