

TOPIC- NEED OF IP PROTECTION IN STARTUPS VIS-À-VIS PATENTS

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Introduction:

Intellectual property rights in today's dynamic and competitive world can be the unique selling point for one's product or service. India's Start-up story began in the 80s nearly four decades ago when companies such as Tata Consultancy Services, Wipro, and Infosys came into existence and placed Indian on the global economic map. The 90s witnessed the launch of some of the largest banks such as ICICI, AXIS and HDFC and one of the India's largest telecommunications company, Airtel.

An entrepreneur can be defined as an individual who creates a new business, enjoying most of the rewards and bearing most of the risks and entrepreneurship is the process of setting up a business.

A start-up is a company which is started with an unique idea and often require investors and a large amount of capital to function and flourish in the competitive market as a scalable start-up.

There is no doubt that entrepreneurship is deeply rooted in India's culture and economy. It has blossomed in India for centuries now. The current entrepreneurial ecosystem of India is a result of three waves of entrepreneurial activity with three distinct focus areas, which are, consumerism, information technology, and innovation.

Wave- 1: Information Technology

The wave of IT-enabled services came into action in the 1980s with founding of companies like Patni Systems. Founding members of these companies received education from abroad, and came back to their home country to set up IT Businesses, which became the nurturing and breeding grounds for the future entrepreneurs.

Wave- 2: Consumerism

This wave was set in force by the emerging middle class with higher incomes who wanted to consume more, get easy access to internet and use smart devices such as smartphones. During this wave, the entrepreneurial activity increased exponentially.

Wave- 3: Innovation

The latest wave deals with IP- driven innovation, deep tech and B2B Models. The start-up ecosystem is now shifting to and more focused on B2B models that has deep tech and IP driven innovation as a part of their very core.

After riding the three above mentioned waves and the government's push for digitization, India's start-up ecosystem stands tall and firmly.

Start-up India Scheme:

The Start-up India Initiative was launched on 16th January,2016 to promote a robust start ecosystem in India.

The SIPP Scheme is envisaged to facilitate protection for Trademark, Designs and Patents of interested and innovative startups.

Initially, the scheme was run on testing basis and was in force up till 31/03/2020. After that, it was decided to extend the scheme for 3 more years by making the requisite amendments.

The objective of the scheme is to promote adoption and awareness of IP Rights amongst Startups. It is inclined to motivate, mentor and nurture emerging and innovative technologies among startups and assist them in commercializing and protecting it by providing them with high-class IP Services and Resources.

Once a startup gets recognised by DPIIT, then the following benefits are provided under the SIPP scheme:-

- Intellectual Property Benefits
- Relaxation in Public Procurement Norms
- Self Certification under Environment and Labor Laws
- Fast exit for Startups

- Tax exemption
- Funds of Funds for Startups

IPR Ecosystem and Government Policies

In a fast moving world, when technologies are changing and developing rapidly, protection of intellectual property automatically assumes greater significance in order to safeguard the innovations in various fields. This would be made possible only if we're able to see the advancements in technology getting adequate IP Protection, where it also gets replicated across the world. IPR will continue to play an important role in establishing India as an intellectual and economic powerhouse.

Realizing start-ups' role in the National Innovation System (NIS), the government has been taking initiatives to promote start-up ecosystem. A number of schemes and policies have been put in force by the government to promote start-up's growth and to provide them with a robust and supportive ecosystem and for protection of their Intellectual Property Rights.

Ministry of Electronics and Information Technology has always acknowledged R&D and promotion of innovation as an integral part of the ICT ecosystem.

Under the umbrella of MeitY, initiatives such as

1. *Centre of Excellence in Intellectual Property (CoE-IP)*
2. *IPR Facilitation for MeitY R&D Societies and Grantee Institutions*
3. *Patent Analysis and Management System (PAMS)*
4. *IP Panorama*

In 2016, National Intellectual Property Rights Policy¹ was formed with seven objectives outlining specific action plan for each one of them. The seven objectives being:

¹ The National IPR Policy is a vision document that encompasses and brings to a single platform all IPRs. It views IPRs holistically, taking into account all inter-linkages and thus aims to create and exploit synergies between all forms of intellectual property (IP), concerned statutes and agencies. It sets in place an institutional mechanism for

- 1) *IPR Awareness: Outreach and Promotion*
- 2) *Generation of IPRs*
- 3) *Legal and Legislative Framework*
- 4) *Administration and Management*
- 5) *Commercialization of IPRs*
- 6) *Enforcement and Adjudication*
- 7) *Human Capital Development*

The Ministry of Commerce and Industry, Department for Promotion of Industry and Internal Trade (DPIIT) – (DIPP earlier) has been the guiding force behind a number of schemes and policies to raise awareness about IPR in different sects of the society.

Procedural Aspects in IPR vis a vis Startups:

The purpose of IPR is to encourage new creations, including artwork, inventions and technology that might increase economic growth.

Under this head I'll be dealing with Patent as an Intellectual Property Right, which is an important intangible asset for any Start-up, as it helps them in thriving in the competitive market. A patent can be defined as a statutory right granted for an invention to the patentee for a limited period of time by the Government, in return of full disclosure of his/her invention that excludes others from using, selling, marketing and importing the patented product or producing it without his/her consent. For an invention to become patentable, it should be novel, have an inventive step, must be capable of industrial application and should not fall within the ambit of Section 3 and 4 of the Patents Act, 1970.

A Startup under Patent law means an entity recognized by a component authority as a startup, under the Startup India Initiative. There a number of steps that an individual has to follow in order to get their patent registered. The steps that are to be followed are as follows:-

- Step 1- Check if your invention is patentable
- Step 2- Draft the patent application

implementation, monitoring and review. It aims to incorporate and adapt global best practices to the Indian scenario.

- Step 3- Filing the patent application
- Step 4- Publishing the patent application
- Step 5- Examining the patent application
- Step 6- Decision to grant
- Step 7- Renewing the patent

Enforceability and Execution

In 1957, the Government of India appointed Justice N. Rajagopala Ayyangar Committee to examine the question of revision of the Patent Law and advise government accordingly. The report of the Committee, which comprised of two parts, was submitted in September, 1959. The first part dealt with general aspects of the Patent Law and the second part gave detailed note on the several clauses of the lapsed bills 1953. The first part also dealt with evils of the patent system and solution with recommendations in regards to the law. The committee recommended retention of the Patent System, despite its shortcomings. This report recommended major changes in the law which formed the basis of the introduction of the Patents Bill, 1965. This bill was introduced in the Lok Sabha on 21st September, 1965, which however lapsed. In 1967, again an amended bill was introduced which was referred to a Joint Parliamentary Committee and on the final recommendation of the Committee, the Patents Act, 1970 was passed. This Act repealed and replaced the 1911 Act so far as the patents law was concerned. However, the 1911 Act continued to be applicable to designs. Most of the provisions of the 1970 Act were brought into force on 20th April 1972 with publication of the Patent Rules, 1972.

This Act remained in force for about 24 years without any change till December 1994. An ordinance effecting certain changes in the Act was issued on 31st December 1994, which ceased to operate after six months. Subsequently, another ordinance was issued in 1999. This ordinance was subsequently replaced by the Patents (Amendment) Act, 1999 that was brought into force retrospectively from 1st January, 1995. The amended Act provided for filing of applications for product patents in the areas of drugs, pharmaceuticals and agro chemicals though such patents were not allowed. However, such applications were to be examined only after 31-12-2004. Meanwhile, the applicants could be allowed Exclusive Marketing Rights (EMR) to sell or distribute these products in India, subject to fulfilment of certain conditions.

The second amendment to the 1970 Act was made through the Patents (Amendment) Act, 2002 (Act 38 Of 2002). This Act came into force on 20th May 2003 with the introduction of the new Patent Rules, 2003 by replacing the earlier Patents Rules, 1972

The third amendment to the Patents Act 1970 was introduced through the Patents (Amendment) Ordinance, 2004 w.e.f. 1st January, 2005. This Ordinance was later replaced by the Patents (Amendment) Act 2005 (Act 15 Of 2005) on 4th April, 2005 which was brought into force from 1-1-2005.²

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Rule 2(fb) of the Patent Rules, 2016, defines a Startup as —Startup means an entity, where-

- (i) more than five years have not lapsed from the date of its incorporation or registration;
- (ii) the turnover for any of the financial years, out of the aforementioned five years, did not exceed rupees twenty-five crores; and
- (iii) it is working towards innovation, development, deployment or commercialisation of new products, processes or services driven by technology or intellectual property: Provided that any such entity formed by splitting up or reconstruction of a business already in existence shall not be considered as a startup.

Provided further that the mere act of developing

- a. products or services or processes which do not have potential for commercialisation, or
- b. undifferentiated products or services or processes, or
- c. products or services or processes with no or limited incremental value for customers or workflow, would not be covered under this definition.

Explanation 1.- An entity shall cease to be a startup on completion of five years from the date of its incorporation/ or registration or if its turnover for any previous year exceeds rupees twenty-five crores.

² <https://ipindia.gov.in/history-of-indian-patent-system.htm>

Explanation 2.- Entity means a private limited company (as defined in the Companies Act, 2013), or a registered partnership firm registered under section 59 of the Partnership Act, 1932 or a limited liability partnership under the Limited Liability Partnership Act, 2002.

Explanation 3.- The term —Turnover shall have the same meaning as defined in the Companies Act, 2013.

Explanation 4.- An entity is considered to be working towards innovation, development, deployment or commercialisation of new products, processes or services driven by technology or intellectual property if it aims to develop and commercialise a new product or service or process, or a significantly improved existing product or service or process that will create or add value for customers or workflow.

Explanation 5.- The reference rates of foreign currency of the Reserve Bank of India shall prevail.³

A patent strategy is one that a startup can develop to protect its ideas. It is a series of steps that a startup has to take in order to protect and secure its innovations, inventions, and or IP. It covers the inventions and ideas that you want to protect, markets in which you want to protect the patents, etc.

In order to develop a successful patent strategy, a start-up must focus on three areas that are products, technology and the value being added to the business.

Conclusion

While the paucity of funds acts as a restriction for startups when it comes to the protection of their intellectual property, what is important is that they should consciously work on setting aside funds to protect their intellectual property while continuously working on identifying the intellectual property they want to protect.

The first step of a startup toward the protection of its intellectual property would be to apply for a domestic trademark/ copyright/ patent, before applying for a patent internationally. As international patents may prove to be a little bit expensive at this stage. Once the startup starts to

³ https://ipindia.gov.in/writereaddata/Portal/IPORule/1_42_1_Patent__Amendment_Rules_2016_16May2016.pdf

scale up, it can start to set aside a budget for protecting its intellectual property in the international market. The startup's prospects might be affected if they fail to do so.

As we know businesses in today's world are always redefining and reinventing themselves at any chance they get, and thus in today's day and age, it's necessary to protect one's intellectual property not only at the startup stage but at a later stage as well. This means the more a startup focuses on innovations, the more it'll have to protect its intellectual property.

The numerous schemes and policies that have been implemented by the government and the Intellectual Property facilitation bodies are proof of the growth of intellectual property awareness and that proper guidance is being provided to people when it comes to the protection of Intellectual Property Rights in India. India is looking to be at the forefront of intellectual property protection with the help of schemes, policies and the facilitation bodies that are in force at present.

Intellectual Property offers long term sustainable advantages to startups and established companies alike and thus the importance of intellectual property should not be undermined.

India does need to focus on modernizing the adjudication system for intellectual property and take steps to bolster the judicial protection for Intellectual Property Rights protection. There is an urgent need to establish a highly efficient and optimally resourced judicial system.

The steps that can be taken to strengthen the already existing system in practice are as follows:-

In order to improve the strength, efficiency and technical abilities of human resources involved in the process of IP examination in IP offices by providing suitable training to them. For IP officials and administrative staff, training in office administration, budgeting and other associated matters can be provided. International exchange programs for IP officials can be planned, to enable it. This can significantly reduce the overall time required for patent grant and clear the immense backlog of examination of patent applications in Indian Patent and Trademark Offices.

India needs to work on improving the ICT skills of Intellectual Property offices to enable a seamless procedure, faster disposal, and transparency. For an end to end digitization of Intellectual Property applications, WIPO's solutions software can be adopted.

There is a need to conduct capacity building by the government in order to educate and inform start-ups on various forms of IPR protection, technical requirements for their filing, IP evaluation and management. Educational institutes should be encouraged to teach IPR education in their curriculum. Focused training and educational programs on patent examination of the frontier and developing technologies like Internet of Things (IoT), Artificial Intelligence (AI) should be designed.

Under the SIPP, for effective implementation, the CGPDTM has appointed facilitators to provide free consultation/guidance and assistance in filing and disposal of IP applications to start-ups for free. Cases have been reported, where facilitators have ignored their duties of facilitation to start-ups or have demanded extra fee from them. Stricter execution of Department for Promotion of Industry and Internal Trade (DPIIT) appointed facilitators is essential, along with involvement in consultation and guidance, and assistance in filing and disposal of IP application to the start-ups.

The startups should be sensitized about the importance of Intellectual Property Rights for their business and the government can do the same by strengthening the Intellectual Property awareness program at the DPIIT registration level and by providing compulsory and free consultations along with other various methods of information dissemination.

From the point of inception, a startup should have an Intellectual Property Strategy as the strategy can help the startup to compare the cost of Intellectual Property with its benefits in the long run. Startups should also train their staff by informing them about Intellectual Property Rights and by teaching them how to conduct Intellectual Property valuation. It might also be useful to increase the scope of IP Facilitators and allow them to provide consultations to startups on how to build an effective IP strategy.

The Intellectual Property environment of India can be made robust and comparable to international standards if the initiatives are enforced properly.

In the light of the above reasons, it can be stated that every startup must build a comprehensive plan which is pertinent to the framework of IPR. It is necessary for a start-up to develop an intellectual property strategy early on. In the long run, it will help them reap a lot many benefits

and enjoy the exemptions and security that comes along with it. Start-ups need to secure their technologies and inventions to avoid disputes with other companies.