

## INTELLECTUAL PROPERTY RIGHT – LIABILITY INSURANCE

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### **Introduction**

Concern for safety and security of life and property is very basic to human nature. Arising out of this basic human concern, insurance as an instrument to provide security, developed over a period of time. To begin with insurance was more concerned with providing relief in case of damage / destruction of physical assets and consequences arising thereof. As society evolved and with rapid industrial and technological development, threat to the existence of organization / individuals started emanating from a new source “liability under statutory and common law.” As a result, a whole lot of liability insurance products developed to cater to this need. Physical assets are now no longer the only tools, for creation of wealth. Intellect and innovation have become the key to succeed in today’s highly competitive environment and have become the main value adders. It helps to build human resources and intellectual capital. In the contemporary economic context, where organizations are facing ever increasing and wider array of competition pressure than ever before, survival and progress depend upon creativity and finding cost effective innovative solutions.

The fact of the matter is that an intellectual property system is a very important and crucial part of any country’s economic infrastructure and hence there is need to protect them. But, first let us examine what is intellectual property, kind of risks to which it is exposed to and how to manage these risks and the role played by insurance in such management. Like other physical properties, IP also needs to be protected and insurance can be one of the mechanisms for this protection.

As will be seen in the later part of this article, the patent battle is becoming more and more order of the day and huge amount of money is involved to fight these battles. According to American Intellectual Property Law Association the estimated cost involved in an infringement suit is in excess of \$ 1 million. Besides, very high

economic value of IP is at stake which has to be taken care of by appropriate risk management approach.

### **What is intellectual property?**

The term 'intellectual property' refers broadly to the creation of human minds and intellectual property right protects the interest of creators by giving them property rights over their creations. Most of the countries have framed laws to govern the protection of intellectual property. There are two reasons why such laws are necessary. The first reason is that the creator must have moral and commercial rights in his creations and the right of the public in accessing those creations must also be recognized under the law. The second reason is to promote creativity and innovation, which contribute to economic and social development. In view of the globalized nature of intellectual property, intellectual property rights and their violation, there was a need felt to have international conventions to codify and standardize rules and procedures governing intellectual property rights in all its dimensions. Accordingly 'World Intellectual Property Organization (WIPO)' was born in 1967. As a specialized UN Agency, WIPO is a forum of member countries to create and harmonize rules and practices to protect intellectual property rights and its enforcements. Globally, WIPO is dedicated to ensure that the rights of creators and owners of intellectual property are protected worldwide and that inventors and authors are thus recognized and rewarded for their ingenuity.

WIPO does not define "Intellectual Property" per se but gives the following list of subject matter protected by intellectual property rights:

- Literary, artistic and scientific works
- Performances of performing artists, phonogram and broadcasts
- Inventions in all fields of human endeavours
- Scientific discoveries
- Trademarks, service marks and commercial names and designation
- Protection against unfair competition
- "All other rights resulting from intellectual activity in the industrial, scientific literary or artistic field"

IP is thus non-tangible property that is the result of creativity.

Intellectual property is divided into two branches by WIPO namely:

(i) **Industrial Property** (ii) **Copy right**

*In Indian context patent and trademarks are the words used to describe industrial property in all its form.*

(i) **Industrial Property:** These apply not only to industry and commerce proper but also to agriculture, mining and to all manufactured and natural products.

Industrial property takes range of forms. These include:

- a. Patent to protect inventions. It is an authority given by a government to an individual or organization conferring a right or title specially the sole right to make a use or sell some invention. The invention could either be a product or a process and accordingly we can have a product patent or a process patent. The rights conferred by patent are defined in the patent law of a country.
- b. Industrial design: This refers to aesthetic creations determining the appearance of industrial products. The visual appeal is an important factor which influences consumer.
- c. Trademarks: This is a distinctive sign used by an organization to uniquely identify the source of its products / services to its consumers and to distinguish its products or services from those of other entities as also its quality. IP also covers trade names i.e. commercial names.
- d. IP with regard to integrated circuit: The layout designs of integrated circuits are creations of human mind. These involve huge financial resources and expertise. The high cost of creation of such layouts design and the relative ease of copying are the main reason why such designs need protection.
- e. Geographical indicators: This refers to the specific geographical origin and posses qualities or a reputation that are due to that place of origin. Agriculture products have qualities typical to their place of production because of climatic, soil and other related factors e.g. Dehraduni Basmati

rice. Similarly these may also refer to non-agricultural products e.g. Swiss watches because of specific manufacturing skills and traditions typical to Switzerland.

- f. Protection against unfair competition: This supplements the protection of inventions, industrial design, trademarks and geographical indication. Unfair competition refers to the act of competition that are contrary to honest practices in industry / commerce. These may include, for example.
  - i. Acts in the nature of creating confusion
  - ii. False allegation to discredit establishment, goods or commercial / industrial activities
  - iii. Allegation that is liable to mislead the public.

- (ii) **Copyright:** This refers to artistic creations such as books, poems, music, painting, films and technology based works such as computer based programmes and electronic data base. Copyright is also referred to as author's right. Like the owner of any tangible property, the owner of copyright protected work may use his work as he wishes. He can prohibit or authorize reproduction. It should be understood that, copyright laws protect only the form of expression of ideas and not the ideas themselves. This means protection against "copy of the form as it is in toto in which the original work was expressed by the author." Again, whereas the protected inventions must be disclosed publicly in an official register, a created work is considered protected as soon as it exists without requiring any public registration. The copyright is thus the exclusive legal right given to the originator or his or her assignee for a fixed number of years to print, publish, perform, film or record, literary, artistic or musical material and to authorize other to do the same.

### **I.P. Risk exposure:**

Unlike physical property which are exposed to actual physical loss / destruction arising out of various contingencies (natural / man made), I.P. is exposed to risk of different

nature. But for sure both would lead to monetary loss. In case of tangible property, you can see the loss / damage, but in case of non-tangible IP asset, you may not even be aware of your IP right being violated. It may even have cross border implications. It should be appreciated that a huge amount of money is invested to create IP's. Besides, creation of IP involves lot of effort, planning and time consumption. However, advances made in technology enable easy creation and use of protected material. Digital technology specially can be very easily made use of for making copies and transmitting copyright protected works. This illegal business is thriving worldwide and it has serious financial implications for the originator / creator of the IP. The other aspect is that you may infringe the IP right of other unintentionally and may create huge liability exposure for yourself. It should be appreciated that despite being intangible, IP contributes substantially towards the profit of business organizations. Yet another aspect of the risk exposure is high cost of litigation involved either for protecting your IPR or defending yourself if unintentionally you have violated someone else's IPR. Again, these legal battles may have to be fought in different countries of the world. World is now a global village. Funding legal battle is an issue. Protecting or defending may become a question of survival The irony is the IPR by itself is a protection mechanism but you have to fight legal battle to ensure that protection provided to you is not violated by others. For the offenders the temptation is always there for it is a low investment and very high return proposition. For the holder of IPR, to counter this is a big challenge, IP's are now a days exploited through licensing and distribution agreements. These contractual agreements bring in their own risk exposure.

### **Risk Management & IPR Insurance:**

In to-days knowledge based business environment, managing IP should form part of strategic risk management policy of any company. This would entail two-pronged approach. Firstly to put in place a constant market vigil mechanism to ensure that their patents are not infringed. Secondly, to have a system of infringement analysis to ensure that your products do not infringe on any one's patent. But these measures alone will not

do. This has to be supplemented by adequate and appropriate insurance cover also. Of late, there has been a substantial increase in litigation involving infringement of patent, copyright & trademarks. Therefore, IP exposure should be considered as an important component of the risk management policy of a company. Patent is a big issue in to-days world and hence if new technology, new design or new functionalities are developed, it is desirable to go for patent insurance. Currently, there are following types of IP insurance available in international market.

- 1) Defense and indemnity: such policy provide coverage for defending alleged patent infringement suit and in the event of liability being fastened, the policy also provides for payment of damages awarded by the court. There can be a policy restricting the cover to defense cost only. This is especially suitable for smaller companies.
- 2) Enforcement: This policy is meant for providing the legal expenditure incurred to pursue legal proceedings against third party infringing the IPR of the insured. This policy is based on reimbursement basis which means the duty to enforce patent remains with the insured.
- 3) IP asset protection (loss of value coverage): the policy compensates for the loss of IP value on either a first person or third person basis i.e. loss in revenue resulting from, for example, an unsuccessful defense of an infringement action preventing it from marketing of a product, government action, etc. Assigning value to IP rights is a difficult job. The factors taken into account for placing a value for an IP are licensing Roralties, contribution of IP to the sale of the product, amount of R & D spent on patent, etc.
- 4) IP exploitation Agreement: This policy covers legal expenses incurred when pursuing or defending legal proceedings on claim for breach of agreement relating to exploitation of IPR e.g. non performance by the licensees, distributors, etc. or defends itself in a suit brought against it.

In view of the nature of IP, we cannot have a standard run-of the mill kind of product. There is, therefore, a need to devise coverage based on client's requirement. One can

visualize this ever-changing need for IP protection specially those relating to computer and Internet. However, these policies are issued by only a handful of insurance companies in international markets. Unfortunately, we are yet to hear any Indian Insurance Company filing any such product with IRDA under “File and Use system.” But extension for IP infringement is available under Directors and Officers’ Liability Policy in Indian market, which is very limited in nature.

These policies are issued on “claims made” basis which means that the claims to become payable must occur within the policy period and must also be reported within the policy period. One year discovery period can be provided at 125% of the policy premium. This means that the claim can be reported and will be entertained also by insurance company even up-to one year after expiry of policy. The policies are subject to a minimum deductible per claim. The insured has to compulsorily participate as co-insurer (10% - 15%). Willful infringement is not covered. Infringement before the effective date of policy is also not covered. Fines, penalties, etc. are not covered. The premium ranges between 2 to 5% of limit opted.

The following feature of the policy called economic benefit clause needs special mention. This is meant to recover money advanced by insurance company to the insured in certain circumstances. This clause has two dimensions.

- When the insured wins a monetary award or settlement against a patent litigation, it will have to reimburse the insurance company on a proportionate basis till the entire money advanced by it is recovered.
- The clause enables an insurance company to recover “presumed economic benefit” from the insured.

Apart from the obvious benefit of IPR policies, the indirect benefit may include possible discouragement to the infringing firm, fearing the financial strength of the patent holder provided by the muscle power of insurance company. Besides, patent insurance ensures long-term survival of the company and builds investors’ confidence.

## Indian Scene

In the recent past there have been many instances of Indian companies getting embroiled in patent litigation. Mumbai based Sun Pharma was sued for patent infringement by US based Medimmune oncology. Similarly Ranbaxy, a big name in domestic pharma is involved with patent litigations against MNCs. In fact, Mr. Malvinder Singh, CEO & MD of Ranbaxy in a recent interview has commented that “Settling patent rows imparts stability to the revenue stream.” Such rows can seriously affect Ranbaxy’s future prospect.

In the Indian context it will be of interest to quote here some of the recent newspaper reporting in relation to what we are discussing.

- “Movies also seek insurance against legal claims.” (Times of India, August 10, 2008)

The news item apart from other aspects talks about copy right infringement in relation to Manoj Kumar – Shahrukh Khan encounter in “*Om Shanti Om*” Movie . It also talks about Rakesh Roshan - Ram Sampat “*Krazy 4*” spot.

- “WIPO urges India to sign net treaties.” (Economic Times, 15<sup>th</sup> July, 2008)  
This relates to protection about use of creative works on the worldwide web.
- “A place for patents in cyberspace”  
It talks of setting up of a site by C-DAC to boost patenting on information, communication and technology.(Times of India, August 2008)
- Techie held for copyright violation; E-learning Company says that it has lost Rs.100 crores. (Times of India, December 1, 2008)

FIR lodged with cyber crime cell, Pune under Section 66 of the Information Technology Act 2000, Section 63 of Copyright Act 1957 and other relevant section of IPC.

These and other similar news items are indicative of the shape of things to come. This segment of insurance will receive boost in the days to come. The Indian insurance company will have to come out with IPR Policies. Initially, they may have to depend on their reinsurer / foreign JV partners to help frame and launch such policies because of lack of experience in Indian market.

## **Conclusion**

The ground reality is that more and more intellectual property claims involving infringement of patent, copyright and trademarks are being filed and litigated at a huge cost to both the parties. Patent cases top the list. Whereas limited coverage for copyright/trademark infringement is available with CGL policy under the advertising injury section, patent per se is excluded from the scope of the policy. A comprehensive cover that can address the concerns of various stakeholders is required. The Indian insurance company must rise to meet this new market need.

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