



**SUBMISSION**

**on**

**SPECIAL 301 REVIEW, 2019**



## **FEDERATION OF INDIAN CHAMBERS OF COMMERCE AND INDUSTRY**

FICCI, established in 1927, is the largest and oldest apex business organization in India. Its history is closely interwoven with India's struggle for independence, its industrialization, and its emergence as one of the most rapidly growing global economies.

A non-government, not-for-profit organization, FICCI is the voice of India's business and industry. From influencing policy to encouraging debate, engaging with policy makers and civil society, FICCI articulates the views and concerns of industry. It serves its members from the Indian private and public corporate sectors and multinational companies, drawing its strength from diverse regional chambers of commerce and industry across states, reaching out to over 2,50,000 companies.

FICCI provides a vital platform for networking and consensus building within and across sectors and is the first port of call for Indian industry, policy makers and the international business community. In the sphere of intellectual property issues, FICCI works closely with various stakeholders, including Indian and foreign government departments/agencies such as USPTO, among others.



## **INTRODUCTION**

FICCI forwards this submission in response to the Notice by the Trade Representative, Office of United States (USTR) requesting comments from the public for the Special 301 Review of 2019.

FICCI continues to take the view that India should no longer be placed under the Special 301 review process. Ever since the announcement of India's first National IPR Policy back in May 2016, there have been sea change and improvement in the country's IP regime. The IPR policy has been welcomed by all stakeholders, and the initiative by the Government of India has been widely acknowledged worldwide as a commendable proactive vision which endeavors to synergize Intellectual Property with India's various policy initiatives. Moreover, subsequent to the Policy accouchement, the Government of India have undertaken extensive exercises to ensure that the recommendations made in the policy are rolled out in right earnest. In this backdrop, USTR continuing to implicate India in its Special 301 review process is uncalled for. This, in fact, may undermine the spirit of the ongoing bilateral dialogue between India and US.

Through this submission, FICCI aims to address the various unsubstantiated assertions that USTR has levied against India's IP Regime. The object is to put forth an objective picture of India's intellectual property regime specially keeping in view the many constructive developments made in recent years in further strengthening the country's IP system. The document outlines a range of key developments which the Government of India, the Indian Industry and the other stakeholders have been undertaking to further strengthen and modernize India's IP ecosystem.



## **IP REGIME IN INDIA**

India has a well-established legislative, administrative and judicial framework for safeguarding IP Rights. A WIPO member since 1975, and WTO member from 1995, India has been meeting its international obligations while utilizing the flexibilities provided in the international regime to address developmental concerns. Accordingly, India's IPR regime is TRIPS-compliant, robust, equitable, dynamic and maintains a fine balance between private rights through IPRs, and rights of the society. Further, as part of the 'Make in India' campaign, there is renewed focus on improving India's IP set-up to be among the world's best standards by establishing a regime which maximizes the incentive to generate and protect IP for all type of inventors.

India's IP scenario has been witnessing significant developments in its laws and policies. Some noteworthy developments include: announcement of India's first National IPR Policy in May 2016, Patent and Trademark Rules amendments, focus on strengthening IP enforcement and administration, and the country's significantly modernized IP offices.

The National IPR Policy has stimulated the focus on protecting and generating revenue from IP. The Government has been putting serious efforts into modernizing the IPR ecosystem, to make it innovation friendly, besides stressing IP commercialization. Initiatives like Start-up India, Make in India and Digital India too are encouraging domestic companies to think out-of-the-box. The Policy has been largely welcomed as a comprehensive, substantive and a balanced enunciation of government's vision and approach relating to IP, providing it prominence as a policy and strategic tool for national development, and envisaging IP as an integral part of the India's overall development policy. While it is progressive and futuristic, it is rooted in the country's strong legislative framework which underpins its IP policy evolution, and balances development priorities with international obligations.

## **POLICY IMPLEMENTATION**

Meanwhile, the Indian government has been taking several initiatives to roll out the recommendations made in the IPR Policy. The Department for Promotion of Industry and Internal Trade - DPIIT (*earlier called the Department of Industrial Policy and Promotion*), the nodal government agency in India that is responsible for IPR, has been aggressively organizing IPR Awareness Programs across the country, focused training programs for enforcement agencies (police, customs) and sensitization of judiciary.

- **IP Awareness Programs**

Cell for IPR Promotion and Management (CIPAM), a Government created professional body under the aegis of DPIIT, has aggressively undertaken these initiatives of creating public awareness, promoting the filing of IPRs through facilitation, providing inventors with a platform to commercialize their IP assets, and coordinating implementation of Policy recommendations in collaboration with concerned Ministries/Departments, industry and other stakeholders.

The objective of these programs is to build an atmosphere where creativity and innovation are encouraged in all public and private sector institutions, leading to generation of IP that can be commercialized. Efforts are to reach the less-visible IP generators and holders, especially in rural/remote areas. FICCI has collaborated with the government in these pan-India programs for industry, enforcement officials and youth/students, where the response received have been encouraging in terms of participation and stakeholders' interface.



- **IPR Enforcement Toolkit for Police**

FICCI, in association with DPIIT/CIPAM, prepared an “IPR Enforcement Toolkit for Police” and subsequently organized capacity building programs for Police Officials on Enforcement of IPRs. The toolkit has been distributed widely to the police departments across the country to help them deal with IP crimes, specifically counterfeiting and piracy. IPR Modules for Customs & Judiciary have also been developed by DPIIT in association with other industry bodies.

- **Technology and Innovation Support Centre**

DPIIT has established India's second Technology and Innovation Support Centre (TISC) at the Centre for Intellectual Property Rights (CIPR), Anna University, Chennai, under the WIPO-TISC program. The objective is to create a dynamic, vibrant and balanced IPR system that encourages creativity and innovation, thus promoting entrepreneurship and enhance social, economic and cultural development by establishing a TISC network across India.

- **Booklet on Intellectual Property Rights & Technology Transfer**

The Indian Council of Medical Research (ICMR) has brought out a booklet on IPR & Technology Transfer to help increase awareness among ICMR scientists for protecting new technologies. This document, which has detailed FAQs on IPR, is an effort by the ICMR to increase awareness of IP protection before publication.

- **Government IPR website – set up by CIPAM**

An IPR website launched by the government ([www.cipam.gov.in](http://www.cipam.gov.in)) to effectively implement the National IPR Policy provides regular updates on all upcoming CIPAM events, besides updates on the latest IP trends, including data on applications filed, examined, grants and disposal for various IPRs.

- **National Workshop on Enforcement of IPRs**

DPIIT has organized National IP Enforcement Workshops to increase awareness amongst officials of enforcement agencies (police/customs) and to help sensitize enforcement agencies country-wide on their importance as IPR enforcer. The events inaugurated/attended by senior ministers provided platform for police officials from across the country to share experiences, exchange views on best practices, providing opportunities to forge inter-agency coordination.

### **Initiatives underway for Creating IPR Awareness**

- CIPAM partnered with industry associations to conduct 19 IPR awareness roadshows in 18 states in the year 2016.
- Awareness Campaign launched in collaboration with the International Trademark Association (INTA). Campaigns conducted in 107 schools, reaching over 8000 students, using presentations and creatively illustrated posters/pamphlets covering basics in IPR and their protection. More programs planned in special schools (e.g. Jawahar Navodaya Vidyalayas, Kendriya Vidyalayas and Savodaya Vidyalayas).
- For the first time, programs conducted using EduSat (satellite communication) in 46 schools of rural Rajasthan. Programs also conducted at Itanagar, Jalgaon, Vijaywada, Mandi through EduSat with over 120 students.
- 3 Facebook Live session in collaboration with Atal Innovation Mission conducted for Atal Tinkering Labs in 2018.
- Similar programs for Colleges/Universities and industry also being taken up; e.g. workshop organized in King George's Medical University, Lucknow. CIPAM also partnered for workshops at Amity University, Sharda University, Guru Nanak Dev University, Lingaya's University.
- Competitions launched in partnership with industry for school/college students for developing mobile apps, videos and online games.



- 51 Programs conducted by RGNIIIPM and 2 programs conducted in collaboration with WIPO, till November 2017 by the office of CGPDTM.
- First batch of 'Training of Trainers' conducted in collaboration with TIFAC. Certified trainers to conduct awareness workshops in schools, colleges and industries.
- CIPAM tied up with Agastya International Foundation to conduct programs in school. The first batch of Training of Trainers of Agastya conducted in Delhi, who in turn will conduct programs in schools.
- Awareness events by the CGPDTM office underway for 2018-19, where FICCI is a partner.
- To reach out India's remotest corners, awareness programs being conducted using satellite communication – one of these had 700 colleges connected online for IP awareness covering over 100,000 students. In another, 46 rural schools with 2700 students were reached online.
- Focus is on developing e-content for dissemination through online channels.
- India's first IP Mascot, "IP NANI", has been launched. Further, series of animated IPR videos for school students have been launched in collaboration with EUIPO.
- CIPAM collaborated with Ministry of MSME to organise a five-day intensive IPR training for MSME Officers pan-India for Development Institutes and Branch Development Institutes. Total of 30 MSME-DIs and 28 Branch MSME-DIs set up in State capitals and other industrial cities nationally were trained at Hyderabad - further enabling them to provide IPR related services to MSMEs nationwide.

#### **Technology and Innovation Support Centres (TISCs)**

- A Level Agreement been signed between DPIIT & WIPO to establish Technology & Innovation Support Centre (TISC) network in India.
- 6 TISCs established till now: PIC-Chandigarh; Anna University; NRDC-IPFC Visakhapatnam; PIC Kerala; GUJCOST, Gujarat; RAJCOST, Rajasthan - several others in pipeline.
- TISC Punjab commercialized innovative hybrid brick kiln technology, proving a game-changer in combating air pollution. It earned INR 8 million till November 2018 via commercialization.

#### **IPR in School Syllabus**

- Content on IPR included in NCERT curriculum of Commerce for Class XII. A chapter on 'IPR, Innovation & Creative Works' being included in NCERT's "Handbook on Entrepreneurship for Northeast Region".
- Work underway to include IPRs in other academic streams too.

#### **Police Training Programs**

- 33 training programs for Police officials on IP Enforcement already undertaken by CIPAM, in association with law firms and industry, in states of Andhra Pradesh, Uttar Pradesh, West Bengal, Madhya Pradesh, Telangana, Haryana, Jharkhand, besides three rounds of training in North-East Police Academy (included participants from 9 states) and Sardar Vallabhbhai National Police Academy, Hyderabad.
- An advisory by Ministry of Home Affairs to all State Police Academies to incorporate IPR in training curriculum for regular and in-service police officers. All State Police Academies advised to undertake training programs & include IPR as a subject in their training curriculum.

#### **CIPAM and DPIIT organized the following important events:**

- National Workshop on IPR Enforcement, August 2017 for state police, public prosecutors and representatives from industry and academia - inauguration by Union Minister of Home Affairs.
- A 2-day "National Conference on Counterfeiting and Role of Enforcement Agencies" in March 2018 in collaboration with European Union IP Office for enforcement agencies and representatives from industry and academia - inauguration by Commerce & Industry minister.



- Regional 3-day workshop for police official of 7 North-Indian states on IPR Enforcement – in association with Haryana Police Academy & Sardar Vallabhbhai Patel National Police Academy.

#### **Sensitization Programs for Judiciary**

- Training of Judges on IP Enforcement and adjudication undertaken.
- Two colloquiums on commercial laws for High Court Judges held at National Judicial Academy, Bhopal to sensitize participating judges on IPR policies. More programs planned in conjunction with National Judicial Academy (NJA) and various State Judicial Academies.
- DPIIT, WIPO and NJA had organized a 3-day IPR conference for High Court Justices in November 2017.

#### **Combating Online Piracy**

Online piracy is assuming gigantic proportions globally, with no country being immune to it. Notably, there is considerable online piracy taking place of Indian content - broadcast, digital and films – in US, besides contents pirated to other countries (Australia, Canada, EU) via US-based servers & other infrastructure. An industry-led investigation identified standalone pirate sites/services in US and other nations, with most supporting infrastructure (web domain providers, content delivery networks) being US based. Also, these websites did not respond to any takedown/DMCA notices issued and continue to infringe, estimated to account for 80% of piracy of Indian content, catering to millions of users per month, causing significant losses to several Indian broadcasters, content creators and service providers.

Government of India efforts to fight this growing menace:

- CIPAM-National Internet Exchange of India (NIXI)-Maharashtra Cyber & Digital Crime Unit collaboration to suspend 235 infringing websites receiving 186 million hits per month
- CIPAM-NIXI collaboration to pull down 80 infringing websites on the basis of incomplete KYC (referred to as WHOIS) and 6 websites have submitted their WHOIS credentials.
- CIPAM-Viacom 18 Media collaboration to launch Anti-Piracy Video Campaign using popular cartoon characters – Motu and Patlu, to raise awareness for kids
- CIPAM- Film & Television Producers Guild of India collaboration to launch Anti-Piracy Video Campaign using popular Bollywood actors
- CIPAM- Internet & Mobile Association of India collaboration workshop on Copyright Policy Framework in Digital Age – facilitated Industry- Search Engine Operators interaction. Google presented tools available to combat piracy.
- CIPAM initiative to bring together Indian film & music industry and advertisers to form a voluntary code of conduct to reduce ad-supported illegal content - signatories to agree their advertisements do not appear on websites hosting infringing content. The intent: to cut off revenue channels of websites hosting pirated content.

*Meantime*, FICCI has been working closely with Government in the policy roll-out process. In the year, FICCI and FICCI CASCADE has organized the following capacity building and awareness programs for a cross section of IP stakeholders:

#### **IPR Awareness programs**

1. Jamia Milia University, Delhi, February 2018
2. Bar Association, Meghalaya, Shillong, February 2018
3. Faculty of Law, M S University, September 2018
4. University of Delhi, New Delhi, February 2019



### **Regional Seminars on Combating Counterfeiting, Piracy and Illicit Trading Activities:**

1. February 2018, Thiruvananthapuram
2. June 2018, Kolkata
3. June 2018, Hyderabad
4. 26 September 2018, Bhopal

### **Capacity Building Programmes for Police Officers**

1. Guwahati, February 2018
2. July 2018, New Delhi
3. August 2018, Vijayawada
4. November 2018, New Delhi

### **India-US Webinars by FICCI**

Despite the extensive developments in its IP regime, India continues to be viewed as IP non-compliant by the US. One reason for this may be the differing views of the two trading partners on the approach to IPR protection. In order to update US stakeholders on the progress made, FICCI has been hosting a series of webinars specifically for American industry and govt. officials, providing updates on IPR regulations and enforcement in India, and the anticipated way forward. These webinars were addressed by Mr. Rajiv Aggarwal, Joint Secretary, DPIIT (*India's nodal government officer who is responsible for all matters IPR*) and Mr. Narendra Sabharwal, Chair, FICCI IPR Committee and Former Deputy Director General, WIPO. The webinars, attended by representatives of US companies, officials of USPTO and US State Department, provided useful opportunity for participants and US stakeholders to get an update on the many steps that are underway to improve administration, enforcement and the overall IP ecosystem in the country, besides the emanating positive results.

### **US-INDIA IP DIALOGUE: A FICCI-US Chamber Initiative**

FICCI and USCC jointly organized an "IP Dialogue: Opportunities for US-India Collaboration" on October 30, 2018 in New Delhi - a unique, first-ever initiative that brought together officials from the US and Indian governments, and industry leaders from both countries to discuss in a solutions-driven approach towards collaborating on bilateral IP issues and challenges.

The deliberations were positive and fruitful, indicating the resolve on both sides to identify, discuss IP issues and sort out differences through regular discussion. The engagement proved helpful and new ideas emerged for exploring bilateral collaboration. Most participants from the US, representing industry associations, large corporations and government, commended the remarkable progress witnessed in many key areas of the country's IP framework, agreeing that the substantial initiatives undertaken by the Indian government as well as the stakeholder consultations initiated three years back to identify/understand basic issues were significantly helping remove apprehensions and build trust.

### **COPYRIGHT PROTECTION AND ENFORCEMENT**

In 2012, the Copyright Act, 1957, was amended for a sixth time, to bring it at par with international benchmarks, as well as to reform and refine the functions of the erstwhile Copyright Board (appellate board for adjudicating copyright disputes). It also brought the act into conformity with WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) to protect Music and Film Industry and address its concerns, among other things. Further, National IPR Policy, which enumerates several deliverables, also aims at reinvigorating India's Copyright landscape. India has also re-iterated its commitment to be part of the negotiations on the WIPO Broadcasting Treaty, which should be welcomed by the international community and best efforts made to agree on a draft that makes the treaty



relevant to the internet age.

India's Copyright Act provides right owners with dual legal machinery for enforcement of their rights in the form of both civil and criminal remedies. Civil remedies available to CR owners are provided for in Chapter XII of the Act and are in the nature of grant of injunctions, damages, declaration of authorship etc.

**The following two developments are significant:**

- Introduction of Anti-camcording provisions into the Cinematograph Act 1952 announced in the Interim Budget of 1<sup>st</sup> February 2019 - a much awaited reform that will help address the piracy menace
- India's Union Cabinet approving amendment to the Cinematograph Act to impose strict penalties (imprisonment up to 3 years and fines extendable to Rs. 1 million lakh or both) to combat piracy, particularly the release of pirated versions of films on the internet which causes huge losses to the film industry and the exchequer

**Key Copyright Provisions:**

| S. No. | Provisions on Civil Remedies in the Copyright Act, 1957   |
|--------|---|
| 1.     | Section 55- Provides for the civil remedies by way of injunction, damages, rendition of accounts etc. Further, sub-section (3) extends discretion to the Courts with respect to costs of the legal proceedings.   |
| 2.     | Section 58 Provides for additional safeguards for owners of copyrights by creating a deeming fiction in their favour - all infringing copies of any work, and all plates used/ intended to be used for production of infringing copies, shall be deemed to be the property of the owner of the copyright. |
| 3.     | Section 66- Empowers the Court to order delivery up of all copies of the work or all plates in the possession of the alleged offender, to the owner of the copyright.   |

India is sensitive towards all forms of IP and copyright infringement, and the Act prescribes criminal sanctions of imprisonment and fine for infringement. Criminal remedies available to CR owners are provided for in Chapter XIII of the Act.

| S. No | Provisions under the Indian penal 1860 for effective protection of Copyright   |
|-------|--|
| 1.    | Section 107 - Abetment of a thing Whether Cognizable/ Bailable - Depends as per the offence of which there was an abetment - Triable by Court by which offence abetted is triable - Non – compoundable   |
| 2.    | Section 120B -Punishment of Whether Cognizable/Bailable - Depends as per the offence criminal conspiracy of which there was a criminal conspiracy - Triable by Court by which abetment of the offence which is the object of conspiracy is triable - Non – compoundable. |
| 3.    | Section 174 - Non-attendance in Non-Cognizable - Bailable - Triable by any Magistrate – Non-obedience to an order from public Compoundable servant   |
| 4.    | Section 177 - Furnishing False Non-Cognizable - Bailable - Traible by any Magistrate - information Non- Compoundable   |
| 5.    | Section 179 - Refusing to answer Non-Cognizable - Bailable- Triable by any Court - Triable by public servant authorized to any Magistrate - Non- Compoundable question   |
| 6.    | Section 204 - Destruction of Non-Cognizable - Bailable- Triable by Magistrate of the first document to prevent its class - Non-Compoundable production as evidence   |



|     |  |
|-----|--|
| 7.  | Section 206 - Fraudulent Non-Cognizable - Bailable- Triable by any Magistrate- Non-removal or concealment of Compoundable property to prevent its seizure as forfeited or in execution                         |
| 8.  | Section 217 - Public Servant Non-Cognizable - Bailable- Triable by any Magistrate-Non-disobeying direction of law with Compoundable intent to save person from punishment or property from forfeiture          |
| 9.  | Section 417 - Punishment for Non-Cognizable - Bailable - Triable by any Magistrate -cheating Compoundable by the person cheated with the permission of the court   |
| 10. | Section 420 - Cheating and Cognizable - Non-bailable-Triable by Magistrate of the first dishonestly inducing delivery class - Compoundable by the person cheated with the of property permission of the court. |
| 11. | Section 465 - Punishment Non-Cognizable - Bailable -Triable by Magistrate of the first for forgery class - Non-Compoundable  |

Legal remedies include imprisonment and/or monetary fines depending upon gravity of the crime, as follows:

| S. No | Provision on Criminal Remedies in the Copyright Act, 1957   |
|-------|---|
| 1.    | Section 63 - Any person who knowingly infringes or abets the infringement of copyright is considered as an offender and is punishable with a minimum of six months' imprisonment which may extend to three years and a fine between fifty thousand and two lakh rupees. |
| 2.    | Section 63A - Provides for an enhanced penalty in case of second and subsequent convictions. On conviction, a subsequent offender is punishable with a minimum of one-year imprisonment which may extend to three years and a fine between one to two lakh rupees       |
| 3.    | Section 63B - Any person who knowingly uses an infringing copy of a computer programme an offence which is punishable with a minimum of seven days' imprisonment which may extend to three years and a fine between fifty thousand and two lakh rupees.                 |
| 4.    | Section 65 - Any person who knowingly makes, or has in possession, any plate for the purpose of making infringing copies of any work in which copyright subsists shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.  |
|       | Section 65A - Any person who circumvents an effective technological measure   |

In addition to infringement offences under Section 63 of Copyright Act, following provisions under the Indian Penal Code, 1860 are also relevant.

#### **The Copyright Amendment 2012:**

The amendment introduced many changes in the Copyright Act, 1957. A few of these are:

- Extension of CR protection in digital environment such as penalties for circumvention of technological protection measures and rights management information
- Liability of internet service provider and introduction of statutory licenses for cover versions and broadcasting organizations; ensuring right to receive royalties for authors, and music composers
- Exclusive economic and moral rights to performers, equal membership rights in copyright societies for right owners and exception of CR for physically disabled to access any works.

#### **The Copyright Rules, 2013:**

The Copyright Rules, 2013 was notified on 14 March 2013 replacing the 1958 rules. These provide for procedure for relinquishment of CR; grant of compulsory licenses in the matter of



work withheld from public; to publish or republish works (in certain circumstances); to produce and publish a translation of a literary or dramatic work in any language; license for benefit of disabled; grant statutory license for cover versions; grant of statutory license for broadcasting literary and musical works and sound recordings; registration of copyright societies and copyright registration.

### **Conforming to WCT & WPPT**

CR Act now conforms with WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty – strengthening CR protection and enforcement, extending these to digital environment, ensuring liability of internet service providers and right to receive royalties for authors and music composers. Also, steps taken to bring online broadcasting within purview of CR Act - earlier applicable only to television or radio broadcasting and issuance of statutory licenses by Copyright Board for online broadcasting of copyrighted works was not within the scope of this provision - a step of considerable importance to online broadcasting community.

### **COUNTERFEITING AND PIRACY**

#### **Some Recent Enforcement Measures taken to curb Film Piracy:**

- Formation of country's first anti-piracy unit - Telangana Intellectual Property Crime Unit (TIPCU) to curb piracy and infringement crimes (on the lines of PIPCU - Police Intellectual Property Crime Unit, specialized unit of the City of London Police). A similar body, MIPCU (Maharashtra Intellectual Property Crime Unit) is also operational.
- In 2018, Maharashtra Govt. Cyber Digital Crime Unit (MCDU) blocked 235 websites, that provided pirated Bollywood, Hollywood and TV content
- In December 2018, Mumbai Police seized 1,000 kg of fake Amul butter in Mumbai and arrested five members of a gang that was involved in making spurious food products.
- West Bengal police raided and seized counterfeit products worth Rs. 3 million of Dabur brand, a well-known Indian brand and arrested the producing unit's owners.
- The Manipur police along with Enforcers of Intellectual Property Rights (EIPR) raided Imphal market shops dealing in fake Canon parts and arrested persons involved, in October 2018. A total of 48 fake 'Canon Packed Toner Cartridge' were sized.
- In February 2018, the IPR Enforcement Unit, Coimbatore Police booked three local cable TV channels owners for telecasting new Tamil films in Tirupur district, based on complaints from the producers. All the three cases were registered under various sections of the State's Cable TV Acts, while the channel offices were raided, sealed and many equipment seized.
- Mumbai police and anti-piracy officials raided a famous Mumbai market and a total of 62 fake Louis Vuitton bags worth ₹4, 47000 were seized. Two people were arrested.
- In 2017, Central Crime Branch registered 73 cases in which fake products were being sold; over 80% of them garments, and 121 persons arrested.
- Crime Branch, Delhi Police raided a commercial hub in Karol Bagh and found counterfeit iPhones and various assembling material for other smartphones. The shop was seized, and a huge scam unearthed.

#### **Administrative Measures taken by Governments**

- All IP-related functions (including copyright) consolidated under DPIIT, to reduce possible conflicts owing to multitude of jurisdictions and to ensure uniformity in decision making at national and international levels. Earlier, DPIIT used to administer patents, trademarks, designs and geographical indication and also matters relating to the WTO and WIPO, while copyright used to be under another ministry/department.
- Finance Act merged Copyright Board with the Intellectual Property Appellate Board. Retired Delhi High Court judge, Justice Manmohan Singh appointed IPAB Chairperson.



- Central Government re-registered IPRS as a copyright society, under Section 33(3) of Copyright Act. The re-registration of IPRS to have positive impact in granting of licenses for literary/musical works used in a cinematographic films and sound recordings.
- Inter-Ministerial Committee on Enforcement of IPR laws set up under DPIIT to deliberate on the IPR enforcement issues.

### **Patent Prosecution Highway**

- Patent Offices of India and Japan have agreed to start a bilateral PPH program (pilot basis) in identified fields of inventions, subject to formalities in the first quarter of FY2019.
- Draft Patent Rules also published for public comments, in this regard.

### **JUDICIAL OPINION**

#### **John Doe Orders against Infringing Websites**

- A possible and effective solution to addressing the piracy problem lies in civil remedy of website blocking orders or John Joe orders.
- Judicial orders, “John Doe orders” are issued against persons, whose identity is unknown, are targeted at specific websites. Notices, even if ineffective, are still issued to the ISP and, if identifiable, to owner of domain and/or website in accordance with statutory provisions. Plaintiffs are then able to obtain court injunctions ordering named websites to cease infringement of their copyright.
- ISPs providing Internet bandwidth connectivity are directed to enforce the injunction by blocking access of Indian subscribers to websites subject of the order. Concerned Government Departments are directed by court to require ISPs to act as per court orders, in accordance with terms and conditions of the license agreement they have with the Department of Telecommunication for the provision of internet services.
- Recent times have seen a rising trend in Indian Film Industry to obtain “John Doe” orders prior to release for blocking access to any website which are deemed to host links to pirated content.

#### **Anton Piller Orders**

- Other than the extensive police powers under the Copyright Act, plaintiffs have various civil powers to enforce their right. Copyright owners and associations can employ civil procedure to search defendant’s premises and seize pirated copies.
- This is done via ‘Anton Piller’ orders obtained from civil courts which permit court-appointed officers, accompanied by representatives of plaintiffs, to search premises and seize evidence without prior warning to defendant.
- Similar to John Doe Orders, these orders can be obtained unilaterally (ex-parte).

In *Cartier International AG and Ors. V. Gaurav Bhatia and Ors*, Court observed that defendants are guilty of offering for sale on their website [www.digaaz.com](http://www.digaaz.com) and supplying massive quantities of counterfeit products bearing several registered trademarks of various luxury brands including those of the plaintiffs. The court inter alia awarded penalty of INR 1 crore (Approx. US\$ 149,667) against defendants and held that the matter was a case of dishonesty where piracy committed by defendants was apparent on the face of the record.

The National IPR Policy also highlighted the intrinsic linkages between commercialization, consumer choice and creativity. India has made piracy and counterfeiting criminal offences being subjected to the judiciary awarding imprisonment and fines for violators widespread, besides compensatory damages to plaintiffs. Aggrieved companies are also being encouraged to file more cases against infringers. However, primary responsibility of enforcement remains that of right holders since IPRs are private rights.



FICCI has been working in the copyright sphere proactively, providing industry inputs to government and organizing interactive forums on topical issues like digital advertising, e-commerce challenges, brand protection and strengthening of creative industries and facilitating constructive interaction among Copyright stakeholders, including government., FICCI-CASCADE works with International organizations (WIPO, WCO, ICC-BASCAP) on fact finding studies and to further spruce-up IPR enforcement.

Continuous developments such as facilitating e-filing of copyright applications, shifting of departments under the IPR Policy and efforts taken by the judiciary to bring out a landmark change in IP jurisprudence, indicate that Copyright Law in India is fast evolving positively.

## **INDIAN PATENT SYSTEM**

India's policy framework is driven by public policy and needs of its people. The country's Constitution mandates that India is a Welfare State and hence all policy decisions are driven by this ideology. It would be erroneous to infer that Indian IP policies will be being emulated by other developing countries. Indian laws & policies are made keeping in view India's needs, priorities and international obligations, and the available policy space. Its policies are framed within the framework of international treaties and agreements. In that context, each country is sovereign and may adopt or reflect or emulate as per its needs.

### **Indian Patent (Amendment) Act, 2005**

Patent Act of 2005 introduced some important changes on the legal regime of patent protection to address patent issues in technology, chemicals and pharmaceuticals sectors. FICCI reiterates that India favours strong patents, evidenced by the strict scrutiny and procedure of granting patents by Indian IP Office. There has been only one instance of issue of a Compulsory License, which should not warrant a discussion on unilateral trade sanctions especially as the action was TRIPS compliant. The provision of 3(d) in Indian Patents Act and CL provisions have worried international pharmaceutical companies since the amendment to the Indian Patent Act in 2005, that it may encourage other developing and even some developed countries to introduce similar provisions in their laws. However, such bilateral pressures are now well recognized globally as pressure tactics on developing countries driven by a few large international pharma companies.

### **Patentability Criteria**

The TRIPS Agreement and Doha Declaration has provided policy space to member countries to exclude certain subject matter from being granted patents. Thus, under Section 3 of Patents Act 1970, inventions based on traditional knowledge, patenting of animals, plants, plant variety and seeds etc. are not allowed.

### **Section 3 (d) of the Patents Act, 1970**

To prevent patent 'ever greening' (extension of life of a patent over products that are about to expire, on account of minor and incremental improvements in the invention), section 3 (d) of the Act provides that:

- A mere discovery of a new form/use/property/process etc. of a known substance which does not result in enhanced efficacy is not patentable.
- Salts, esters, ethers, polymorphs, etc. of known substance are to be considered to be the same substance until these differ significantly in properties with regard to efficacy.
- Mere use of a known process, machine or apparatus is not patentable unless such known process results in a new product or employs at least one new reactant.



### Similar Provisions in Other Countries

In some countries, features of patent legislation are similar to India's Section 3(d). Countries in Asia Pacific are also planning to adapt similar provision of Section 3(d) to patent those drugs only which are breakthrough inventions.

- **Philippines**, to toughen criteria of patentability, had proposed to amend its law on identical lines.
- **Brazil** Patent Office drafted guidelines to restrict patentability of new forms of compounds (polymorphs) or new property or new use of a known process unless this known process resulted in new product.
- **Argentina** guidelines for patentability for pharmaceutical and chemical inventions also exclude subject matter of polymorphs, hydrates and solvates as it is considered to be the intrinsic property of the substance so not an invention but a mere discovery. Further, in Argentina new form, new use, and new formulations are not patentable. Description of the product in accordance with pre-existing formulation is not eligible for patent protection. Patent office of Argentina also provides definition for new form, new use, and new formulation in their Patents Act.
- **Japan** patent legislation mentions the subject matter as new use of a drug can be patented if the usage is absolutely novel over the original and its use must be clearly differentiated.
- **Mexico** IP Law in Article 19 (Industrial Property Law, 1991) mentions that "Juxtaposition of known inventions or mixtures of known products, or alteration of the use, form, dimensions or materials thereof, except where in reality they are so combined or merged that they cannot function separately or where their particular qualities or functions have been so modified as to produce an industrial result or use not obvious to a person skilled in the art".
- **European Patent Office** had also given guidelines regarding patentability of polymorphs. For polymorphs to be considered as inventive it must produce extraordinary technical effect compared to already known.

### Compulsory License (CL) and Access to Medicine

Indian Patent Office has so far granted only one CL to Natco Pharma Ltd. for producing the generic version of Bayer Corporation's patented drug Nexavar and the decision was backed by public policy, i.e., the multinational innovator could not make its invention available in India at affordable price and commercial scale. *It is important to note that the Indian patent office, as a mark of its careful scrutiny, has rejected other applications on compulsory licenses, namely Saxagliptin and Dasatinib.*

| S.No. | Drug   | Details   |
|-------|--|---|
| 1.    | NEXAVAR (BAYER)22<br>Kidney/liver cancer drug                            | NATCO was granted a CL on Bayer patented drug Nexavar on the ground of public policy as the German Innovator was unable to provide the lifesaving drug at affordable prices in the domestic market.   |
| 2.    | DASTINIB (BMS) -<br>immunologic and oncologic disorders                  | The CL application for the Bristol-Myers Squibb (BMS) drug by BDR pharmaceutical Int. Ltd. was rejected by IPO. Injunction was awarded by Indian court in infringement proceedings brought by BMS against Natco, Hetero Pharma and BDR pharmaceutical Int. Ltd. |
| 3.    | PYRROLE (SUGEN INC) -<br>cancer drug                                     | Post grant opposition was filed by M/s Cipla Ltd. India. The Patent was revoked under section 2(1)(j) of Patent.  |
| 4.    | Erlotinib Hydrochloride (Pfizer, OSI) - Epidermal Growth Factor Receptor | Patent was granted disposing pre-patent opposition by Natco Ltd.  |



|     |  |   |
|-----|--|---|
| 5.  | Gifitinib (AstraZeneca) - lung cancer drug                 | Pre-grant opposition was filed by Natco pharma and G.M. Pharmaceuticals. AstraZeneca's patent application was refused due to lack of novelty, non-obviousness and inventive step. |
| 6.  | Asthma Combination Product (M/s Merck Sharp & Dohme Corp.) | Patent granted and then was subsequently revoked on 10 December 2012 based on the post grant opposition by Cipla Ltd.   |
| 7.  | DP-IV Inhibitors (M/s Merck Sharp & Dohme Corp)            | MSD has filed infringement suit against Glenmark and Aprica Pharmaceuticals. MSD won the infringement suit against generic diabetes drug.   |
| 8.  | Gliver (Novartis)- Cancer drug                             | Supreme Court denied grant of patent for Gleevec on ground of failure in the test of invention and patentability under Section 2(1) (j) and (ja) and Section 3(d).                |
| 9.  | Combigan (Allergan Inc.)                                   | Patent was granted on 7 May 2008 and revocation application was filed by Ajanta Pharma. Patent stands revoked by IPAB.  |
| 10. | Ganfort (Allergan Inc.)                                    | Patent was granted on 20 October 2013 but was later revoked under Section 64 read with section 117D of Patent Act on basis of application filed by Ajanta Pharma.                 |

### Cases of Compulsory Licensing granted in other countries:

CLs have been used as a tool against anti-competitive activities & enforcement of affordable commodities globally - including by Canada, US and Germany in the recent past.

#### 1. United States of America

US Government has wide powers under several legislations to exercise CL for reasons such as government use, public purpose or anti-competitive remedies. Besides, CL provisions exist under Clean Energy Act, Atomic Energy Act and Federal Insecticide, Fungicide & Rodenticide Act. Courts have had progressive equitable doctrines to deny injunctions to patentees with valid patents that are admittedly infringed. Such actions are akin to compulsory licenses.

One such observation was made by Justice Rader in Paice LLC Vs Toyota Motor Corp where he had observed: *District courts have considerable discretion in crafting equitable remedies, and in a limited number of cases, as here, imposition of an ongoing royalty may be appropriate. Nonetheless, calling a CL an "ongoing royalty" does not make it any less a CL.*"

Various judgments have been pronounced by US Courts in similar light. A list of instances which highlight the pro-public stance dating back to as early as the year 1934 are enumerated:

- In May 2017, US Court of Appeals in Nichia Corporation Vs. Everlight Americas Inc, held that the patentee was not entitled to an injunction or a restraining order and stated that monetary damages could adequately compensate Nichia for Everlight's infringement of its patent.
- In 2008, FTC obtained an open CL to patents held by Negotiated Data Solutions LLC (NData), for use in Ethernet technologies.
- In September 2006, a court granted Johnson & Johnson a CL to use three of Dr. Jan Voda's patents on guiding-catheters medical devices for performing angioplasty.
- In August 2006, a court granted Toyota a CL on 3 Paice patents for hybrid transmissions, for a royalty of \$25 per automobile.
- In July 2006, a court granted Direct TV a CL to use the Finisar patent on integrated receiver decoders (satellite set top boxes), for a royalty of \$1.60 per device.
- In June 2006, a US court granted Microsoft a CL to use two patents owned by z4 Technologies that relate to Digital Rights Management systems used by Microsoft for its Windows and MS Office software programs.



- In 2005, Ebay Inc Et Al Vs. Merckexchange LLC, the Supreme Court of the United States did not grant an injunction in light of public interest.
- In 2005, Johnson & Johnson Vs. Ciba Vision refused to enjoin the use of patented contact lens technology on the ground that “millions of innocent lens wearers will suffer real adverse consequences if sale of ACUVUE®OASYS is enjoined”.
- In 2001, ExxonMobil and National Petrochemical & Refiners Association asked US Federal Trade Commission (FTC) to force Unocal, another oil company, to grant licenses to patents on reformulated gasoline. The patents were necessary to comply with clean air regulations in California. In 2005, the FTC obtained a zero-royalty CL on a portfolio of patents, as a condition of Chevron acquiring Unocal.
- In 1934, City of Milwaukee v. Activated Sludge Inc., US court refused to enjoin City of Milwaukee from infringing a patent relating to treatment of sewage on the ground that this would cause grave harm to public interest, as citizens would have no other option than to dump their garbage in Lake Michigan. While denying injunction, court appeared to suggest that damages would suffice, effectively paving the way for a de facto Compulsory License.

## **2. Thailand**

- 2006 - Issued CL to import generic and locally produce Efavirenz from India.
- 2007- Issued CL to heart disease drug Plavix (Clopidogrel bisulphate) and for AIDS drug Kaletra.

## **3. Brazil**

- In 2007, Issued CL to import generic efavirenz from India rather than buy Stocrin (brand name for patented efavirenz) from its US-based manufacturer Merck & Co.

## **4. Ecuador**

- In 2009, CLs were issued by National Ecuadorian Institute of Intellectual Property (IEPI), and the term of application of license for ritonavir/lopinavir. In 2012, CL issued for abacavir/lamivudine.

## **5. Germany**

- In August 2016, German Federal Patent Court (FPC) granted pharmaceutical company Merck Sharp & Dohme / MSD (US) right to use European Patent of Shionogi and allowed sales of the AIDS drug Isentress in Germany.

## **6. Malaysia**

- In August 2017, Malaysia's government issued a CL in an effort to offer a less-expensive version of Gilead's hepatitis C drug and increase access.

## **7. Canada**

- On May 7, 2004, Torpham successfully appealed a rejection of a compulsory license application involving Merck patents for manufacture & sale of Lisinopril. Torphan had sought a license to use the patents for purposes of manufacturing/exporting to US.

## **8. Italy**

- On 23 February 2005, Autorità garante della concorrenza e del mercato (AGCM) opened an investigation into abuses of a dominant position by refusals to license rights to active pharmaceutical products by two large pharmaceutical companies -- GlaxoSmithKline and Merck & Co Inc (Cases A363 and A364). On 21 June 2005, AGCM ordered a CL for Merck patents on antibiotics that use the active ingredients Imipenem Cilastatina



*The US and other countries have constantly set precedence of using CL as a tool to curb anti-competitive activities and for providing to its citizen availability of affordable commodities thereby signalling that it would not enforce exclusive rights in patents at the cost of public interest or other domestic concerns. Hence, India cannot be held deficient in terms of TRIPS Agreement, when India has issued just one CL under the Indian Patent Act, based on the rationale of public policy and access to affordable life-saving drug to its citizens; especially when there is ample precedence in International Patent jurisprudence to support such actions.*

### **The UN Secretary-General's High-Level Panel on Access to Medicines Report**

UN Secretary-General Ban Ki-Moon constituted a High-Level Panel on Access to Medicines in November 2015, with proposed objective “to review and assess proposals and recommend solutions for remedying the policy incoherence between the justifiable rights of inventors, international human rights law, trade rules and public health in the context of health technologies.” In summary, the report’s main recommendations are:

- WTO members must make full use of TRIPS flexibilities as confirmed by Doha Declaration to promote access to health technologies when necessary.
- WTO members should make full use of policy space available in Article 27 of TRIPS agreement by adopting and applying rigorous definitions of invention and patentability that are in interests of country’s public health and its inhabitants. This includes amending laws to curtail patents ever-greening & awarding patents only when genuine innovations occur.
- Multilateral organizations (UNCTAD/WTO) should strengthen capacity of patent examiners to apply rigorous public health-sensitive standards of patentability taking into account public health needs.
- Governments should adopt/implement legislation that facilitates issuance of CLs. The use of CL should be based on provisions found in Doha Declaration and grounds for issuance left to discretion of the governments.
- Governments and private sector must refrain from explicit or implicit threats, tactics or strategies that undermine the right of WTO Members to use TRIPS flexibilities.
- Governments engaged in bilateral and regional trade and investment treaties should ensure that these agreements do not include provisions that interfere with their obligations to fulfil the rights to health.

### **The report also elucidates following aspects as being TRIPS Plus provisions (reiterating India’s steadfast stand regarding such provisions):**

- Patents for new uses or methods of using a known product (ever greening)
- Prohibition on pre-grant patent opposition
- Test data exclusivity periods
- Patent term extensions for ‘unreasonable’ regulatory or marketing delays
- Patent linkage
- Limits on compulsory licensing grounds
- Limits on parallel imports
- Enhanced obligations regarding border measures, civil and administrative procedures, remedial provisions and the criminalization of certain violations beyond what is required by the TRIPS Agreement

### **New Patent Rules, 2016**

The Government of India has published Patent (Amendment) Rules, 2016 vide notification dated May 16, 2015 amending the Patent Rules, 2003. Some notable amendments are:

- Applications can be transferred electronically from any of the Patent Office branches to another, utilizing specialized technical manpower more efficiently.



- Refund of fees in certain cases has been permitted, as also withdrawal of application being permitted without any fees.
- Provisions have been included for condonation of delay due to war/natural calamities.
- Timelines have been imposed to ensure speedy disposal
- The number of admissible adjournments has been limited
- Expedited examination is now permitted on certain grounds
- Hearing through video conferencing is now possible
- Provisions for start-ups for 80% fee rebate and expedited application examination
- Start-Ups Intellectual Property Protection Scheme (SIPP) launched to encourage innovation and creativity in Start-Ups where Government will bear entire costs of facilitators for any number of patents, trademarks or designs filed

### **CRI Guidelines for Software Patents**

IPO recalled the 2015 guidelines on Computer Related Inventions (CRI) examination and issued new guidelines that are in line with the provisions of the Patents Act. The new guidelines provide that the inventive step in any invention must be a feature that is not an excluded subject itself. For the purposes of interpreting 'technical advance' as provided under Section 2(1)(ja), the Guidelines state 'that comparison should be done with the subject matter of invention and it should be found that the advancement is not related to any of the excluded subjects'.

### **Government Intervention on Standard Essential Patents - FRAND terms**

DPIIT had issued a paper on FRANDS in order to develop a suitable policy framework to define the obligations of Essential Patent holders and their licenses. The document elaborated on a number of topics including the basics of Standard Essential Patents, Competition laws, Standard Setting Organisation, Ongoing recent SEP cases and ends with a list of "Issues for Resolution" seeking the opinion of concerned stakeholders on those issues.

### **Compulsory License of GM technology on FRAND Terms**

The Ministry of Agriculture notified the 'Licensing and Formats for GM Technology Agreements Guidelines 2016' that in effect created a CL regime for GM crop technology patents. The guidelines prohibited all patentees of GM technology from refusing to license their technology on FRAND terms to any eligible seed company that requests for it and at a royalty rate fixed by the Govt. They further created a presumption of license in case of patentee's failure to respond to a seed company's request within 30 days from its receipt.

### **Traditional Knowledge Digital Library**

- India's Traditional Knowledge Digital Library (TKDL), set up in 2001, was a collaborative project between Council of Scientific and Industrial Research (CSIR) and Department of AYUSH to ensure that patent offices around the world do not grant patents for applications founded on India's wealth of age-old Traditional Knowledge.
- TKDL is a unique, proprietary database that integrates diverse knowledge systems and languages, based on 359 books of Indian Systems of Medicine, and are available at a cost of approx US\$ 1000 in open domain and can be sourced by any individual/organization at national/international level.
- Access to around 3,30,044 Traditional Medicinal Formulations is available in patent compatible format in five international languages under TKDL Access Agreement to 10 Patent Offices - EPO, USPTO, JPO, CIPO, UKPTO, IP Australia, IPO, DPMA-German, Chile and Malaysia.



### Important Judicial Pronouncements

In India, various court decisions demonstrate efforts by Indian judiciary in protecting rights of IP owners. Indian judiciary has taken significant strides in interpreting some complex but important statutory provisions of IP legislation, which would have far-reaching implications on nature and extent of IP protection and enforcement in India. Some of these decisions are:

**Novartis Case:** There was a series of cases filed by Novartis against multiple defendants for infringement on its patent on anti-diabetic drug Vildagliptin. Defendants challenged validity of the patent under section 3(d), but different courts in India have granted injunctions in favour of Novartis and thereby protected the rights of patentee, Novartis.

Therefore, in the case of a medicine that claims to cure a disease, the test of efficacy can only be “therapeutic efficacy”. Section 3(d) is fully in conformity with the TRIPS agreement. It does not lay down a fourth requirement of patentability; rather it is a second-tier requirement in cases of new uses of a known substance covered by the section. *Hence, the Indian Stance on the Section 3 (d) is sound in terms of TRIPS, Public policy and Health policy. The Novartis Judgment is well reasoned, reasonable and TRIPs permissible.*

**Markush claims ought to be held valid:** In *Merck v Glenmark*, October 2015, Delhi High court observed that Markush claims of patent to be valid and on this basis the court held the defendant’s product to be infringing.

**SEP and FRAND Licensing - *Ericsson v. CCI*** – Delhi High Court delivered a well-reasoned judgment refusing to set aside CCI order directing investigation into Ericsson’s conduct of demanding excessive royalties etc. for its SEPs that was prima facie found to constitute abuse of dominance. The court clarified that CCI does not lack jurisdiction to deal with complaints on abuse of dominance in respect of patent rights as there is no irreconcilable conflict between the Patents Act and the Competition Act. It also noted that there is nothing in the law that prevents a party from challenging a patent’s validity or apply for a CL and simultaneously institute a CCI complaint against the patent holder alleging anti-competitive behaviour.

### ADDITIONAL PROVISIONS

- **Expired/ Ceased Patents:** To provide access to Patents that have ceased to be in effect under section 53 (2) of Patents Act, 1970. The status of the patent is updated dynamically, and the user has access to complete patent document and e-register.
- **Disposal of Patent Applications:** To provide disposal reports for patents granted, refused and applications abandoned under section 21(1). The reports are available location-wise and group-wise based on a particular month of a year or between a particular set of dates.
- **Request for Examination status of issued First Examination Reports/FER:** To display information about month & year of ‘Request for Examination’ (RQ) being examined and FERs being issued - is available location-wise and group-wise on real-time basis. The user can intimate the office if the RQ has not been examined yet by clicking on a button.
- **Dynamic FER view:** To display the FER dynamically. Reports can be accessed for particular year & month, location-wise, group-wise. One can also access all the FERs issued in a particular month and for a particular group in that year.
- **Dynamic status of Patent Application (As per field of invention):** This tool provides information on ‘Working of Patents’ (under section 146) and access to the information received from patentee regarding working of patented inventions and can be accessed location-wise and year-wise based on various parameters.
- **Stock and Flow based Dynamic Patent Utility:** A utility which existed for trademarks, has now been extended to patents as well. Reports suggest that IPO is the first in the



world to achieve such transparency. This facility allows the public to see the actual status of IP applications on a real-time basis.

## **DATA PROTECTION AND TRADE SECRET**

### **Data Exclusivity**

TRIPS agreement does not refer to data exclusivity, nor does it refer to any period of data protection. Its Article 39 relates to 'data protection' when data pertinent for seeking approval of the authority is shared with marketing regulator. Text of this Article does not specifically state that member countries would need to comply with the 'data exclusivity' requirement, but only that the regulator will need to protect it from unfair commercial use. Therefore, no additional obligations such as 'data exclusivity' which are not present in text can be interpreted.

The obligation on the authorities is to keep the test data secret and not allow it to be accessed by third parties through unfair means. Data exclusivity includes both non-disclosure of data by market regulators and non-reliance of regulator on this data submitted for according marketing approvals to another applicant, which would be a TRIPS plus provision.

A large proportion of Indian Pharmaceutical industry produces generic drugs. Extending data exclusivity would thus have a considerable impact on Indian industry especially in the short run. More importantly, data exclusivity provisions will impact access to medicines which is a major social/human cost for a country which still has a large population living below poverty line.

### **Trade Secret**

Trade Secret, at present, is protected through contract law in India and is part of the concept of protection against unfair competition. Section 27 of Contract Act provides the remedy, restricting a person from disclosing any information which is acquired during employment or through a contract. Trade Secret is an important form of IPR and most innovative companies rely upon this confidential/proprietary information to gain business advantage. A predictable and recognizable trade secret regime will improve investor confidence and create a facilitative environment for flow of information.

In October 2016, FICCI in partnership with Government of India organized an India-US workshop on Protection of Trade Secrets in Delhi. The purpose was to generate a constructive discussion among stake holders to evaluate industry viewpoint on existing legal framework of trade secrets protection in India and the key challenges faced by Industry under existing Indian legal provisions. Attended by Govt. officials from India and US, industry representatives and IP experts, deliberations were on US and global legal scenarios on trade secret protection.

## **TRADEMARKS**

Trademarks Act 1999 provides for registration & protection of TMs for goods and services and for the prevention of the use of fraudulent marks. The TM Rules amendments of March 2017 greatly helped streamline processes and improved functioning.

### **Recent amendment in TM Rules**

- **Dynamic Utility Facility in TM:** Various tools have been introduced to make it convenient for public to track status of various functions performed by TM Registry on real time basis.
- One can now access examinations of trademark applications, show cause hearings, publications in TM Journal, Registrations of TM, disposal of applications (abandonment, refusal etc.) done, notices issued (month wise/date wise), international registrations designating India etc. using tools provided in the facility.



- **Stock and Flow based Dynamic TM Utility:** This tool provides applicants with facility to view a particular TM under different stocks and the flow of TM applications pending at Registry's various stages. Reports are obtainable in following categories: new application received for TM registration, awaiting examination, under examination, post examination, under show-cause hearing, published and awaiting oppositions etc.
- Process laid out for determination of well-known mark
- 74 forms that existed earlier replaced by 8 consolidated ones
- Express provision for filing applications for sound marks
- E-filing encouraged through 10% rebate in fees
- Email recognized as Mode of Service
- Expedited processing of an application right up to registration stage

### Madrid Protocol

India became the Madrid Protocol's 90<sup>th</sup> member when it joined the System in July 2013. *Notably, it was in at a program organized in July 2015, jointly by FICCI, WIPO and Government of India, in New Delhi that the 1.25 millionth International Registration Number was conferred on an Indian company (Micromax Informatics) in 2015.* Till 31<sup>st</sup> December 2017, 44225 international applications seeking protection of TM in India have been forwarded by WIPO to the Indian TM Office for confirming protection of such marks in India. On the other hand, Indian TM Registry received 793 Indian applications for international registration of TM under Madrid Protocol, out of which 680 applications have been certified and forwarded to WIPO; 598 such applications have already been registered at the International Bureau of WIPO.

### IP FILINGS AND TRENDS IN INDIA

#### Upsurge in IPR filing

- Latest data available shows a total of 355,882 applications being filed during 2017-18.
- Patent filings, which were 45,449 during 2016-17, saw 5.29% rise over during 47,854 in 2017-18.
- Number of TM applications filed in 2017-18 was 272,974.
- With rapid increase in TM examinations of 532,230 applications in 2016 -17, IPO was able to significantly reduce pendency of applications, examining 306,259 in 2017-18.
- Keeping in line with past trends, copyrights saw the largest number of filings with over 23,217 filings applications in 2017-18, an increase of 28% in application filing compared to the previous year.
- Filing of design applications also increased from 10,213 to 11,837 in 2017-18.

#### Recent summary of IP Trends in India –

| CUMULATIVE STATISTICS: Yearwise Comparison (FY 2015-16 - FY 2017-18) |                    |            |            |                                    |                       |            |            |                                    |                       |            |            |                                    |            |            |            |                                    |
|--|--------------------|------------|------------|------------------------------------|-----------------------|------------|------------|------------------------------------|-----------------------|------------|------------|------------------------------------|------------|------------|------------|------------------------------------|
| IP   | Applications Filed |            |            |                                    | Applications Examined |            |            |                                    | Grants/ Registrations |            |            |                                    | Disposal   |            |            |                                    |
|  | FY 2015-16         | FY 2016-17 | FY 2017-18 | % Change FY 2017-18 vs. FY 2016-17 | FY 2015-16            | FY 2016-17 | FY 2017-18 | % Change FY 2017-18 vs. FY 2016-17 | FY 2015-16            | FY 2016-17 | FY 2017-18 | % Change FY 2017-18 vs. FY 2016-17 | FY 2015-16 | FY 2016-17 | FY 2017-18 | % Change FY 2017-18 vs. FY 2016-17 |
| Patents  | 46904              | 45444      | 47854      | 5%                                 | 16853                 | 28967      | 40330      | 108%                               | 6326                  | 9847       | 13035      | 32%                                | 21987      | 30271      | 47695      | 58%                                |
| Trademarks   | 283040             | 278170     | 272974     | -2%                                | 267861                | 532230     | 306259     | -42%                               | 65045                 | 250070     | 300913     | 20%                                | 116167     | 290444     | 555777     | 91%                                |
| Designs  | 11108              | 10213      | 11837      | 14%                                | 7545                  | 11940      | 11850      | -1%                                | 7904                  | 8276       | 10020      | 21%                                | 8273       | 8332       | 10788      | 29%                                |
| Copyrights   | 14812              | 16617      | 23217      | 28%                                | 9325                  | 16584      | 26195      | 58%                                | 4505                  | 3596       | 19997      | 456%                               | 4505       | 3596       | 32008      | 790%                               |



**Note:** The drop in Trademark examination FY in 2017-18 is due to the elimination of pendency and examination of an application is just one month.

#### **Clearing Backlog/ Reducing Pendency**

- Pendency in Patent examination targeted to be brought down (5/7 years to less than 18 months). Technical manpower duly increased. 220 Patent Examiners recruited in addition to existing 458.
- 59 TM examiners also recruited in addition to 100 contractual examiners
- In a first in past few years, patent applications examined exceeded the number filed in any one month.
- To promote ease of doing business, IPO introduced automatic issuance of e-generated patent and TM certificates.
- TM examination pendency brought down (13 to just 1 month) among the fastest globally.
- Disposal of Patent applications increased by 58% in 2017-18.
- Disposal of CR applications increased by 9 times in 2017-18. Earlier pendency wiped out.
- Patent application examination increased by 51% during April-December 2018.
- Patent grants increased 12% in April-December 2018, compared same period in 2017.

#### **Promotion and Marketing of Geographical Indications**

- India's first GI Store launched on 28 January 2019 at Goa International Airport.
- Common logo design and tagline for all India GIs launched after a public competition.
- Engagement with various State Governments and Union Territories ongoing to create awareness on GIs among consumers & producers, assisting in capacity building and hand-holding respective GI producers and facilitating sales & marketing. Region specific projects to be taken up for state specific GIs.

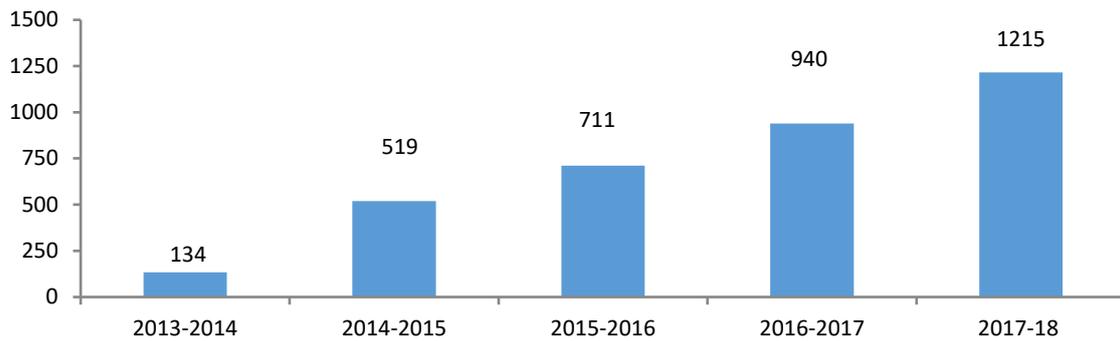
#### **Trend in Geographical Indications (2011-12 to 2015-16)**

| <b>Year</b>       | <b>2011-12</b> | <b>2012-13</b> | <b>2013-14</b> | <b>2014-15</b> | <b>2015-16</b> |
|-------------------|----------------|----------------|----------------|----------------|----------------|
| <b>Filed</b>      | 148            | 24             | 75             | 47             | 17             |
| <b>Examined</b>   | 37             | 30             | 42             | 60             | 200            |
| <b>Registered</b> | 23             | 21             | 22             | 20             | 26             |

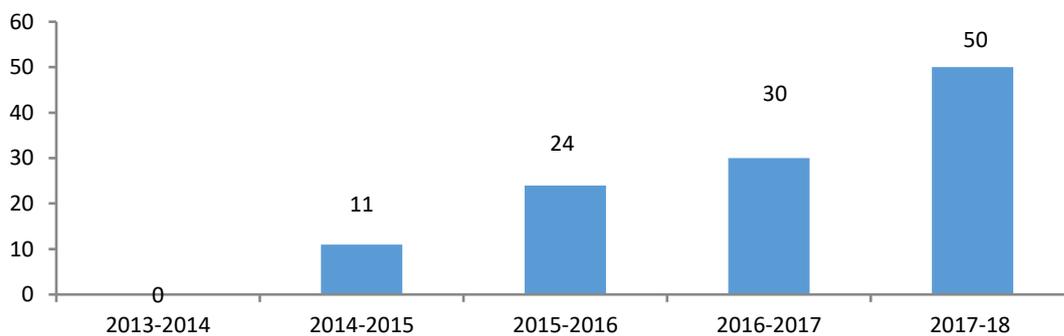
#### **Trend in functioning of IPO office as ISA (International Searching Authority):**

IPO started operating as ISA from October 2013. A total of 1365 international applications were since received till 31.03.2016 for establishing International Search Reports (ISR). As on 31st December 2017, the Indian Patent Office as ISA, has received 3150 international applications choosing India as ISA, requesting for international search reports and 98 applications choosing India as IPEA for international preliminary examination.

Indian Patent office (ISA) has improved timeliness of establishing International Search reports (ISR) over the years. By 31 June 2018, IPO as ISA, received 3976 international applications choosing India as ISA, requesting for international search reports and 98 applications choosing India as IPEA for international preliminary examination.



**Total applications in ISA received till 31st March 2018 = 3519**

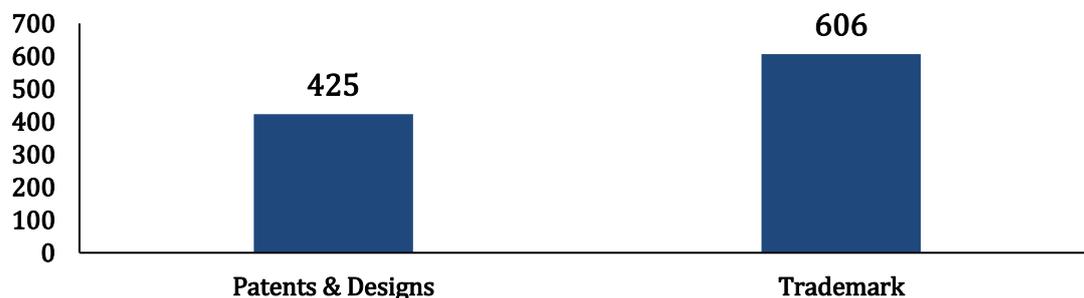


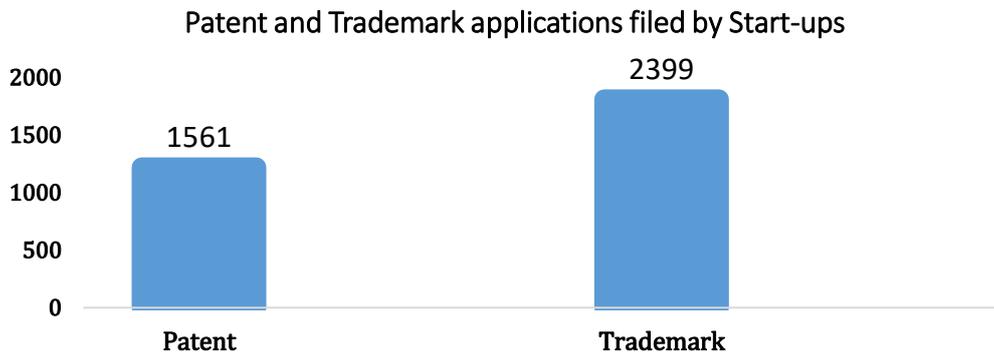
**Total applications received in IPEA till 31st March 2018 = 115**

During 2015-16, 41% search reports were issued within time i.e. 3 months from search copy received by ISA, whereas in 2016-17, 68% reports were issued in time. During 2017-18, percentage of timeliness in issuing ISRs increased to 97 %. Further, IPO ISA develops high-quality reports at the lowest possible cost among all ISAs internationally within the stipulated time frame.

**Start-ups & IPRs (January 2016 to November 2018)**

**Facilitators empaneled under SIPP Scheme**





### Special Incentives for Startups

- 50% rebate in trademark fees
- 80% rebate in patent fees
- Expedited examination of patent applications

### Global Innovation Index (GII)

Innovation is a central driver of economic growth. GI, which captures the multi-dimensional facets of innovation of a country, ranked India the 57<sup>th</sup> most innovative nation in 2018, improving its ranking from 60<sup>th</sup> last year, improving steadily since ranked 81<sup>st</sup> in 2015. To strengthen India's innovation ethos further, govt. is setting up a Task Force on Innovation.

India has also been retaining a leading position in ICT Service Export for several years. A top-ranked economy in Central & Southern Asia, India has particular strengths in tertiary education and R&D, hosting global R&D firms and quality universities with scientific publications. India also over-performs in innovation relative to its GDP, being ranked second on innovation quality amongst middle-income economies.

### Performance of India in Global Innovation Index (GII)

In GI 2018, India moved up by three places to be ranked at 57<sup>th</sup>. Notably, since 2015, India has improved 24 positions in GI rankings.

### INITIATIVE BY THE GOVERNMENT

#### Enforcement: Sensitization of Enforcement Agencies & Judiciary

- Training programs for Police have organized in Andhra Pradesh, West Bengal, Uttar Pradesh, Madhya Pradesh, Telangana, plus two rounds of trainings each in North East Police Academy and three rounds at National Police Academy, Hyderabad.
- IPR Cells created under State Police Department in Karnataka, Punjab, J&K.
- Advisory issued by Home Ministry to all State Police Departments and union territories to include IPRs in training curriculum.
- Collaboration with National Internet Exchange of India (NIXI) to pull down infringing sites
- Anti-piracy videos for children launched in collaboration with Viacom 18 Media Pvt. Ltd.

#### IPR Awareness and Promotion

- IPR Awareness programs have been conducted in many schools, using presentations and creatively illustrated posters, pamphlets covering IPR basics and the need IPR protection.
- Similar programs for Colleges/Universities and industry organized.
- IPR programs conducted by RGNIPM, including in collaboration with WIPO.
- 'Training of Trainers' in collaboration with TIFAC - certified Trainers now conducting



workshops in schools, colleges and for industries.

### **Social Media Campaign**

CIPAM launched social media campaign: "LetsTalkIP" which received overwhelming response from IPR fraternity, helping organic growth of followers on Twitter, Facebook and YouTube.

### **Modernization and strengthening of IP offices**

Government implemented projects for modernization of Patent Offices, TM Registry and GI Registry. Focus on commissioning of four state-of-the-art offices in Delhi, Kolkata, Chennai, Mumbai, creating additional posts in Patent Office and TMR, providing initial level of computerization/Internet facilities, launching of e-filing of patent and TM applications, establishing online search facilities and Intellectual Property Training Institute to provide training and develop strategies for awareness creation.

Result: Drastic fall in patent and TM processing, backlog of applications liquidated - triggering IP activity in the country through increased filings.

### **IP Protection and Commercialization**

Among IPR Policy's 7 objectives, objective 5 is Commercialization of IPRs.

Ministry of Science and Technology through the National Research Development Corporation has proposed establishment of an IP Exchange in India, to enable IP owners to list and sell/license their works, while cutting down bilateral and arbitrary negotiations between parties. This will further add transparency, simplicity to IP buying, selling and licensing processes. The exchange is expected to benefit inventors who do not have means to showcase their invention, and research laboratories and universities.

### **Encouraging creativity and innovation**

- IPR policy promotes an innovation-conducive ambience for R&D organizations, educational institutions, corporations, MSMEs, start-ups
- Launch of Start-Ups Intellectual Property Protection (SIPP) demonstrates government's commitment to fostering innovation and to make India an IP friendly nation.
- Aims to promote awareness and adoption of IPRs among Start-ups, provide them high quality IP services and resources. SIPP scheme extended till March 2020.
- IP Facilitators empanelled (Patent Agents, TM attorneys) to work with start-ups in filing and prosecuting Patent applications. Facilitators do not charge fees from start-ups and instead bill government for their professional fees which is then reimbursed.
- Special provisions inserted Patents Act, 1970 for start-ups for 80% fee rebate and expedited application. The expedition route has resulted in granting of patent in a record of 95 days.

### **Global trends and Indian IP ecosystem**

- World Bank Ease of Doing Business 2018 rankings: India jumped 23 spots to 77<sup>th</sup> among top-100 countries
- Indian government identified policies and practices that can further improve ease-of-doing-business in India and incentives trade - includes addressing issues like enhancing IPR protection and enforcement, rationalizing taxes/tariffs, harmonizing with global standards
- Foreign investment into India has risen to unprecedented levels, with total FDI reaching US\$ 38 billion, surpassing China – key reasons: India's stable fundamentals, a bankruptcy code and fresh opportunities in sunrise sectors.
- E-filing of Applications: India first to have 24x7 e-filing system for IP applications.



## CONCLUSION

India-US relations have developed into a global strategic partnership, based on shared democratic values and increasing convergence of interests on bilateral, regional and global issues. Emphasis placed by Government in India on development and good governance has created opportunity to strengthen bilateral ties and enhance cooperation, making the partnership broad-based and multi-sectoral. Vibrant people-to-people interaction and support across political spectrum in both countries have further nurtured the relationship.

There is now recognition among Indian stakeholders, especially the government, that IP is the key to compete in today's world, and that catalyzing innovation only will enhance domestic/international competence. With policy makers envisaging it as an integral part of the country's development strategy, the Indian IP landscape is witnessing a paradigm shift. Every year, basis of India's IP regime is gaining momentum and strengthening itself for an innovation and technology driven economy.

FICCI, on behalf of Indian industry, proposes a continued India-US dialogue on IP issues for a better understanding of India's development priorities, public policy and the desired delicate balance of rights and obligations. A reciprocative and transparent way to address IP issues will open the way for more meaningful bilateral collaborations. India's commitment to create a strong IP eco-system has been well recognized globally, with the ongoing reforms making this intent clear. The need to sort out India-US IPR issues is crucial for bilateral trade relations to flourish further. Although there may not be ready solutions, the mutual IP dialogue must be based on a footing that appreciates each other's point of view. India does recognize the need for a policy aligned with global standards, but cannot accept discriminatory and unfair imputations, nor act in disregard of its overriding national interests. Improving on the IPR irritants is an aspirational goal but must be consistent with India's priorities. Deepening bilateral engagement will help dispel misunderstanding and secure acceptance of what we genuinely believe is both responsible and reasonable. Meantime, considering the extensive initiatives taken to reinforce its IPR laws as well as to protect patents and all IP forms in the country, FICCI recommends that India should immediately be taken off the USTR Priority Watch List. This will certainly be important to maintain and indeed further enhance the positive spirit of the ongoing bilateral dialogue between India and US.

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