

India and Intellectual Property

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The year 2019 has started on a good note for India as far as Intellectual Property (IP) is concerned. India has improved its ranking on **Global Innovation Index (GII)**. For the year 2018 India was ranked 57 by the GII report, up from 60 last year. For the last few years, India has consistently improved its ranking on GII. In 2015 it was ranked 81st! India has improved its ranking on **International Intellectual Property Index** too. India has jumped from 44th position last year to 36th position in 2019. The index, which analyses the IP climate in 50 global economies, is brought out by the US Chamber of Commerce's Global Innovation Policy Centre (GIPC).

2018 witnessed 15% increase in the number of patents granted. 11993 applications were granted between January 2017 and December 2017, whereas 13782 patents have been granted in 2018. This is the result of conscious and sustained efforts to improve Intellectual Property eco -

system in the country. In 2016 the **National Intellectual Property policy** was framed which envisions 'an India where creativity and innovation are stimulated by Intellectual Property for the benefit of all; an India where intellectual property promotes advancement in science and technology, arts and culture, traditional knowledge and biodiversity resources; an India where knowledge is the main driver of development, and knowledge owned is transformed into knowledge shared'. The Policy has seven objectives:

- i. **IPR Awareness: Outreach and Promotion** - To create public awareness about the economic, social and cultural benefits of IPRs among all sections of society.
- ii. **Generation of IPRs** - To stimulate the generation of IPRs.
- iii. **Legal and Legislative Framework** - To have strong and effective IPR laws, which balance the interests of rights owners with larger public interest.

iv. Administration and Management

- To modernize and strengthen service-oriented IPR administration.

v. Commercialization of IPRs

- Get value for IPRs through commercialization.

vi. Enforcement and Adjudication

- To strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements.

vii. Human Capital Development

- To strengthen and expand human resources, institutions and capacities for teaching, training, research and skill building in IPR

The policy also includes action plans to achieve the objectives. Intellectual Property Rights refer to exclusive rights in various intellectual creations which originate from statutes. India has a comprehensive legislative framework which has been amended from time to time to fulfil obligations under the TRIPS.

S.N.	Name of IPR	Protection accorded	Legal Protection(India)
1	Patent	Inventions	Patent Act
2	Industrial Designs	External Appearance of the product	Design Act
3	Trademark	Sign (name/picture etc.) distinguishing products from competitor's product	Trademark Act
4	Copyright	Literary, dramatic, musical and artistic work,	Copyright Act
5	Geographical Indications	Traditional knowledge and skill, region specific products.	Geographical Indications Act
6	New Plant varieties	Inventions in agriculture, horticulture etc.	Protection of Plant Varieties and Farmers Rights Act
7	Semiconductor IC Layout Design	IC layout designs of integrated circuits	Semiconductor Integrated Circuits Layout-Design Act

There is no separate legislation for Trade secrets which also contain valuable Intellectual Property. Trade secrets are respected by courts on the principles of equity and allowed action under common law for breach of confidence under contractual agreements. Liability for infringement of Trade Secrets can be determined through various laws in addition to Contract Act like, Indian Penal Code, Criminal Procedure code, Information technology Act. Intellectual Property Rights are territorial in nature. India is part of important international conventions and treaties which facilitate international registration of IP. Indian IP eco-system has been evolving over the years on both the fronts – judicial and administrative an. On the occasion of World IP Day on 26th April brief review of developments in last few years is presented below.

a)Judicial front :We can come across certain far reaching decisions on the judicial front. In case of patents there were decisions regarding interpretation of S.3 (d), compulsory licensing, Standard Essential Patents and others like non-working of a patent disentitles its holder to injunctive relief. S. 3 (d) of Patent Act refuses Patent for ' mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine, or apparatus unless such known process results in a

new product or employs at least one new reactant'. In 2015 March, India's Patent Office revoked a patent on asthma drug, Spiriva (tiotropium bromide monohydrate) held by German company Boehringer Ingelheim on an opposition filed by Cipla. The patent was revoked on grounds that it lacks inventive step, fails to demonstrate therapeutic efficacy as well as requirements of Section 3 (d). The Patent office held that the compound failed to show any technical advancement or any economic significance of the compound Tiotropium bromide monohydrate over the disclosures of prior art. Novartis's patent application for cancer drug Glivec was rejected by Indian Patent office on certain grounds which was upheld by Indian Supreme court. One of important grounds was that it is not a new medicine, but an amended version of a known compound. Novartis has lost a long patent battle in India for this drug. Patent Trolls which are non- practising entities create a lot of nuisance for the business organisations. In USA such trolls do flourishing business. S.3(d) prevents evergreening of patents by making small modifications in existing patents. . *Also Patent Act requires that Patent is commercially exploited or worked in India (Form 27) and also provides for Compulsory Licensing under certain circumstances. Such provisions have so far discouraged patent trolling . In another case Delhi High Court declined injunctive relief to Bayer Corporation and allowed Ajanta Pharma commercially export generic*

version of Bayer's patented drug Vardenafil on the ground of non - working of patent in India.

In case of **Industrial Designs** the Delhi High Court reaffirmed that in case of Design infringement suit, infringement is to be judged solely by ' eye' , minor differences in design are immaterial and no defence in infringement suit. J. N. Electricals had filed a suit for infringement of their registered design of electric toaster against President Electricals. J. N had registered design for outward appearance of an electric toaster. President Electrical 's design was similar to their design . Minor differences like lines on outer surface were not considered as defence in infringement suit.

In an important decision relating to **Trademark** the Supreme Court gave a decision that M/s Prius Auto Industries Ltd. did not infringe on Prius Trademark on Toyota . M/s Prius had registered the mark in 2002 which was opposed by Toyota claiming early use of the mark. The Court observed that Trademark rights are territorial in nature. Indian judiciary has always respected trans - border reputation of the mark but the reputation has to be proved. The SC did not find convincing evidence regarding Toyota's mark in Indian market. In **Copyright** suits the ownership of copyright and fair use are contentious issues. Ms. Neetu Singh was working with Rajiv Saumitra 's (she eventually married him)coaching institute in the

capacity of a Director. A well-known figure in the field of education and training, she had authored a book in her tenure as a Director. After a few years she separated from him and filed a suit against him for illegally publishing her book. He argued that the book was written during her tenure with the coaching class and hence he is the owner of copyright. While refusing his arguments the High Court ruled that writing book could not be considered as a 'duty' and Director is the agent of the institution. In determining ownership of the copyright, terms of employment are to be referred. His argument of 'fair use' was also refused as he was publishing and selling the books.

In 2016 Scotch Whisky Association (SWA) which has registered 'scotch' as **Geographical Indication** was successful in stopping Indian local producers of whiskey from selling the brews other than those sourced from the UK-registered association of scotch producers as 'scotch' or 'scotch whisky' or 'whisky from Scotland'. Oasis Distilleries, Adie Broswon Distillers & Bottlers and Malbros International were allegedly selling three local products — Royal Arms, Blue Patrol and Malbros — without sourcing them from the Scotch Whisky Association, b) **Administrative front** - In spite of comprehensive legislation, progress of IP has been slow and IP scenario not very encouraging. So since last few years many initiatives have been taken to improve India's IP scenario by the Government. Delays in granting of trademarks, patents and other IPRs and multiplicity of forms was making IP registration process complex, time consuming and laborious. Efforts are being made to make the processes user-friendly and expeditious. Government is encouraging e-filing of IP registration documents through incentives in registration fees. For **speeding up patent process** and reduce patent pendency number of examiners is increased. There is auto-allotment of patent applications to ensure uniformity and utilization of the specialized expertise of all examiners and controllers. Pendency in Patent examination is targeted to be brought down from the present 5 to 7 years to less than 18 months. There are

concessions to the Start-ups (recognised as a start-up by the competent authority under the Start-up India initiative) in Patent fees to promote patenting among start-ups. "The Department of Science and Technology has announced a cash prize of ₹1 lakh for each patent, The National Research Development Corporation also gives tax-free awards of ₹3 lakh each to three persons for IP-driven and innovation in high-tech area.

In 2016, Department of Industrial Policy and Promotion (DIPP), Government of India (GOI) made a pact with World Intellectual Property Organisation to establish **Technology and Innovation Support Centres (TISCs)** in India. The centres aim at *giving an impetus to Knowledge sharing, sharing of best practices among the TISC's, capacity building, generation and commercialization of IPs*" which will help India to improve its IPR infrastructure. Computer programs per se can not be patented in India. (copyright protection is available). There used to be lot of debates, confusion and arguments about Computer Related Inventions. In 2017 Patent Office has issued revised guidelines for such inventions for clearing the air.

As per **Trademark** rules 2017 number of Trademark forms has been reduced to 8 from 74. The provisions relating to expedited processing of an application for registration of a trade mark have been extended right up to registration stage (hitherto, it was only up to examination stage). Over all fees have been rationalized by reducing the number of entries in Schedule I from 88 to just 23. E-filing fee is 10% lower than physical filing fee. The examination time for a TM application has already been brought down from 13 months to just 1 month in January 2017; this is despite a stupendous 35% jump in TM filings in 2015-16 vis a vis the previous year. Provisions for determining and declaring a trade mark as "well-known" have been incorporated in the new Rules. There are concessions in registration fees to Start-ups, individuals and small and medium enterprises. In case of **Copyright** an important step was taken by acceding to the WIPO Copyright Treaty and WIPO

Performers and Phonograms Treaty which extends coverage of copyright to the internet and digital environment. Geographical Indications Act was passed in 2000. 326 products were registered under the Act till Oct.2018 'Hapus' received GI tag last year. In August 2018, a tagline and a tricolour logo for GI was released.



(logo is used for information purpose only)

IP offices are being upgraded to latest technology and in many cases even video conferencing is allowed.

IP Concerns and challenges : A very disturbing fact is that though number of patents granted has been increasing, **share of domestic companies is stagnant around 20-25%**. (in China, it is around 70%). There is not a single Indian company in top fifty international patent filers. ZTE and Huawei the Chinese companies are among top international patent filers. Out of the granted patents only 25% are working. Patent scene is too fragmented. IIT and CSIR and few big domestic companies are major filers. In case of New Plant varieties too government funded research institutes dominate the scene. In spite of India being an IT hub, there is very little response to Semiconductor IC Layout Design.

Overall ranking on GII has improved but on certain sub-indexes country has not done well. On R&D, education, innovation output index the rankings are very disappointing. In 2018, China has improved its ranking to 17 on GII. Low awareness and respect for IP and inadequate execution of IP laws has made India a paradise for counterfeit products. It is estimated that **FMCG sector loses 30% of its business to fake goods**. E-commerce is also contributing its might to this menace.



20% buyers receive counterfeit products. In 2017 Skechers, the famous US footwear brand had filed suits against certain e-commerce platforms after discovering that 15,000 fake pairs were sold. This is just a tip of the ice-berg. Indian film industry which generates annual revenue of more than \$2 billion from theatre releases, TV distribution rights and DVD releases of more than thousand movies per year is a victim of piracy. \$2.8 billion of its annual revenue goes to piracy. **India ranks at No. 4 globally for online movie piracy.** Counterfeiting and piracy not only affect interest of producers and consumers but also contribute to organised crime and terrorism. India has been figuring on the US' Priority Watch List that identifies trade barriers to US companies due to intellectual property (IP) laws and execution, year 2018 is no exception. According to the 2018 Special 301 Report "China and India are reportedly leading sources of counterfeit medicines distributed globally and 20 per cent of drugs sold in the Indian market are counterfeit and could represent a serious threat to patient health and safety." Citing a 2017 report by the OECD and EU Intellectual Property Office, the USTR report says India is reportedly a key producer and exporter of counterfeit foodstuff, pharmaceuticals, perfumes and cosmetics, textiles, footwear, electronics and electrical equipment,

toys, games, and sporting equipment.' Even the seeds, the vital input in agriculture are no exception to fake products. Spurious seeds, especially in chilli and cotton crops have caused distress to farmers in various states including Andhra Pradesh and Telangana. It is high time police are sensitised towards evil effects of counterfeiting and IP laws are implemented strictly. There is urgent need to create awareness and respect for IP at the ground level i.e. consumers, students and SMEs.

21st century economy is knowledge economy where new business models are coming up. Indian industry has to appreciate that IP will be central to new business models. Government and Industry must work hand in hand to **Make in India** dream come true.

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