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## INTELLECTUAL PROPERTY RIGHTS AND ENTREPRENEURIAL VENTURE - SOME REFLECTIONS

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**Abstract:** *Any successful business has an element of IP (intellectual property) (be it a trade mark or a patent or an industrial design or a copyright) as part of its successful business strategy. Realizing the role of IP and identifying the same in the business will help in protecting the same, before the opportunity to avail protection under the law lapses or before the IP becomes generic. Hence, realizing IP creation should be an important strategy in business. Once the IP asset is identified, evaluating the same vis-a-vis the provisions of applicable law as to their legal relevance, term of protection etc needs to be understood and efforts made to protect the same under relevant law should be activated. The cost of creation, protection in territories where the business lies and enforcement of IP can be substantial for an enterprise. Hence the cost associated with such an ongoing exercise needs to be budgeted and evaluated. Protecting the IP asset from falling into public domain or in getting communicated without ring fencing the same against unauthorized communication needs to be enforced. Creating awareness about IP with employees, consumers and other stakeholders goes a long way in preserving the identity of IP asset.*

**Keywords:** *Intellectual property, business strategy, generic, legal relevance, public domain, ring fencing, industrial design, stakeholders*

### INTRODUCTION

Every business venture in this world is born out of Entrepreneurship. Entrepreneurship has been the sprouting ground for various discoveries, inventions, innovations, products and processes. It is a universal truth that Intellectual Property (IP) is part and parcel of every entrepreneurial venture. In the rush to making the entrepreneurial venture a success, many entrepreneurs forget the aspect of IP arising there from and *fail* to take adequate steps from protecting the same. In some cases, the entrepreneurs do not even realise that they possess an IP asset. It is generally felt that unless there is a cost to the creation of an IP



there is no need to protect or even an attempt to realise need for protecting an IP asset. Nature of an IP asset being intangible its value also truly remains so for an upcoming entrepreneur. This is because entrepreneurs barring a few lack awareness about IP and fail to realise for budgeting a cost for protecting the same even in earlier stages. Certain IP assets like a Patent or Design require first disclosure to the regulator or the authority for registration of the same, if the inventor or creator of the same prefer legal monopoly and reap its benefits. Certain IP assets like copyrights, trademarks do not compulsorily require registration for enforcing one's ownership rights, but registration will certainly ease in asserting their rights before a court of law. The general perception in India is that when something is innovated without much effort or sweat, no attempt need be made to protect the IP in such innovation. This careless attitude has resulted many an innovations, inventions, brands, designs, copyrightable material being copied right royally rendering the innovator or inventor or creator losing his golden chance of asserting his rights. The Hindu Dharma preaches knowledge is free but it does not mean preach that the creations arising out of application of knowledge is also free.

### **REALISING IP CREATION**

One of the biggest challenges for any entrepreneur is to realise that he or she has created an IP asset in the course of his or her entrepreneurial journey. In the early years of entrepreneurship, entrepreneurs showed much importance of budgeting any cost towards IP prosecution for registration or monopolizing the same due to bleak finances and other priorities. Hence an entrepreneur needs to build in IP assets creation into his business such that the moment the same is created, effective steps are taken to protect the same. Inventions would require disclosure to the patent office prior to commercialisation; else the inventor will lose the right to patent the same. Designs also require registration prior to publication. Trademarks and Copyrights can be registered optionally. If the same is created under contract for service, then a declaration to the effect that the copyright in the work belongs to the entrepreneur needs to be taken.

### **EVALUATING THE VALUE OF THE IP**

An analysis of the nature of the IP and its value both present and the future needs to be evaluated. Except trademarks, all other IP assets are limited by a period. For example, patents are valid for a period of 20 years, designs are valid for a period of 14 years, and



copyrights are valid during the life time of the author and 60 years after the death of the author. Trademarks as such do not have any expiry period for the rights. Hence the effective utility of the IP asset have to be evaluated so that the urgency and need to protect the same will be realised. As regards trademarks, there is no period for expiry of rights. If a trademark is registered, the same is valid only if the registration is renewed once in ten years. However non-renewal only cancels the registration and not the ownership of the trademark. The entrepreneur may choose certain invention (process based) to be kept as a trade secret. However, it is a very risky to safeguard the trade secret. There is no law in India to protect trade secrets. It is said that KFC and Coca Cola have kept their business process in creating their products are kept as trade secret. By this manner, the life of the invention is able to beat the period set by a patent. The secret loses its value the moment it falls into the public domain. In the era of reverse engineering to decipher any kind of product construction or process mechanism, it requires an immaculate effort of the entrepreneur to keep his IP asset as a trade secret. This also entails the protection mechanisms to be elaborate and costly.

### **BUDGETING THE COST OF IP PROTECTION**

It is pertinent for the entrepreneur to budget the cost of acquisition of IP, be it by means of registration or by means of assignment as an important cost in their business plans. Budgeting of costs should consider the territory where the entrepreneur seeks to do his business. Since an IP asset is territorial, the entrepreneur needs to protect the same separately in respective territory (country) where he proposes to operate. Budgeting also needs to be done for aspects relating to frequent search for any infringement of the IP asset by any person in the territories where the IP asset is being operated or registration is obtained. Adequate measures need to be taken against such infringement which cost also needs to be budgeted. Advertisements and caution notices need to be published time and again to communicate to the public about the ownership of the IP asset.

### **IMPROVEMENT / ACCRETION OF IP ASSET**

Any useful modification to the process or product borne out of an invention which is subject to a patent needs to be protected by separate application. Any omission to do so will result in the same falling in the public domain.



## **NON-DISCLOSURE / CONFIDENTIALITY**

The entrepreneur should ensure that every employee or business associate is party to a Non-Disclosure & Confidentiality Agreement so that the valuable IP asset is not communicated recklessly in the course of business. Adequate care and caution needs to be exercised to recover the documents or evidences representing the IP asset when an employment contract or business relationship ends. It should be adequately made known that the Non-Disclosure & Confidentiality Agreement survives the termination of the employment or business association.

## **CREATION OF AWARENESS ABOUT THE IP ASSET**

The entrepreneur should create awareness to the consumers and the public about the ownership and importance of protecting the IP asset. Certain trademarks have gained such popularity as to being in the risk of becoming the generic name of the product or the process. The best example is Xerox which is a trademark owned by the Xerox Corporation of the US but recklessly used by the consumers and general public as the name of the process. Xerox Corporation has taken various measures in educating the public about differentiating the trademark "Xerox" from the process of photocopying.

## **ROLE OF GOVERNMENT IN POPULARISING IP PROTECTION**

There is a great need on the part of the Government agencies which promote entrepreneurial talent to preach the importance of IP so that entrepreneurs are well informed of their intangible assets and ways and means of protecting and leveraging the same. In the west, any new green field venture will invite interest from angel investors or venture capitalists only if such venture can demonstrate creation of IP wealth. In today's business scenario, it is raw truth that an IP asset sometimes is much more valuable than the choicest and prime real estate. Thus spreading awareness about IP and its protection akin to consumer activism is important for a country to be self sufficient in technological advance. Indian entrepreneurs stand greatly benefited as the cost of prosecuting an IP registration or protection exercise is not a very costly affair when compared to the situation in other countries. The need to make this point reach the entrepreneurs is the responsibility of the Government and the various trade bodies in the Country should strive to spread the message to their clan zealously. India with its huge purchasing power and growing urban population with spending power has made even the premier brands, whose target



consumers are from upper class, has brought in a realisation to water down their ambition to target the middle and upper middle class. The best examples are premium cars companies like Benz and Volkswagen have started launching family hatch backs in the price bracket which can be easily accessed by middle class so that the product has a wider reach and better popularity. The huge population of India drives volumes for the manufacturer and hence he is able to realise more profits rather than selling few premium cars.

## **NATIONAL IP POLICY**

India was regularly accused by the west about lack of proper protection of IP assets especially in the realm of patent laws. Hence, Government of India formulated a think tank with the former Chairperson of IPAB Justice Ms. Prabha Sridevan as Chairperson. The think tank has since rolled out the National Intellectual Property Policy with the new tag line ***Creative India; Innovative India***. The key objectives of the IP Policy is to provide a legal framework that will provide a substantial time reduction in registering patents and trademarks when compared to the period taken in the present dispensation. The seven pronged IP Policy provides for the following:

- (i) ***IP awareness outreach and promotion***: To create public awareness about public, social and cultural benefits of IPR among all sections of the society. It espouses a nationwide program of IP awareness with an aim to improve the awareness about the benefits of IPR's and their value to the public and the creators of IP. It helps in building an atmosphere such that creativity and innovation are encouraged in public and private sectors, R&D centers, industry and educational institutions.
- (ii) ***Generation of IPR***: To stimulate generation of IP assets in the business. Accordingly Government has encouraged start-ups to register patents and trademarks with lesser costs. As the country boasts a huge talent pool with young graduates and technologists, any resounding success in the market will require generation of IPRs and their commercial exploitation.
- (iii) ***Legal and Legislative framework***: To have strong IPR laws which will balance the rights of owners with the larger public interest. While IPR laws in India are TRIPS compliant, this objective will ensure that the laws keep pace with development of trade and commerce.



- (iv) **Administration and Management:** To modernise and strengthen service oriented administration such that there is reduction of time taken for completion of process and registration with the reduction of costs associated with registration. The rules under the Trademarks Act, 1999 have been completely revamped with lesser forms and lean process administration.
- (v) **Commercialisation of IPR:** Leveraging the commercial value of IPR asset is the ultimate objective which will make the creativity reach the common man. Hence IP entrepreneurship is one of the important aspects which link the creators of the IP with the investors.
- (vi) **Enforcement and Adjudication:** Strengthening the enforcement and adjudicatory processes become indispensable in combating infringement of IPR. A robust IP regime is one which is well supported by an efficient and effective IP enforcement eco system.
- (vii) **Human Capital Development:** Further, there is an imperative need to strengthen and develop human capital; institutions need to be identified for teaching, research and skill building in IPRs. Besides, it requires development of knowledge pool of IP professionals who can help in IP protection and its commercial exploitation.

## CHANGE IN THE MARKET PERCEPTION

With the National IP Policy in place, India is part of select League of Nations which openly espouses an IP protective environment making it attractive for foreign entrepreneurs to invest not only commercially but also bring in proprietary technology. The concept of caveat emptor has paved way for caveat venditor, else, with the entrepreneur being pushed to constantly think and innovate his products, services and processes so that he stays in the hunt. Hence, it can be confidently declared that every entrepreneur cannot oversee realisation and protection of IP assets in his business venture, if he has to make a difference in the ever competitive market place. Therefore, it can be further declared that entrepreneurship and IP assets are mutually dependent for a successful business venture.

## INNOVATE OR PERISH

Hence in the changing business environment and constant Research and Development to make the lives of the people simpler and easier, every entrepreneur has to continuously



innovate to stay in the race. Its innovate or perish kind of a business climate if one wants to be a leader or even to remain competitive in his sphere of business. Any slackness will result in huge loss of market share. One best example is that of Nokia who once commanded 65% of mobile phone handset market had to exit the market as it failed to innovate on its age old symbian software, which failed to meet the expectation of smart phone applications and hence proved to be unattractive in the changed market environment. New entrants with android platforms and iphone (proprietary applications) use advanced technologies providing various applications for both business and entertainment uses. Thus with IP being the hallmark for any successful technology, one cannot rest on its laurels. Continuous innovations require huge investment in Research and Development and technologies. Thus, it can be said without any hesitation that there cannot be any more entrepreneurship without IP. There cannot be successful entrepreneurship without competent IP protection. Hence the most appropriate mantra for business is *Innovate or Perish*.

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