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NECESSITY OF INTELLECTUAL PROPERTY RIGHTS IN CORPORATE SECTOR

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ABSTRACT

The intellectual property rights (IPR) are intangible in nature and gives exclusive rights to inventor or creator for their valuable invention or creation. In present scenario of globalization, IPR is the focal point in global trade practices and livelihood across the world. These rights boost the innovative environment by giving recognition and economic benefits to creator or inventor. The lack of IPR awareness and its ineffective implementation may hamper the economic, technical and social developments of nation. Hence dissemination of IPR knowledge and its appropriate implementation is utmost requirement for any nation. The present paper highlights various terms of IPR such as patents, trademarks, industrial designs, geographic indications, copyright, etc. with their corresponding rules, regulations, their need and role especially pertaining to Indian context.

KEY WORDS: IPR, Patents, Copyright, Trademarks

INTRODUCTION

In today's competitive environment, innovation is the mainstay for every business that leads to development of intellectual property. Identifying, developing, and leveraging innovation provides competitive edge and aids in long term success of the company. Intellectual property is not limited to technology companies, but is valuable for every business which invests huge sums in research and development for creating indigenous products and services.

The Intellectual property rights safeguards or acts as a binder to the creator of ideas in a particular sector or field wherein these rights bind the maker with the creation lawfully, wherein infringement can be considered unlawful. Over the years the value of intellectual property has

grown tremendously and it is now a vital element to business. The important forms of intellectual property are copyrights, patent, trademark, geographical indications and industrial designs. Apart from these there is one more form known as trade secret. A trade secret is any information that allows you to make money because it is not generally known. A trade secret could be anything such as formula, process, method or non-public information. One of the famous examples of trade secret is of the giant fast food chain KFC which has a trade secret of not disclosing its ingredients of its delicious chicken.

Intellectual property (IP) is the backbone of any modern organization. IP protection acts as both a shield and a sword for businesses: helping them secure their long-term revenue streams through IP licensing and enforcing patent rights. Therefore, IP needs to be sufficiently protected from duplication as it can threaten the market position of an organization and affect its business growth. The forms of Intellectual Property allow you and your products to be distinguished individually from others. They are a seal of authority in respect to the quality, product, services and expectations put forth by the buyer or the user. Intellectual Property is a wealth creating machine which gives you legitimate ownership with image of a trustworthy organization. Every business house relies on intellectual property rights, spending millions of dollars to secure their intellectual properties.

Intellectual property rights is an important intangible asset in any company. It gives competitive edge in the market and protects from hackers and pirates. India is fast growing economy and innovation is becoming priority for Indian firms and Government. This innovation needs protection and for this Intellectual Property is necessary.

¹According to WIPO, an understanding in Intellectual Property can help your business become more competitive and manage intellectual property related risks.

The Intellectual property system has an important role to play in helping us:

- Protect innovative products and services;
- Increase the visibility, attractiveness and value of your products on the market;
- Distinguish your business and its products from the competition;
- Access technical and business information and knowledge;

¹ wipo.int

- Avoid the risk of unknowingly using third party proprietary content or inadvertently losing your own valuable information, innovation or creative output.

The forms of Intellectual Property allow you and your products to be distinguished individually from others. They are a seal of authority in the respect to the quality, product, services and expectations put forth by the buyer or the user. IP is a wealth creating machine which gives you legitimate ownership with image of a trustworthy organization. Every business house relies on intellectual property rights, spending millions of dollars to secure their intellectual properties.

With IPR you have the legal right to file a suit against anyone who uses your idea or logo etc without your permission, you can franchise or give copyright of your work to someone and get royalties over it. Nowadays every country realizes the importance of IPR and so , almost every country has statutes providing guidelines regarding it. In India some of the important statutes regarding this are like The Patents Act 1970, The Trade Marks Act 1999, The Copyright Act 1957 etc. The provisions of these act have to be followed and any person infringing can be punished.

IPRs is an important intangible asset in any company. It gives competitive edge in the market and protects from hackers and pirates. India is fast growing economy and innovation is becoming priority for Indian firms and the government, this innovation needs protection and for this IP is necessary.

²Intellectual property rights is one of the sources of security for intangible properties which are still open to the public and which can be quickly replicated by anyone.

- Patent – A patent is used to prohibit the use or selling by another party, for a defined period of time, of original production. In brief, a sovereign authority awards the inventor the intellectual property right after an examination of its viability.
- Copyright – It is the right that protects a tangible form of expression like book, painting, etc. It protects the mannerism in which the idea is expressed.
- Trademark – It refers to the protection of logo or design that an individual or company uses. The distinguished logo or design helps the customers to connect with the brand value and thereby ensure trust on the goods and services.

² mondaq.com

TRADE SECRETS

The Important forms of intellectual property are copyright, patents, trademarks , industrial designs. Apart from these there is one more form known as Trade Secret. A trade secret is any information that allows you to make money because it is not generally known. A trade secret could be a formula, process, method other non-public information. One of the famous example of trade secret is of the giant fast food chain KFC which has a trade secret of not disclosing its ingredients of its delicious chicken.

North American Free Trade Agreement (NAFTA) defines a trade secret as “information having commercial value, which is not in the public domain, and for which reasonable steps have been taken to maintain its secrecy.”

The Trade Related Aspects of Intellectual Property Rights (TRIPS) lays down three essential conditions which are to be fulfilled by any information before it can be considered undisclosed information (trade secret), they are: -

- Such information must be secret, i.e., not generally known or readily accessible to "persons within the circles that normally deal with the kinds of information in question."
- the information must have commercial value because it is secret and,
- the information must be the subject of reasonable steps by its owners to keep it secret.

The Uniform Trades Secrets Act, 1970³ also provides for the definition of trade secrets, which is as follows: -

“Information, including a formula, pattern, compilation, program device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from no being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy”.

Significance of Trade Secrets

Trade secrets in the industrial economy have increased greatly in the past few years, for a number of reasons. There are mainly two reasons for that, one among them is that other forms of intellectual property like Patent, Trademark and Copyright have an element of uncertainty as

³ <https://www.wipo.int/edocs/lexdocs/laws/en/us/us034en>

compared to Trade Secret. Secondly, trade secrets have gained importance because, in many fields, the technology is changing so rapidly that it has surpassed the existing laws intended to encourage and protect inventions and innovations.

Another significant factor which has enhanced the value of trade secrets is the relative ease of creating and controlling trade secret rights. There are no bureaucratic delays and no multiyear waits for government grants, such as those for patents. Trade secret rights, in contrast, can be established by the explicit conduct or agreement of the interested parties. A trade secret right starts upon the creation of the idea in some concrete form, and continues as long as secrecy is maintained. Protection of information such as ideas or information which does not qualify to be protected as intellectual property within the legal framework Intellectual Property Laws of the land can be protected by Trade Secrets. They also have the advantage of being lasting forever, again, as long as secrecy is maintained.

Of course, trade secrets have negative aspects. They are a volatile form of property, and they terminate when secrecy is lost. Also, they require constant vigilance to protect them. Nevertheless, trade secrets play a major role in protecting innovations and establishing rights to use new technology. It is thus important for the intellectual property practitioner to be alert to the intricacies of this large body of trade secret law.

In any developing country, protection of intellectual property is one of the most significant tasks, as it encourages foreign investment in many fields. India does not have any proper laws for protection of Trade Secrets, we still depend on the old traditional Common Law Principles for Protection of Trade Secrets; these Common Law Principles have lost their significance in the scenario of the developing economy. There is a dire need for a Proper Policy Framework to regulate Protection of Trade Secrets. There are a lot of Companies, especially chemical companies who prefer Trade Secrets as a form of protection for their Intellectual property; these companies are reluctant to invest in India just because India cannot offer proper protection for their Trade Secrets. India is losing on a lot of Foreign Direct Investment because of this.

Protection of Trade Secrets in India

Trade Secrets seems to be a neglected field in India, as there is no enactment or policy framework for the protection of trade secrets. This form of intellectual property is a new entrant in India, but

is nevertheless a very important field of IP. Protection of trade secrets is a very important and one of the most challenging tasks for the Indian government as this will enhance the foreign investment in India giving a boost to the Indian economy. Foreign investors have to be assured of the protection of their trade secrets, so that they can do business with our country. A proper policy for trade secret protection will further enhance the security in our own industry. Almost all the countries in the world have a policy for the protection of trade secrets and India also being a signatory to the TRIPS is under an obligation to amend its laws or create a new law in order to safeguard the trade secrets of various businesses. So a proper policy for the protection of trade secrets in India is the need of the hour in order to provide a sense of security among the foreign investors and the local businessmen regarding their trade secrets which will further boost the Indian economy.

As mentioned above, in India, no substantive authoritative text or case laws are available to determine the nature or ambit of trade secrets. But the Indian courts have tried putting the trade secrets of various businesses under the purview of various other legislations in order to protect them and also, they have tried to define what a trade secret is in various cases, some of them are as follows: -

American Express Bank Ltd. v. Ms. Priya Puri Delhi High Court⁴, in this case defined trade secrets as “... formulae, technical know-how or a peculiar mode or method of business adopted by an employer which is unknown to others.”

⁵Michael Heath Nathan Johnson v. Subhash Chandra and Ors and John Richard Brady And Ors v. Chemical Process Equipment P. Ltd. And Anr ⁶took note of the contentions of the counsels who referred to English decisions to define trade secrets

Mr. Anil Gupta and Anr. v. Mr. Kunal Dasgupta and Ors⁷ the Delhi High Court held that the concept developed and evolved by the plaintiff is the result of the work done by the plaintiff upon material which may be available for the use of anybody, but what makes it confidential is the fact that the plaintiff has used his brain and thus produced a result in the shape of a concept.

⁴ (2006)III LLJ 540(Del)

⁵ 60(1995) DLT 757

⁶ AIR 1987 Delhi 372

⁷ 97 (2002) DLT 257

The legislations which are having a connection with the trade secrets can be summed up as:

1. Copyright Act, 1957[Section 51,55 and 63]
2. The Designs Act,2000
3. The Information Technology Act, 2000[Section 65, 72]
4. Indian Penal Code [Section 408, 415]
5. The Indian Contract Act [Section 27]
6. The Competition Act, 2002 [Section 3]
7. Civil Procedure Code
8. Criminal Procedure Code

BENEFITS OF INTELLECTUAL PROPERTY RIGHTS IN CURRENT TIMES

- **Innovative idea is a means to earn profit** - ideas have little to no worth on their own. Intellectual Property has great untapped potential to turn innovations into products and services which are commercially viable. The registering of copyright and patent will result in a constant stream of fee and increased income that will boost the overall market result.
- **Export Business Opportunities** – The productivity of a company in the export market is also improved by intellectual property. An Intellectual Property rights holder may use these logos and designs to sell products and services in foreign countries and obtain a franchise arrangement with the overseas of corporation or export the proprietary products.
- **Encourage the ideas by securing them** – There will still be people who will attempt to duplicate a unique idea or concept or development for monetary benefit. It is therefore, necessary to protect the Intellectual Property properties from unlawful infringement from a third party. For all forms and sizes of companies, Intellectual property security maybe implemented.
- **Business growth** – For ensuring the growth and profit, it is important for enterprises, more so in case of small-scale business to shield their exclusive goods or services from the rivals who may snatch away their market share. Losing market share in the initial phases of business cycle can be dangerous in the long run to an enterprise death.

Strong intellectual property rights help the consumers make an educated choice about the safety, reliability and effectiveness of their purchases. Enforced intellectual property

rights ensure products are authentic and of high quality that consumers recognize and expect. Also, intellectual property rights foster confidence and ease of mind that consumers demand and markets rely on.

⁸According to Economic times, a company should be proactive in implementing Intellectual property solutions to identify novel innovations and increase revenues. A well-defined intellectual property goal can result in achieving business objectives and help position the business as a leader in the marketplace. With the growth in business revenues, the intellectual property strategy can include protecting the unique aspects and foster innovations to explore new geographies. This can be achieved through licensing or joint ventures to create novel solutions that satisfy the needs in the market.

A company must elevate its existing intellectual property to determine whether it is in line with business objectives. This helps the company to identify new ways to leverage the intellectual property through licensing opportunities. Successful companies must look for new avenues to expand their product offerings, increase their sales revenue, and foray into new markets.

An organization's patent portfolio is vital for its future success along its various intellectual property assets as designs, trademarks and copyrights. Thus, organization should ensure the maximum realization of its existing portfolio which can be done through effective portfolio management. Also, the organization should understand the patent portfolio in tandem with its competencies and market opportunities available. There is need to identify white spaces where the organization can license its patent portfolio or divest to gain financial returns. A clear and effective patent strategy can aid the organization to manage its patent portfolio.

RISKS INVOLVED IN INTELLECTUAL PROPERTY RIGHTS IN CORPORATE WORLD

In the **King IV Reports**⁹ which presents good corporate governance guidelines for companies, the term 'Intellectual Property' does not feature. Yet, it is perhaps the single most important and valuable aspect of any modern business. The mismanagement of IP assets introduces massive

⁸ m.economictimes.com

⁹ <https://kpmg.com/za/en/home/insights/2016/10/king-iv-report-on-corporate-governance-for-south-africa-2016.html>

commercial risks for shareholders and directors alike. In instances where a company does not have the luxury of having an expert IP counsel on board, it is imperative that the directors are guided by the expert advice of outside IP counsel.

Where companies are concerned, the management of IP rights and assets are often left to mid-level managers and general legal counsel who are not necessarily experienced in IP law. Monthly reports are typically presented to the relevant board of directors and in many instances decisions on how to proceed in matters relating to the formalization of IP acquisitions and the implementation of statutory IP protection and enforcement programs are not necessarily directed by the board, but rather at a mid-management level. Important IP considerations such as transfer pricing, exchange control regulations, appropriate valuations and IP due diligences are often not addressed properly before commercial transactions are entered into. IP laws differ from country to country and with South African companies entering more international and indeed other African markets, the effective strategic management of IP assets is dependent upon expert advice on pertinent legal aspects in each jurisdiction concerned by expert IP counsel. It is important that IP assets are valued, recognized and managed by the top management level of a company to reduce commercial risks and ensure that the company's IP development, protection and commercialization strategies are in line with the commercial strategy and objectives of each company and group of companies (for larger organizations).

INTELLECTUAL PROPERTY WITH STARTUPS

Traditionally, IPRs were not critical to Mergers & Acquisition deals except for Intellectual Property intensive industries such as the pharmaceuticals. Under a broad range of Mergers & Acquisitions transactions, IPRs were considered to be intricately woven to the business and its revenues and therefore were not evaluated separately. Moreover, the onerous task of valuing it added to the reasons due to which IPR did not have a major role to play in Mergers & Acquisition.

However, IPRs have evolved to become one of the most significant assets of M&A deals. The enhanced liquidity, encouraging transactions in the patent market and the sophisticated system of patent evaluation, have added to the importance of IPR in M&A. IP adds value to a company as it signifies ownership and, in most cases, it represents exclusivity in terms of right to use a unique idea or creation. IP becomes the means of maximising returns and also reflects the inventions and innovations of a company which could potentially be a sustainable advantage over the

competitors. Especially in case of high-tech companies, its primary and most cherished assets are their ideas and the IPRs that protect their ideas such as patents, design, copyrights and trademarks. IP acts as a major negotiating factor for start-ups to leverage the best deal possible when it comes to M&A. The longer the list of IP registrations in one's name, the higher are the chances of bringing in the big bucks. Acquisition of Indian online travel booking company Yatra by Ebix through a merger deal of whopping 337.8 million dollars in 2019 forms a prime example of the same. It gives the start-up, an unfaltering competitive edge as IPRs are the embodiment of inherent uniqueness and creativity present within the company. A company's prudence and skill to create and maintain IP, mirrors its potential to become a desirable acquisition for an investor. The desirability and the competitive edge then further add to the value of the start-up. A strong base in IP for any start-up, projects a promising market value that it can attain in the future.

In a report published by the **World Intellectual Property Organisation (WIPO) in 2017**¹⁰, it was revealed that "1/3rd of the value of manufactured products traded around the world comes from "intangible capital", such as branding, design and technology." Therefore, IP is a crucial asset and an all-encompassing stimulus for investors.

Brand Finance's Annual Global 500 report of 2020¹¹, ranks Amazon as the most valuable brand at a staggering 220 billion dollars followed by Google and Apple in the second and third positions at highly impressive figures of 160 billion and 140 billion respectively. The cherry on top is the fact that there is no upper limit on how valuable a trademark can be and is fairly proportional to how well a company is doing in the market. Likewise, other IPRs such as copyrights, design registrations, patents etc. also result in value addition where patents are inherently valuable and do not even depend on the performance of the company to ascertain its value.

Companies whose products enjoy IPR protection have obvious benefits such as augmented sales and profits on account of its novelty. Protection provided by IPR prevents disintegration of the company's individuality and lowers risks and losses that may occur due to it. Moreover, owing to the fact that, protection of one's brand, idea and creation through IPR reflects a certain level of prudence and intelligence, it is completely safe to make the assumption that such start up owners

¹⁰ https://www.wipo.int/edocs/pubdocs/en/wipo_pub_941_2017.pdf

¹¹ https://brandfinance.com/wp-content/uploads/1/brand_finance_global_500_2020

will make for highly reliable partners.

Given the current scenario, investors look to put their money in start-ups that are distinct and innovative with a competitive edge. The same is achieved through a broad range of Intellectual Property Rights (IPR) that consolidate all the protection the start-up requires, in order to make its intellectual property a Unique Selling Proposition. Therefore, as Warren Buffett once famously said "In business, I look for economic castles protected by unbreachable 'moats' ". The term economic moat popularised by Mr. Buffett is nothing but a competitive advantage that a company possesses where IPR then invariably becomes a strong contender. Hence, simply put, IPRs deserve all the protection they can get. Securing IPRs in a timely manner can positively improve the chances of attracting investments and hence pave the way for major returns in the name of the company.

CONCLUSION / SUGGESTIONS

From the cases discussed we can clearly see that in India trade secrets have been protected using common law principles like equity and fraud. In most cases of these they have been refereed under Section 27 of the Indian Contract Act. Relief claimed in these cases, are enforcement of Non-Disclosure Agreements between the employee and the employer. The courts have been very reluctant to enforce covenants, which put post-employment restrains on the employee. The courts have seen these cases as a clash of two interests, the right to livelihood of the employee and right to make profit of the employer. So it is quite clear from these cases that the courts have try to protect the interest of the employees rather than the employer and in all these cases the court has taken a different stand in the circumstance of the respective case there is no uniform rule. This is where the problem starts when there is no uniform rule you cannot be sure of in which direction the court may lean on, this apprehension discourages development of ideas and Investment by companies in areas where they can protect their Intellectual Property through investment but if we have policy like a legislation this will give a uniformity for protection of Trade Secrets then the courts will have to be bound by the legislation.