IP Flavors

Bi-Monthly Magazine

Subscribe to 'IP Flavors' today as it is Unequivocal, Uncomplicated and Highly Informative!

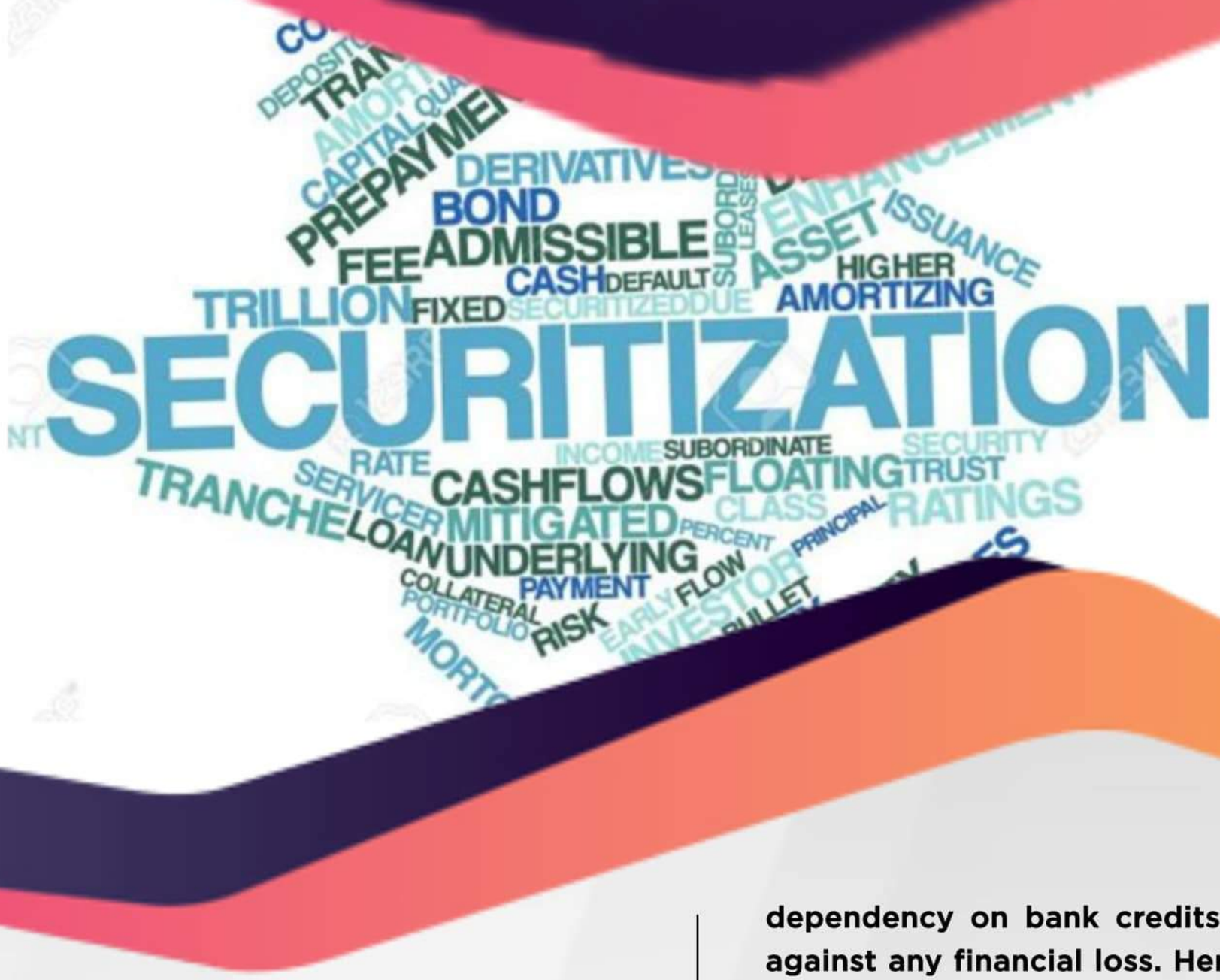
What's Included?

4th Edition

Kashish Intellectual Property Group (KIPG)

Table of Contents

A GUIDE TO SECURITIZATION OF INTELLECTUAL PROPERTY ASSETS



In the earliest days, economic advantages were rooted in tangible property like real estate, personal property, or different forms of natural resources. There has been a shift in this paradigm with the introduction of the modern-day economy, which has garnered almost every country's economic progress based on Intellectual Property Rights (IPRs) through information embedded products and services like pharmaceuticals, computer software, databases, films, musical works, broadcasts of sporting events, and brand names. Understanding the potential of these resources is very crucial for the growth and development of any economy, which may occur through securitization. Securitization is a beneficial financial tool that is backed by future income channels, which have the capacity to grow as a leading source of financial gains.

What is Securitization of Intellectual Property Rights?

The securitization of IPRs enables the capitalization of the intangible assets to accrue predictable channels of royalties, which can help finance business dependency on bank credits and creates a cushion against any financial loss. Hence, it helps to diversify the interest of an entity procuring creativity and innovation. A few famous examples of securitization of Intellectual Property (IP) assets began to be witnessed right after the mid-1990s in the form of copyright held by singer David Bowie, the Trademark Rights over the franchises held by Domino's Pizza, and the Patent Rights over the HIV drug prepared by the Yale University.

The term has been defined by the Reserve Bank of India as:

"Securitization is the process of pooling and repackaging of homogenous illiquid financial assets into marketable securities that can be sold to investors."

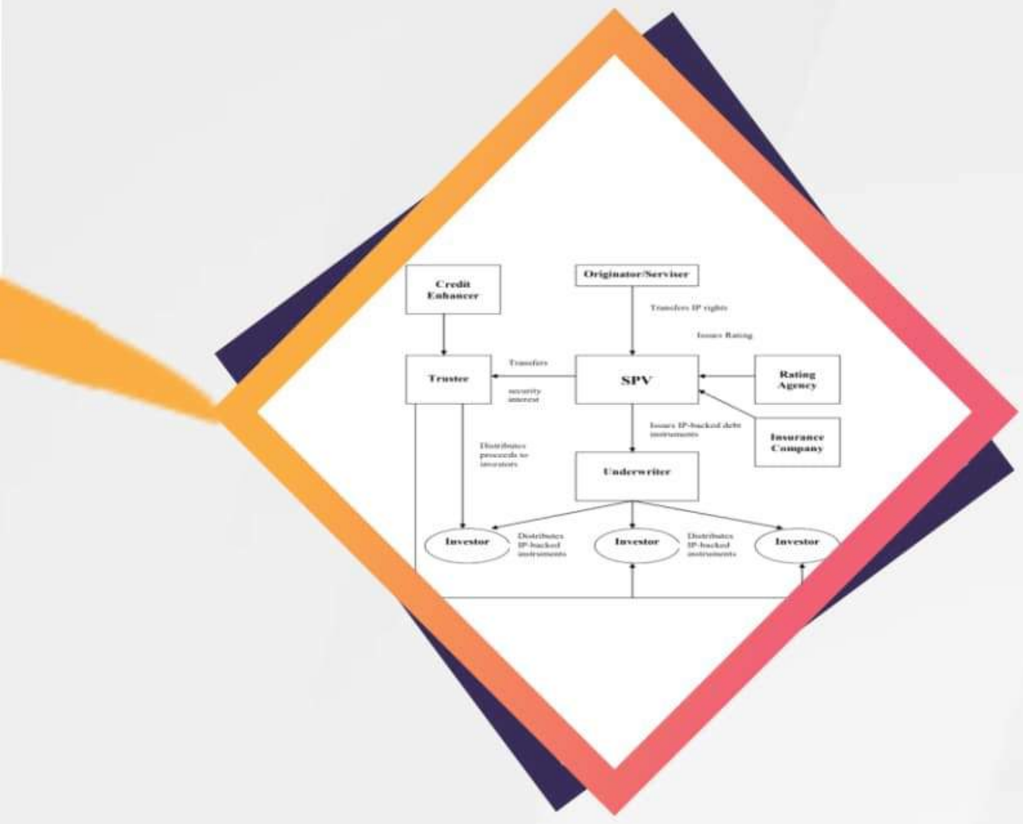
To be specific, it is a practice whereby the future cash flow of an entity from an IP asset is used in the form of a guarantee for the repayment of its debts. Therefore, it helps to create the funds before actually receiving the payment due in the future.

Parties to the Procedure of Securitization

1. **The Originator:** The originator is usually the bank

in the case of non-IPR assets, but for IP assets, it is the company that owns the said asset, which is to be securitized, i.e., being financed to the investors through an indirect mechanism. It is the originator that transfers the assets to the SPV, which it creates on its own.

2. The Special Purpose Vehicle (SPV): It is created by the originator to transfer the IP assets instead of the funds, which the SPV provides to the originator. The SPV raises the previously mentioned funds from the investors in return for the IPR assets by issuing IP security backed instruments, or it can also create a Trust. Although it is created by the originator, it is a separate legal entity. .



3. Investors: These are those people who wish to invest money in the said IPR asset. They pay the SPV the amount, which is specified in the negotiable instruments in return for the IPR asset-backed security in addition to an interest rate. The same money is then used to replay the originator. It is usually performed by insurance companies.

4. Servicer: It is the authority that takes care of these assets during the process of securitization concerning their payment and collection of annuities, royalties, taxes, etc.

5. Trustee: The Trustee is the one acting as a connecting link between the investor and the SPV or the Trust. It is a stalwart of the investors as it protects them by ensuring that the transferred assets are free from any claims or liabilities.

6. Rating Agency: It evaluates the level of risk the particular security backed by such assets hold by giving ratings to the debtor. The rating is an indicator of the ratio of cash flow that would come after the securitization of IPR assets by analyzing uncertain future events as well.

7. Credit Enhancer: As seen above, the rating agency provides for ratings. These ratings can be boosted if the IP is credit enhanced, and it would thus, attract more investors. Credit enhancement reduces the losses, which an investor may incur in the face of unstable IP performance.

The Process of Securitization

The procedure of securitization is such that it facilitates the holder of the IP asset (also known as the originator) to sell the asset to an SPV. This SPV creates the marketable security, which is back by the IP asset of the originator (asset-backed security), which is then sold to the investor in the capital market. Therefore, it is appropriate to say that it helps convert an illiquid asset that cannot be readily sold or exchanged without sustaining a substantial loss in its value into a marketable security. The same is against the background, where only tangible assets like physical properties were the assets used to back such securities. However, today it is possible to have IPRs, which could be used to back securities that help in funding.

The entire procedure is summarized as follows:

1. Where an IP asset is assessed by a company holding it that it is capable of generating cash flow, the process of securitization is initiated by the originator.

2. The originator then makes an SPV and sells his assets to it.

3. The SPV then creates securities backed by IPR assets, which can be offered to investors. An alternate route of creating a Trust can also be taken up by the SPV by transferring the assets to the Trust itself, which is taken care of by the Trustees. Here the Trustees are responsible for the securities to make the sales to the investors.

4. The credit rating agency offers it ratings which act as advisory pointers for investors.

5. Then the investors either approach the Trustee or the SPV directly to buy the securities in place of the money given to the SPV/Trustee.

6. Lastly, these funds, which are raised by the SPV or the Trust, are used to pay back the originator that initially issued the IP assets.

Why Should an Entity Consider Securitization of its IP Assets?

• As has been discussed above, it is an additional mode of generating income. An entity can strategically utilize the tangible and intangible assets held by it to enable securitization at a mass level.

• While tangible assets require greater interest rates on security back by the SPV, the interests of intangible assets are generally lower, which helps raise funds cheaper in nature. The same, however, depends on the rating a particular IP asset's back security has received.

• It can help make up for any losses or need of funds that may be needed to cure debts, introduce expansion projects, or for R&D activities since it substitutes the future receivables in the form of royalties with current existent cash.

• In the notion that credit ratings are extended to rate the securities, there is an element of mutual trust, respect, and transparency between all the actors involved in the process. Hence, it helps raise money while also build trust and confidence amongst the existent and potential investors.

• It also helps in providing liquidity to the firm as the illiquid assets get readily converted into capital market securities.

• Since such a transaction is considered as a loan and not a sale under the premise of the law, it is excluded from being taxed.

• Since the IP is not subjected to sale, there is no transfer of ownership rights. The same results in the entity being able to exploit and maximize the

Problems Incurred During the Securitization of IP Assets

There are a few issues that arise during the securitization of IP assets. The same are mentioned below:

• Securitization of assets requires bearing the costs, which would include payments to be made to law firms for IP valuation, to the accounting firms, etc. Therefore, the IP asset should be capable of sizable returns to make good of such expenditures incurred.

• The value of the IP right is enforced after receiving the requisite rating. However, in certain instances, there are trade secrets, some know-how, or confidential information attached to the assets, which may not render it valuable when viewed by a common man acting as an investor.

• The entire transaction is based on a predictable cash flow in the future. Where the cash flow is doubtful or not sizable, such a step may not be the right one.

• The term of securitization runs parallel to the term of IPR. Therefore, the same should be taken into consideration while opting for such a financial strategy.

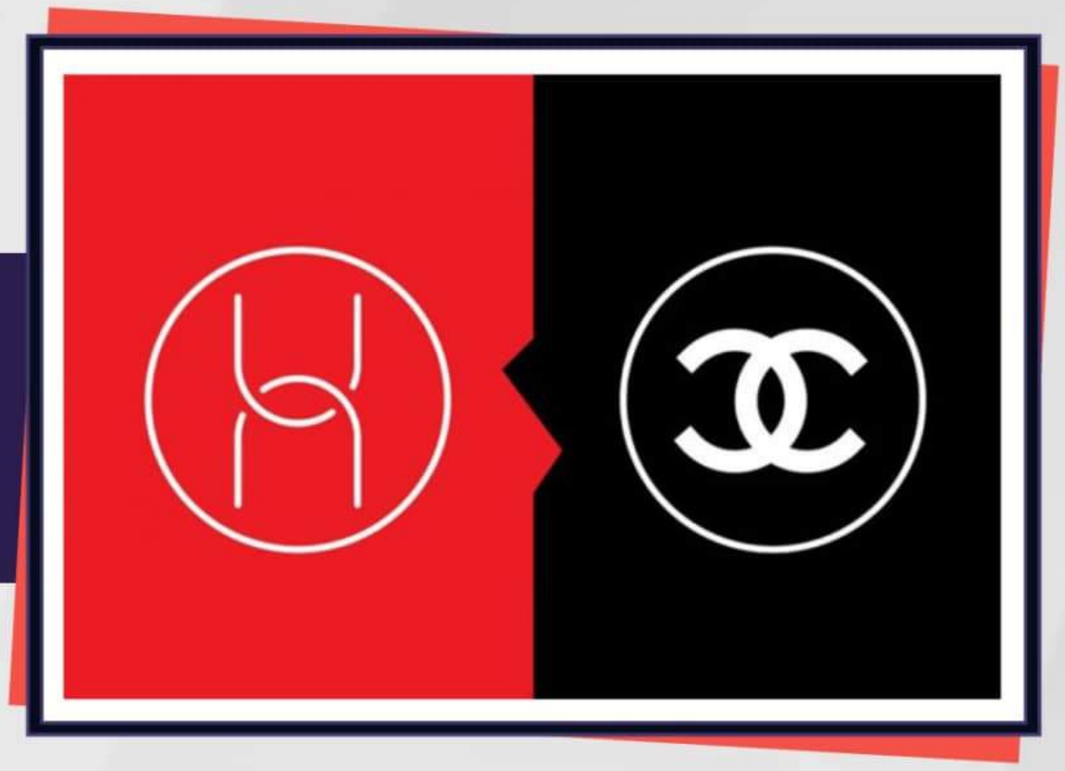
Concluding Remarks

The concept of securitization is new to the realm of IPRs when compared to the securitization of tangible properties. The same conceptually changes the idea of what constitutes an asset and how it can be realized to maximize the financial outputs. It also helps the originator to avoid bank formalities and yet generate optimum funds. This financial strategy can help not just big entities but also small startups that have no substantial tangible assets but do hold valuable IP assets to help in their expansion. However, a major problem lies in the manner of valuation of IP assets as there are different and conflicting models of valuation, which may introduce the problem of actual determination of future outcomes.

IP NEWS IN BRIEF

NEWS ARTICLE 1

CHANEL LOSES TRADEMARK BATTLE AGAINST HUAWEI OVER LOGO DESIGN



When we talk about brand identity, no other aspect is as important as the brand logo. Famous logos have the power to signify brand status and become cultural touchstones over the period.

Luxury brands, in particular, are more defensive when it comes to their branding as it is because of their design icons and logos only that they charge exorbitant prices for their otherwise simple wares.

Quite recently, Chanel (a French luxury fashion house founded by couturière Coco Chanel in 1910) lost a trademark battle against Huawei Technologies Co., Ltd. (a Chinese multinational technology company founded in 1987 by Ren Zhengfei and headquartered in Shenzhen, Guangdong) over its logo design in a top European Union (EU) court.

This case also sheds light on the sensitive nature of high-end luxury brands when it comes to safeguarding their logos and symbols, which exhibit their exclusivity and style to millions of people worldwide. Chanel's first claim against Huawei came in 2017 when the Chinese tech giant had sought approval from the European Union Intellectual Property Office (EUIPO), corresponding to the Trademark Registration of its computer hardware featuring two vertical interlocking semicircles. Chanel alleged that Huawei's design is similar to its registered French logo, which has two horizontal interlocking semicircles that are used on its perfumes, cosmetics, clothing-line, and other accessories. In 2019, the trademark office had rejected the company's claims by stating that there was no similarity between the two logos and there wouldn't be any confusion between both the brands in the eyes of the customers in the markets.

However, Chanel didn't easily give up and went ahead by taking the case to the Luxembourg-based General Court, where the claim got rejected again in a recent ruling. According to the tribunal of judges, the figurative marks belonging to the two firms were not similar. The tribunal further added that the two marks must be compared as applied for and registered - without altering their orientation in any scenario. It said that there were visual differences between the two logos in question, specifically that Chanel's logo had thicker lines, rounded curves, and horizontal orientation, and on the other hand, Huawei's logo had a vertical orientation. As a result, the General Court stated in its final ruling that the two marks were different.

NEWS ARTICLE 2

INDIAN MANGOES WITH GI TAG BECOME COMPLETELY TRACEABLE THIS SEASON

It is indeed a tradition in many Indian families to pick the first fragrant batch of ripe Alphonso mangoes and celebrate the beginning of summer.

With the latest collaboration, featuring a tech company, state government, producers, and retailers, people in India can now assure themselves that they have picked the original king of mangoes, the GI-tagged Konkan Alphonso mangoes.

Innoterra Tech, an Innoterra business unit, has recently announced its collaboration with the Geographical Indication (GI) Authority of India, Maharashtra Government, and the Indian mango farmers collective to tag each Alphonso mango with FarmTrace.

FarmTrace enables the consumers to scan a QR code and make themselves familiar with the GI status and source of the Alphonso mango, right back to where the fruit was grown. In a recent statement delivered, Innoterra said that the same would make it easier for the customers to pick the original Alphonso, which is the most premium variant of Indian mangoes available worldwide.

The GI tags will be applied to near about 100,000 tonnes of mangoes (400m individual mangoes) grown over 2,023 hectares of land in the Konkan belt of India by 2022, which, in turn, will benefit even more than 1,000 mango farmers in the nation.

The Chairperson of Konkan Alphonso Mango Producers and Sellers Cooperative Association, Vivek Bhide, recently said that many national and international variants of mangoes, such as those from Malawi in Africa, are being currently sold in the markets as Alphonso mangoes. He believes that since Alphonso mangoes are GI-tagged, the previously-mentioned practice is incorrect and unlawful. According to him, establishing traceability for original Alphonso mangoes would not only help the consumers in obtaining value for their money but also control product misleading and falsification. In this scenario, the true beneficiaries will be the farmers, who will experience an immediate increase in their overall income level.

The Managing Director and Chief Executive at Innoterra Tech, Suniti Gupta, recently mentioned that the company's solution is based on a technology architecture, which links the data already logged by food producers and suppliers and tracks every piece of fruit corresponding to a unique sticker. By scanning the sticker QR code, the consumers will come to know about the location of the farm, batch number, processing unit, packaging unit, shipping information, along with a complete timeline of these steps. To be specific, the entire journey of a fruit, beginning from the farm to the retail shelf, will be made available to the consumers. Suniti Gupta believes that all these points are exceedingly relevant for the GI-tagged products as their source of origin and authenticity play a crucial role in ensuring the right value for producers. She also confirmed that the company is presently working on integrating the said solution with blockchain technology for making the supply chain data verifiable and building trust among the consumers.

IP BLOG POSTS

1.

CAN INTELLECTUAL PROPERTY RIGHTS SAFEGUARD YOUR BLOG?

A blog is like any other creative work of literature manifested in a different form. Due to creative and original use of expressions, blogs are deemed to be counted as private property for which Intellectual Property Rights (IPRs) can be sought. A blog may contain an amalgamation of such rights since blogs do not merely utilize words and phrases but also videos, eBooks, music, etc.

Copyright and Blogs

Copyright is a legal protection afforded to an original, creative literary, musical, or artistic work. However, the content must reflect an expression of something since ideas are not governed under copyright. The protection under copyright is instantaneous and immediate to the works being created, and therefore, it is not necessary to have such rights registered. However, there are a few additional benefits that are attached to the registration. The registration acts as a prima facie proof of the date on which such rights came into being, and the infringement proceedings, as provided for in the respective copyright act of some specific jurisdiction, can be deployed for seeking enforcement of such rights. It may not always prevent unauthorized copying; however, it may serve as a public notice by securing a public record in one's favor.

The process of seeking registration can be cumbersome and tedious. Therefore, it is always an option to copyright the entire blog. However, after the first registration is obtained, for every addition made in the form of a new video or a fresh write-up, supplementary registration may be required. There are a few websites that endorse the policy of automatic copyright over the content projected therein after giving due acknowledgment and credits to the author of the blogs.

The mode of registering copyright has been eased by most of the jurisdictions by providing for online and offline formats. The cost of filing is generally lower if the online mode of registration is pursued, along with it being faster to process and easier to track the other additional benefits. The offline mode may not be the best-suited method since it would require a lengthier approach and multiple resources to generate the forms and to submit the same.

Alternatives to Seeking Copyright Protection

There are a few other alternatives that can be considered to safeguard the original content contained in a blog. These measures could be as follows:

- **Making declarations of the rights vested in the author at a conspicuous place on the website to generate awareness about its source of origin may prove to be fruitful.**
- **You may consider dedicating a page that illustrates the definite reposting policies. The same should mention the do's and don'ts, which shall or shall not be tolerated, in addition to any legal provisions that may be applicable.**
- **You may sign-up for a Creative Common License where the issue lies in seeking acknowledgment of the work. Such a license would enable using the resources held by owners of the CC Licenses to the extent of editing, remixing, copying, and distributing the work without circumventing the copyright law.**
- **Configure the RSS (Really Simple Syndication or Rich Site Summary) Feed on the WordPress site to keep yourself updated about the website. It helps maintain summaries of your work as well as metadata for each element like date, author, category, etc.**
- **You may consider adding watermarks to the content created by the author to indicate the source of origin by either using a recognizable and distinct logo, author name, or website.**
- **You may consider seeking legal redressal by issuing a takedown notice if it is discovered that the content of an author has been stolen.**

Blogging and Fair Use

The doctrine of fair use bears substantial importance for blogs since the question of plagiarism may sprout up at regular intervals. Fair use or fair dealing essentially means that in certain instances, like in the form of criticism, commentary, news reporting, teaching, and conducting research, it may be permissible to utilize the content of which the authorship is held by someone else without seeking authorization. However, whether a particular use of copyright content forms fair use or not is purely subjective and may depend on the following factors:

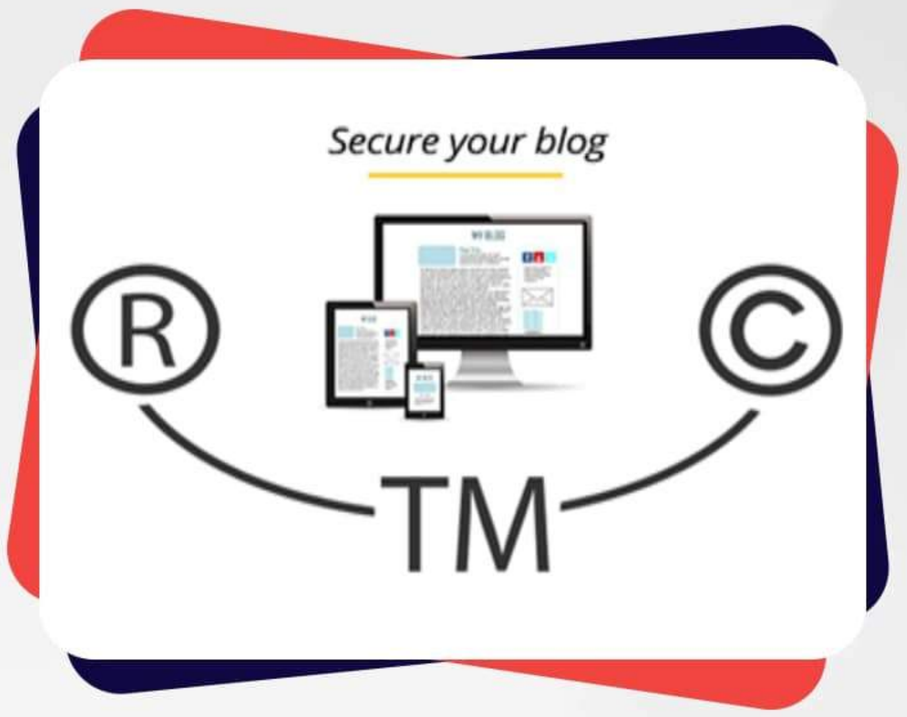
- The purpose of using the content: whether it is for commercial or non-commercial exploitation?
- The nature of the content: whether the content being utilized is an original creative expression or a factual expression?
- The extent of use of such content: whether the entire content is being copied or a specific excerpt relevant to the purpose (teaching, commenting, etc.) is being utilized?
- The impact of one's work on the value of the original work: where the work has been copied to displace the sales and benefits accruing to the original author, it probably won't account for fair use.

It is noteworthy to analyze a few examples that might or might not fall into fair use of copyrighted content:

- A parody can be made of a particular piece of work. A parody is a content created out of the original work to make a gimmick or fun of the original work itself. A satire may, however, not always be protected against such use as it does make use of the original content, but it makes a comment or impact on something entirely different (for instance, politics).
- Using the ideas of another person is not copyrightable as well. Therefore, it is fair to use, in the form of content, anything that is an idea conceptualized by another person; for instance, where it was someone else's idea to write a short story on two people falling in love - the expression is copyrightable, and where the content of another is verbatim copied by another, it does not amount to fair use.
- Utilizing the facts gathered by another person is also not subject to copyright; for instance, a blog quotes that there are 365 days in a year, and the same is copied by a competitor in his or her blog. However, quoting facts word-to-word, paragraph after paragraph, won't be construed as constituting fair use.
- It is also fair to use works that have fallen into the public domain as the rights over such content are exhausted due to the nature of these rights. It can be used freely by anyone. The same may come in handy while using images of another person to make one's blog visually appealing.

Trademarking a Blog

Trademarks are the rights vested in the proprietor of a mark, which help differentiate the goods and services of one from that of another to ensure there is no ambiguity in identifying the source of origin of those goods and services. From such a perspective, a blog can be viewed as a service, which provides the content that is readily made available through the internet to all the readers or those who are accessing such content.



Therefore, a trademark may be used to create a distinct identity of the blog, which would help the potential readers from drifting the path and finding the right blog right away. Other than enabling the

right course of identification, seeking a trademark would also resolve any instance where a competitor or a third party willingly uses a confusingly similar or identical mark in furtherance of purposing his or her blogging activity. Such a move can be easily objected to since the right can be secured and enforced easily by adducing proof of proprietorship against the mark in conflict.

Another additional benefit of securing trademarks for blogs is where the blog is making commercial gains through advertising. Such income can be negatively affected through theft or duplication of the content since the organic traffic for the original content will be diverted to the one making unauthorized use of the trademark. Securing a trademark would enable easy enforcement of the right against such notorious activities. Similarly, the protection of copyright will also aid in controlling such unscrupulous copying.

To ensure and keep under check such activities, there are many different tools made available both online and offline.

Conclusion

Blogs are the new age medium of sharing digital content, which may be reflected in text or through pictures, etc. Since they are creative, IP laws are the correct choice to safeguard and enforce such rights in the form of trademarks and copyright. For preventing digital theft, other routes of action can be undertaken as observed above, like editing the RSS feed, adding a symbol of trademark and copyright to the website. Unethical copying stops when one decides to treat the content of others as they would like their content to be treated. Therefore, the thumb rule of using the content of another person is to give due credits at all times and seek the requite permission from the person authorized for the same.

INDIAN SUB-CONTINENT - COPYRIGHT PROTECTION

In most nations across the globe, copyright protection is automatic as soon as the work is created in a material form, while in others, registration is mandatory.

The Indian Sub-Continent, including Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka, is a hub for the creation, licensing, and sale of copyrighted works. Parallel to this, in the present digital age, it has now become a concern for the copyright owners to protect their rights in the transaction and distribution of creative works to the public.

With a team of experienced lawyers on board, Kashishipr offers all services related to copyright registration, protection, and enforcement in the Indian Sub-Continent.

2.

AN OVERVIEW OF INTELLECTUAL PROPERTY IN CONTRACTS

Owners of businesses enter into contracts with others for various reasons. However, they may not always be aware of or fully appreciate the legal implications on the company's valuable Intellectual Property (IP) assets, such as trademarks, copyright, patents, and trade secrets. These intangible property rights and interests are of substantial value to the company either at present or in the future. Therefore, the business contract of a company must address the issue of ownership of the IP in question clearly and concisely. The company must ensure that the contract contains a clearly expressed provision that identifies the IP that is subject to the agreement and also that ownership of the IP remains with the company. Therefore, it is vital to understand how Intellectual Property Rights (IPRs) should be dealt with effectively in contracts.

Defining IP in Contracts

IP is generally understood to include patents, trademarks, copyright, and trade secrets; however, a definition of IP in a contract may also include confidential or proprietary information. It may include registered as well as non-registered IP, domestic as well as foreign IP; however, this may not always be the case. Hence, it is crucial to start with how IP needs to be defined in a given contract so that the parties are on the same page as to what is being covered and what is excluded.

Contracts typically include a definition of IP. The parties usually desire for this definition to be as broad as possible, specifically concerning a definition that may be included in confidentiality or non-disclosure agreements. The definition should avoid being limited to a registered IP, as this might unintentionally exclude trade secrets or confidential information from being addressed. There also may be instances where IP may be defined as only those items that are reduced to writing or specifically identified by the parties, but this can be dangerous, such as in instances where 'know-how' may be considered as IP.

There also may be instances, such as in the case of an IP license or assignment, where one or more specific items of IP should be specifically identified in the contract. For example, if a party is granted the right to use a specific trademark - but not other trademarks, then that specific trademark should be defined in the contract. In another example, the contract may be geographically restricted. These separate definitions of certain IPs may be included in a definition section of a contract, and they may be incorporated into the general IP definition.

Types of IP Contracts

- **IP Assignment Agreement**

The agreement to assign the IPR transfers the same completely or partially from the original creator to another person or organization for consideration. By this kind of agreement, the original owner transfers his right to develop or sell the said IP to another person or legal entity.

- **Non-Disclosure Agreement**

To protect the information falling under the branch of IP, which is also dynamic for the functioning of the company, like trade secrets, business plans or business structures, technologies or codes, companies enter into NDAs while contemplating business relationships.

- **Technology Licensing or Technology Transfer Agreements**

Through this agreement, the owner of the IP authorizes another person or company to use such rights of the technology developed by the owner for a considerable amount as agreed between the parties.

It is a way to transfer knowledge of technology. The same helps small companies grow as they acquire such technology licenses from the bigger companies for the production and promotion of a product.

- **Trademark Licensing and Franchising Agreement**

Through licensing or franchising agreement, the goodwill gained by a mark is shared by another entity that helps promote the business or carry on a business with the same mark and maintains the same standard of the business and its goods and service.

- **Copyright Licensing Agreement**

Through this agreement, the owner of the copyright can grant other people or companies the 'license' to monetarily exploit the copyright, such as by creating a reprint or reproducing or distributing the original works on the terms and conditions of the owner. The license can be very limited in scope, time, or territory. In exchange for such a right, the owner is paid a royalty or an amount of consideration as agreed upon by the parties. It does not permanently transfer the right of copyright to another person; it is only licensed for some duration.

- **Inventions Assignment Agreement**

This contract gives the employer the rights over the creations of his employee during the period of his employment. Usually, the employment agreement contains a clause whereby all the creations of an employee are the product of the employer's business. Furthermore, these kinds of agreements and clauses also protect the confidential information of the company. The IPRs, in an employer-employee relationship, are by default assigned to the employer in case of copyright, but the same is not the case in respect of trademarks and patents. Hence, executing a separate inventions assignment agreement is necessary for this purpose.

- **Music Licensing Agreement**

A music license agreement is a contract between the creator of the music and a third party to exchange his composition for consideration, which gives a right to the third party to publish or distribute the music in various forms.

- **Research and Development Agreement**

Such agreements are entered between a company with any individual or organization for conduction research and development of an idea, goods, or services. The company or the university includes assignment clauses to assign any IP developed to itself.

Important Elements in IP Contracts

Contractual clauses should always be considered very carefully, but most contracts generally share the following important clauses (although the content of the clauses differs):

- Duration of agreement
- Services and commitments
- Payment terms
- Jurisdiction
- Default events
- Termination of the contract
- Disclosure of information and data
- Warranties and/or indemnities

Talking about IP contracts, in particular, the most important clauses to be included as best practices are:

- **Confidentiality and Non-Disclosure Provisions**

Most contracts include at least one confidentiality or non-disclosure provision, and these provisions can be crucial to Intellectual Property Protection. Sometimes confidential information is defined as part of the definition of IP; however, in many cases, confidential information is separately defined in these provisions and can include all or a portion of what is covered in the definition of IP. If the scope of what is to be covered as confidential information is different than what is defined as IP, it may result in different obligations depending on the other terms of the

contract. Another consideration is whether the confidentiality or non-disclosure provisions are one-way or two-way. If it is one-way, this means that only one party is disclosing the confidential information to be protected, while a two-way provision contemplates that all parties to the contract may be disclosing the confidential information to be protected.

The scope of the non-disclosure obligation may differ from contract to contract, and it is vital to define it so that the parties know when a disclosure constitutes a breach and whether a breach can be cured. In most non-disclosure provisions, there are exceptions for independent (or prior) knowledge as well as the information that is public or later becomes public outside of the disclosures made according to the contract.

- **Indemnification**

IP indemnification can be a way of holding a seller responsible for breaches of IP representations and warranties. These types of breaches may not be the only matters for which indemnification may apply in a contract as in contracts where IP may not be the main focus - the IP-related indemnification provisions sometimes can be overlooked in the negotiations, which can be problematic if a claim later arises. Negotiations related to IP indemnification should include addressing the scope and survival of indemnification.

- **Ownership of IP**

The contract must be clear in indicating who shall be the owner of the IP, which is being used or continuously created throughout the relationship.

- **Documentation and Record of Intellectual Property**

Sophisticated contracts may specify a mechanism to record the IP that is created throughout the relationship so that it is specifically identifiable. The same facilitates better valuation of the IP in the future and also expands the opportunities to monetize such property.

MALDIVES – COPYRIGHT PROTECTION

Maldives is a member of the Berne Convention. The Copyright and Related Rights Act was passed in the nation in October 2010 and became effective in April 2011.

The Act allows parties to get their creative works registered with the allocated government authority and obtain copyright protection for the same. An application can be made in person to the Ministry of Economic Development. If approved, an official copyright registration certificate gets issued.

Trademarkmaldives delivers economically feasible copyright-related legal services to clients in Maldives by safeguarding their business interests.

3.

TAXATION OF INTELLECTUAL PROPERTY: A COMPARATIVE NOTE

Today, companies are increasingly placing a huge amount of enterprise value on Intellectual Property (IP). In a few instances, the value attributed to IP assets by companies is greater than the entire net worth of the corporation itself. In the modern world, things such as overseas inter-company transactions of IP, franchising models, licensing, mergers, and acquisitions, etc., have attracted taxation on IP as a global issue. As IP's role in the world economy increased, so did the controversies between taxpayers and the government over the tax implications of IP transactions (for instance, development, acquisitions, sales, and licenses). Even for authentic inter-company transactions for royalties or license fees, tax authorities of most developed nations necessitate tax on IP assets. Therefore, an understanding of how IP assets are taxed is crucial.

The United States of America

For purposes of the US tax law, IP can take many forms. As embodied in the Internal Revenue Code, IRS regulations, and case laws, IP includes patents, trademarks, copyright, trade secrets, know-how, and computer software. Recently, after the enactment of the Tax Cuts and Jobs Act, taxation of IP has become more complex. For multinational taxpayers, significant changes related to the US IP taxation include a new tax on the global intangible income earned by foreign subsidiaries and a new tax incentive for certain foreign-derived income earned by the US corporations. The Tax Cuts and Jobs Act also reduced the corporate tax rate to 21 percent from the previous 35 percent.

Under the Act, two new rules were enacted, namely, the Global Intangible Low-Taxed Income (GILTI) rules, which are intended to penalize the US-based multinational companies with offshore IP and the Foreign Derived Intangible Income (FDII) rules intended to reduce the US taxes on IP residents in the US but used abroad, thus incentivizing placing, or 'onshoring,' IP in the US.

The new GILTI tax reduces the benefit of using foreign IP holding companies to defer the US tax on global income. As a result, GILTI has the biggest impact on industries with low tangible property ownership when compared to revenues, such as the technology sector and the pharmaceutical industry, where companies rely heavily on IP in manufacturing and selling their products or delivering their services.

If a US corporation sells or licenses goods (including IP) to a foreign-related party, the income should generally qualify as FDII if the property is ultimately sold to an unrelated foreign person, used to make property sold to an unrelated foreign person, or used in providing services to an unrelated foreign person outside the US. However, if, for example, a US corporation sells IP to an unrelated party for further development within the US, the IP is not treated as sold for a foreign use even if the IP subsequently has a foreign use.

The act also made some specific changes that make it more costly to transfer IP outside the US. Previously, certain otherwise tax-free transfers of patents, know-how, copyright, trademarks, franchises, licenses, and other similar IP created a taxable deemed royalty in the US, resulting in a tax cost in the US to transferring IP offshore. The act added goodwill, going concern value, and workforce in place to the list of IP that is subject to the deemed royalty, creating an additional tax cost to moving IP offshore. The same serves as a disincentive to transferring ownership of IP outside the US.

The European Union

In the EU, the Base Erosion and Profit Sharing (BEPS) regime focuses on aligning IP ownership with value creation and eliminating tax structures where legal IP ownership bears little to no relationship to physical IP development. Among the intended targets were the now-infamous 'Double Dutch' and 'Triple Irish' structures popular in the international IP tax planning for ages. The advantages of these structures were

removed by a combination of EU tax court losses, local rulemaking, and changes to transfer pricing rules where economic benefits no longer accrue for mere IP legal ownership, which was the keystone of many favourable IP tax regimes. As a result, a multinational taxpayer may no longer rely on contractual arrangements and R&D funding to mobilize IP income streams. BEPS seeks to tie IP economic benefits to regions where the taxpayer has Development, Enhancement, Management, Protection, and Exploitation (DEMPE) activities. The goal, in short, is to tie IP profits to physical R&D and business activities. There has been a seismic shift in global IP tax planning as numerous tax authorities have adopted DEMPE principles in whole or in part.

Furthermore, the EU has issued rules requiring zero- and low-taxed countries, i.e., traditional tax havens, to enact core income-generating activities (CIGA) rules concerning IP development. Countries that fail to enact these rules would be blacklisted and subjected to penalties. As a result, many traditional tax havens have enacted legislation sharing tax information with other countries, eliminating numerous non-compliant tax haven IP-holding companies.

Today, something known as 'Patent Box Regimes' is widespread in Europe. Patent box regimes provide lower effective tax rates on income derived from IP. Most commonly, eligible types of IP are patents and software copyright. Depending on the patent box regime, income derived from IP can include royalties, licensing fees, gains on the sale of IP, sales of goods and services incorporating IP, and Patent Infringement damage awards. Patent boxes aim to encourage and attract local research and development (R&D) and incentivize businesses to locate IP in the country. Many European countries offer additional R&D incentives, such as direct government support, R&D tax credits, or accelerated depreciation on R&D assets. The effective tax rates on IP income can, therefore, be lower than the ones stated in the respective patent box regimes.

The United Kingdom

The United Kingdom introduced a 'Patent Box' scheme in April 2013 taxing qualifying IP at a reduced rate of 10% in place of the normal corporate tax rate of 20%. The Patent Box in the UK is a tax incentive regime designed to encourage companies to keep and commercialize their patents and innovations by reducing the UK tax paid on those profits. The UK Government wished to support the high-value growth in UK public limited companies through a competitive tax regime that supports UK R&D from conception to commercialization.

A company can use the Patent Box regime if:

- It is liable to pay the corporation tax.
- It makes a profit from exploiting patented inventions and innovations that qualify under this regime.
- It either owns or has an exclusive license in the patents.
- It has taken the qualifying development of the patents.
- The Patent is granted by the UK Intellectual Property Office (UKIPO) or the European Patent Office (EPO).
- The company is a member of the group of companies that worked on a particular invention, has active ownership of the invention, and takes a significant role in managing its whole portfolio of patented inventions.

Effective IP Planning is the Way Ahead

Looking at these comprehensive rules of each nation on how IP is taxed, all the multinational players with considerable IP assets need to make changes to their tax planning and align their IP assets along with it. What is significant to note from the various tax regimes of these countries is that the tax policies encourage creation and innovation and also favor ownership of the IP assets within their jurisdiction. The tax considerations of IP are numerous and depend upon several factors, such as whether the IP was self-created or acquired or whether the taxpayer's objective is to use the IP in a business or transfer it through a license or sale. As with most tax planning, it is better to consider the tax issues during the endeavor's early stages and tailor the tax planning to the taxpayer's immediate plans.

DETAILED ANALYSIS: CAN QR CODES BE TRADEMARKED?

Judicial Viewpoint

Those in the print industry have been eager to adopt quick response codes over the past few years. The relatively new advent allows the marketers to put the barcodes on several different items and allow smartphone users to scan them and discover more information. A QR (shorthand for 'Quick Response') code is a machine-readable matrix barcode. QR codes originated in the automotive industry and are now commonly used in advertising, payments, product tracing, and detection of counterfeits, etc.

Can we Trademark QR Codes?

QR codes by themselves are unable to be trademarked since Trademark Law only covers the things that allow the public to identify your goods and services easily, such as names, logos, slogans, sounds, or colors. The same is because it is usually not easy to identify the source by only looking at a QR code. However, if you incorporate a QR code into a logo, you can file a Trademark Application to register that logo. Like any other trademark, you have to be using the logo that includes the QR code with the branding for your products or services. Your logo must be a recognizable and distinct aspect of your brand, and it should distinguish your goods or services from competitors within your specific field.

SIX Interbank Clearing AG, a major Swiss operator of payment platforms, filed a trademark application in Switzerland for registering the following sign in classes 35, 36, and 38:

The application included a disclaimer that the cross used in the center of the sign would not be reproduced either in white on red background or in red on white background. It was intended to avoid rejection of the application for being too close to the Swiss flag or the emblem of the Red Cross.

The Federal Institute of Intellectual Property rejected the application for the lack of distinctiveness. It considered that:

(1) QR codes have a technical purpose and are not used in direct communication with clients of the claimed services; and
(2) The cross-shaped element in the middle of the sign is too small to make up for the lack of distinctiveness of the sign as a whole.

The applicant then appealed to the Federal Administrative Court. The Court recognized that QR codes might be regarded as decorative patterns or device marks, both of which are signs that are inherently registrable. However, the code ultimately serves a technical purpose, and the matrix can hardly be memorized or easily distinguished from other QR codes by humans.

Thus, the sign cannot be used to distinguish goods or services in the market. However, the above only relates to the portion of the QR code that is 'technically necessary,' i.e., everything but the center of the matrix. Concerning the cross in the center of the sign, the Court came to a different conclusion. It considered that while this part of the sign has a 'certain distinctive force,' the disclaimer proposed by the applicant is too narrow.

The Court remarked that a white cross on black background would still be understood as an indication of origin referring to Switzerland and a black cross on white background as a reference to the Red Cross (for instance, as black and white versions of the Swiss flag or the Red Cross are often used on black and white letterheads). Therefore, the use in black and white - needs to be disclaimed as well.

Distinctiveness needs to be examined based on the overall impression of the sign. The fact that the central-distinctive element is small (compared to the sign as a whole) is not decisive. The Court explained that the relevant public is used to seeing a distinctive element at the center of a QR code. Therefore, the central-distinctive element would not disappear in the eyes of the public, and to the contrary, the public expects some sign readable by humans at the center of the matrix. There is also no public interest in refusing the registration of the sign. It is imperative to note that registering the sign as a trademark does not provide any protection for the technical elements of the QR matrix, which remain a non-distinctive part of the distinctive whole. Also, registering the sign does not prevent third parties from using QR codes, whether the center of the matrix contains a distinctive element.

Therefore, the Court granted the appeal and remanded the case to the Federal Institute of Intellectual Property to register the sign with the broader disclaimer covering the black and white version as well.

It remains to be seen what kind of protection such trademarks will offer to their proprietors; but, considering how popular QR codes have become during the pandemic for the simplest of things such as traveling, eating out, etc., more clarity is certainly expected in the times to come.

FIVE INTERESTING POINTS TO NOTE ABOUT THE COPYRIGHT LAW OF INDIA, I.E., THE COPYRIGHT ACT, 1957

#1 The Copyright Act, 1957, was the first copyright legislation passed in independent India. To date, it has been amended six times.

#2 India is a member of almost all the important international conventions on copyright law.

#3 The Act protects literary works, dramatic works, musical works, artistic works, sound recordings, and cinematographic films.

#4 Under the Act, the author is considered as the first owner of the copyrighted work.

#5 In India, civil, criminal, and administrative remedies are available to the copyright holders.

COVID-19 VACCINES AND PATENT RIGHTS

COVID-19 vaccines are set to safeguard billions of citizens worldwide in the coming months. However, vaccinating the entire world population may mean finding a way around Intellectual Property Rights (IPRs). The focus now shifts towards equally challenging issues of availability, accessibility, and affordability of vaccines.

The current pandemic has led to a veritable boom in the research and development of vaccines and treatments, illustrating how the Patent System works to boost innovation. According to the World Health Organization (WHO), there are more than 200 COVID-19 vaccine projects underway across the globe. A quarter of those are in clinical trials, and several have already been approved. In other words, this is a competitive marketplace where companies will fight to manufacture vaccines quickly and keep prices low to earn contracts.

Patent Rights

Patents give the patent holders the exclusive right to stop others from using the patented technology without their license for the duration of the patent (generally 20 years). This right allows the patent holders to develop an income stream and recoup their investment in the technology. Yet patents have significant implications for healthcare. For example, patent holders can refuse licenses to third parties to produce a patented medicine. The same could lead to the patent holder becoming the only provider of that medicine with implications for its supply.

Patents can also impact the price of medicines as the patent holders can charge enormously for licenses or access. The significance of such issues is heightened in the global pandemic context because it is in all our interests to eliminate the virus globally as quickly as possible. This is best achieved by maximizing affordable access to future vaccines and medicines globally. However, to do so, the ethical implications of Patent Rights must be acknowledged, and we must ensure that the way patents are used does not obstruct access.

South Africa and India have called for the World Trade Organization (WTO) to suspend the IPRs related to COVID-19 for ensuring that not only the wealthiest countries but also the least developed ones get access to and can afford the vaccines, medicines, and other new technologies needed to control the pandemic. The pharmaceutical industry and many high-income countries (HICs) staunchly oppose the move, which they say will stifle innovation when needed the most. Without special measures, proponents argue that rich countries will benefit from new technologies as they come to the market, while poor nations will continue being devastated by the pandemic. The proposal states that IPRs such as patents are obstructing affordable COVID-19 medical products. A temporary ban would allow multiple

actors to start the production pretty soon instead of having manufacturing concentrated in the hands of a small number of patent holders. The proposal was initially tabled last year in October in the TRIPS Council, a committee dedicated to discussing the implementation of the WTO's IP agreement, where it rallied support from other low and middle-income countries and attracted the co-sponsorship of Kenya, Eswatini, Mozambique, Bolivia, and Pakistan.

Two crucial issues must be addressed. In the first place, there is a need to clarify and strengthen national compulsory licensing mechanisms. Secondly, countries should support voluntary international patent licensing initiatives to secure favorable access for the patented COVID-19 medicines and vaccines globally.

Compulsory Licensing and Access

Under international trade law, pathways exist for countries to issue compulsory patent licenses, provided certain legal criteria are met. Compulsory licenses allow countries to grant permission to a third party to produce the patented invention, for instance, medicines, without the patent holder's consent. Compulsory licenses could be used to ease concerns caused by other countries negotiating deals with patent holders for significant supplies of life-saving medicines and vaccines. By using compulsory licenses, a country could grant permission to third parties to make similar (generic) versions of medicines for use in that country if access on reasonable terms cannot be obtained from the patent holder (provided raw materials and manufacturing capabilities were available).

Conventionally, countries have been reluctant to use compulsory licenses given industry opposition. Nevertheless, COVID-19 provides a strong motivation for change. Some nations have adopted legal

measures to facilitate compulsory licensing, where required in the pandemic. Other nations should also do the same and ensure that any national or regional barriers to the effective use of compulsory licensing are eliminated.

Voluntary Licensing – Towards a Possible Solution?

Compulsory licensing can address access issues within the countries for individual medicines and vaccines. However, the arrangements where patent holders voluntarily license their patents on reasonable terms to address COVID-19 are also important and must be supported as these can have broader global impacts. For example, WHO recently launched the COVID-19 Technology Access Pool (C-TAP), which encourages the patent holders to voluntarily share or pool IPRs, knowledge, and data to tackle COVID-19. 39 countries worldwide have endorsed this pool, but the US and the UK have opposed it. Other countries should take action to endorse this initiative as soon as possible as a commitment to global solidarity in addressing COVID-19.

To conclude, COVID-19 poses a fundamental challenge to global health. Combined with exceptional work being conducted to develop vaccines and medicines, better consideration is urgently needed over how such vaccines and medicines will be accessed once developed. Also, the power of the patent holders in such contexts cannot be overlooked.

Fun and Games

MOTIVATIONAL QUOTE OF THE MONTH

Intellectual property is a key aspect for economic development.

- Craig Venter

SLOGAN TRIVIA

Can you guess the brands behind the slogans/taglines given below?

1. "The happiest place on Earth." _____
2. "Just do it." _____
3. "Move the way you want." _____
4. "Belong anywhere." _____
5. "Betcha can't just eat one." _____
6. "The ultimate driving machine." _____
7. "Don't live life without it." _____
8. "Be your way." _____
9. "The best a man can get." _____
10. "Let's go places." _____

CLICK TO PLAY

EVOLUTION OF MARKS/LOGOS

Sometimes, trademark owners update or modernize their marks/logos but ensure keeping them recognizable always. Can you guess the marks/logos that came first?

1.

(A)

(B)

(C)

2.

(A)

(B)

(C)

3.

(A)

(B)

(C)

4.

(A)

(B)

(C)

5.

(A)

(B)

(C)

CLICK TO PLAY

Subscribe to 'IP Flavors' using the link given below:

https://www.kashishworld.com/newsletter/ipflavors/

Address

KASHISH INTELLECTUAL PROPERTY GROUP
16, AUTRUCHES AVENUE,
QUATRE BORNES,
REPUBLIC OF MAURITIUS

Contact Details

(230) 4278861, 4260399

(230) 4278660, 4276955

ipflavors@kashishworld.com

www.kashishworld.com