

Business Value from Intellectual Property

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The value of an asset is measured by its business worthiness. Intellectual property enables companies build business and competitive value through exclusivity. The IP asset value of a company is generally much higher than its tangible asset value. Though all forms of IP are important, the value associated to a form of IP varies based on the field to which the company belongs. The integration of various activities ranging from building culture to effective portfolio management enables a company maximize business benefits from IP. Business advantage from IP is the outcome of putting together various best practices and vital steps in generation, protection and management of IP.

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The value of an asset is measured by its business worthiness. Intellectual property (IP) enables companies build business and competitive value through exclusivity. The IP asset value of a company is generally much higher than its tangible asset value. Though all forms of IP are important, the value associated to a form of IP varies based on the field to which the company belongs. In other words, various species of IP have different business value in different industries. For example, copyrights have very high business value in entertainment industry as opposed to automobile industry, where patents and trade secrets are valued more than other forms of IP.

The business value afforded by intellectual property to a company depends on its IP practices. A company that has a well-established IP culture and system will be able to gain better value from IP than one that does not have such practices. With the objective of maximizing returns from IP, many Indian companies are today setting up and implementing best practices and mechanisms for IP protection, management and utilization. The recent increase in IP activities brings forth many risks to companies and management of such risks has become an important element of a company's IP activities.

Culture and Hygiene

A company's IP behaviour depends on the culture and hygiene among its personnel. Employees in

various departments of the company play an important role in IP generation, identification, protection, management and utilization. Therefore, building IP culture among employees assumes very high importance for enabling a company derive business value from IP. Activities such as training, events, promotion and recognition are generally undertaken by companies to build IP culture.

Training helps in spreading IP knowledge and awareness among employees. This knowledge enables personnel to identify IP when it is created, take necessary steps for protection and manage it efficiently. While basic awareness is required for all personnel in a company, specialized skills are imparted to employees from specific departments. For example, every employee in a company needs to know what is IP and how it is relevant for their work but the skill of patent searching and freedom to operate is taught to only personnel in R and D or engineering department.

Promotional activities such as email alerts, newsletters and banners on IP achievements of the company can play a very important role in spreading IP culture and hygiene. In addition to promotion of IP at various levels, companies also organize events revolving around IP. Events such as quizzes, plays, and special programs on IP are effectively used to spread IP knowledge. Recognition of inventors, monetary incentives and other mechanisms are also adopted by some companies to build IP culture.

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Incentives to Invent

The objective of the IP regime is to encourage inventors and creators to invent and create by granting exclusive rights, which provide recognition and financial benefits. Though financial benefits are considered under the IP regime as a primary driver of invention and creation, a study carried out by SiNApSE Blog on inventor incentives in India indicates that very few inventors are encouraged to invent by financial benefits. Most inventors have cited love of invention, desire to improve and recognition as primary drivers of invention. Therefore, companies endeavour to provide incentives aimed at recognition and creative behaviour in addition to financial rewards.

Many types of inventor and creator recognition programs are instituted by companies to promote creative activity. Some of such programs include issuance of merit certificates or plaques, programs to felicitate inventors, publication of creator achievements and special facilities. In addition to recognition, amicable work environment and facilities for carrying out inventive and creative activity have been proved to play a critical role in encouraging inventors and creators. Companies such as Google are known to focus on providing environment and facilities that allow inventors to think laterally and thereby generate path breaking inventions. The emphasis on such work environment is higher in creative industries such as entertainment, animation and designing when compared to other fields.

Favourable personnel treatment is generally given by companies to individuals, who are inventive and creative. In addition to giving flexibility with respect to mode of working, timings and access to resources, creativity forms part of employment assessment metrics for promotion, salary appraisal and related matters in many companies. Such incentives play a very important role in not only retaining a creator but also in encouraging him to create intellectual assets.

Though financial gain is not considered as a primary incentive for encouraging inventors and creators, it has been playing a very important role in getting inventor co-operation in protection and enforcement of IP. Financial incentives have also been proved to help in excavation of inventions and creations in a company. Therefore, most companies have financial incentives as part of their inventor incentive mechanism. These incentives are generally spread across various steps ranging from filing to licensing.

Policy and Process

An intellectual property policy setting out the IP goals of a company in consonance with its business goals plays a very important role in enabling the company acquire business value from its IP. Such a policy lays down the framework and approach in the light of a company's business strategy. Most IP policies cover aspects such as generation, protection, ownership, utilization, management and commercialization of IP. They also include the company's policy with respect to use of third party IP, interaction with third parties and IP risk management. While the broad policy of a company is provided in the IP policy, specific process guidelines are drafted to implement the policy at the ground level. The guidelines and templates ensure that the IP Policy is implemented in the desired manner.

Despite the value of an IP policy, most knowledge driven companies in India do not have one in place. IP activities in these companies are generally carried out in an ad hoc manner without a well laid out approach or plan. As a result, the business value realized from IP is not very high and expenditure on IP is viewed as dead investment. However, many organisations such as Indian Institutes of Technology, public sector enterprises such as Bharat Heavy Electricals Limited and other technology driven companies have instituted IP policies after realizing their business value.

Value of IP

The value of IP to a company depends on the extent of business advantage it can provide. The manner of protection plays an important role in defining IP value. Intellectual property that is strategically well protected always has high business value than unplanned IP. The strength of protection depends on various factors ranging from the nature of IP to the quality of attorney. For example, a fanciful trade mark such as Kodak has more value than a descriptive mark such as House of Coffee and therefore, a company that protects a fanciful mark will have higher business advantage than the one using a descriptive mark.

Likewise, a patent claim that is well drafted with a thorough understanding of the technology and foresight will provide greater business value than a narrowly drafted claim. Let us consider a claim for a table to elucidate this. The claim reads as follows: 'What I claim is a Table comprising of a flat plank of wood connected to legs at the corners.'

This claim is very narrowly drafted and provides very less protection. It can be easily circumvented by making a circular table, replacing legs with flat support and by many other means. If the same claim is drafted broadly, it would have greater protection and greater business value. An example of such a broad claim is as follows: 'What I claim is a Table comprising of a flat plank connected to support structures.' Such a claim will prevent easy circumvention and the business advantage is much higher. Bearing in mind the limitations of prior art, requirements under the law and other relevant factors, a claim that is drafted with foresight, craftsmanship and understanding of technology will provide high business value.

In addition to the manner of protection, strength of protection depends on number of patents in the field. If the field is crowded and has many patents relating to tables, the value of the patent will be much lower as opposed to there being very few patents or inventions in the field. Most companies perform patent mapping and technology landscaping exercises to understand the layout of patent domain before initiating their research efforts. These activities enable companies to identify white spaces in a domain and thereby, help companies orient their research towards gaps that can result in strong and valuable IP. Competitor activities are consistently monitored by companies to understand their IP direction and frame invention/creation development approach. Inventions, that fall into the white space, where the field is not crowded and which are devoid of competitor activity are considered to provide greater business value.

Protection Strategy

Protecting all forms of IP in a product enables a company to safeguard different facets of the product. Therefore, companies integrate different types of IP protection with the objective of creating an IP fence around the product. For example, a company selling novel spring mattresses will protect the name of the mattress as trade mark, the composition of the mattress as patent, the look and feel of the mattress as design and the user booklet as copyright. The layer provided by integration of various forms of IP acts as an entry barrier for competitors and provides business advantage.

While protecting all intellectual aspects of a product is important, such protection is not always possible due to resource constraints. The protection

strategy is therefore driven by available financial and other resources. Companies strategize protection approach to maximize business value within the available resources. IP is generally prioritized based on its business importance and financial resources are utilized for protecting IP that has higher business value. For example, a technology driven company will spend money on getting patent protection as opposed to designs or copyrights because patents provide much higher business value than other forms.

Likewise, the mechanism of protection is also defined by resources. A technology based start up will most probably start with provisional filings instead of complete filings, which are much expensive. That will allow the company to block its intellectual assets with less expenditure to start with and gain time for arranging funds for complete filing. The protection strategy of a company will also depend on its target markets. Most forms of IP provide multiple approaches to national and international protection and appropriate strategy and planning is required for deciding on the best approach based on resources and business plans of an organisation for different countries.

Risk Management

Risks from intellectual property of third parties are an inevitable reality in today's business environment. Therefore, avoiding IP risks assumes as much importance as protection of intellectual assets of a company. To avoid risks, every company endeavours to ensure that its products or activities do not encroach on another company's IP. Recent IP litigation involving companies like Bajaj, Cipla, Novartis and so on has shown that violation of intellectual property can result in huge losses to a company in the form of damages, injunction against product sales and so on. To avoid business losses, companies spend time and effort on IP risk assessment and management before launching products. They take steps such as patent mapping, freedom to operate analysis, risk clearance opinion and compliance audits to mitigate risks.

Patent mapping enables a company understand the patent landscape of the field and helps the company work around patented inventions and thereby, avoid infringement. Freedom to operate analysis, which is generally performed before a product launch or product development provides an understanding of whether the product or activity is free from

infringement. Products that are not free from infringement are not launched into the market as that would be very risky. Risk clearance opinions with respect to patents, trade marks and other forms of IP help companies mitigate risks by avoiding use of risk prone IP.

IP Valuation

The value of property lies in the money it can fetch. Determining the value of IP in terms of money is called IP valuation. Unlike real property, IP is intangible and filled with many ambiguities that its valuation is not easy and straight forward. Despite a few drawbacks, traditional valuation methods such as cost, income, market and discounted cash flow are being used for valuing IP. Valuation of IP has been a subject of research and new methods are being consistently developed and tried.

Valuation of IP is performed under many circumstances. Some of the common transactions for which valuation is done include assignment, licensing, merger or acquisition, litigation and investment. Each of the said transactions is unique and an appropriate method is chosen based on the purpose. After aggressively investing in IP protection, Indian companies are today attempting to determine the financial value of their portfolios. Despite the need, valuation efforts of many companies have not gone too far due to lack of such expertise in India.

Portfolio Management

Building an IP portfolio enables a company gain business value provided the portfolio is kept alive and effectively used. Portfolio management allows a company to maintain its IP and maximize returns from it. It involves docketing of IP, tracking and complying with deadlines, paying renewal fee and other related activities. Strategic decisions on maintenance, abandonment, licensing, grouping and so on are made by a company to use its IP assets effectively. Companies having huge IP portfolios generally appoint specialized teams to analyse and manage their IP portfolios.

Marking

Marking and notices play an important role in giving public notice of IP ownership. As a standard practice, companies incorporate patent, copyright, trademark and confidentiality notices on products and materials. Such notices are incorporated on

components, articles, machines, catalogues, brochures, documentation, manuals, drawings and other IP materials. The notices will enable a company to not only claim protection but also acquire punitive damages from willful infringers. Existence of such notices also deter competitors from copying or replicating products or materials by giving notice of IP and sending a message that the company is serious about its IP protection and enforcement.

Licensing

Authorization of an IP holder to exercise rights exclusively owned by him is referred to as licensing. Companies use licensing as a key mechanism for generating value from IP. Though IP does not form part of the business of a company, it can generate large revenues from licensing. Many dedicated research companies today focus on IP development and licensing as their core business model. They develop IP and make money out of its sale or licensing. One of the key revenue sources for companies in entertainment, publishing and pharmaceutical and biotechnology industries is licensing.

Many Indian companies and universities such as CSIR, Indian Institutes of Technology, Yash Raj Films, Balaji Telefilms and others generate substantial amounts of revenue from licensing their IP. Though the IP being protected is growing at a very rapid pace, licensing efforts of many companies have not been so successful due to lack of licensing expertise. The government under the aegis of various ministries is now putting efforts to build licensing capacity and facilitate licensing efforts of companies and individuals. National Innovation Foundation, Technology Information Forecasting and Assessment Council, National Research Development Corporation, CSIR and other organizations have been reasonably successful in licensing patents and generating revenues.

A typical licensing transaction includes the following steps:

- Identifying patents that are capable of being licensed;
- Validating the patents for strength;
- Forming a portfolio of patents for licensing;
- Carrying out a patent valuation;
- Identifying and contacting potential licensees;
- Negotiating a deal with interested licensees; and
- Drafting and executing a license agreement.

The licensability of a patent may fail at any of the steps. Lack of patent strength, low monetary value or lack of interest in licensees may foil licensing efforts. Today, specialized businesses focussing on assessing IP strengths, identifying licensees and facilitating license transactions have come into existence. Platforms such as Invenomics and Idea Buyer provide an online forum for licensing and enable companies to identify potential licensees and strike license deals. They also offer expertise for negotiating and drafting license transactions. With the development of new business models and capacity building efforts of the government, licensing activities in India are predicted to increase inorganically in the next few years.

IP Audits

With the increase in emphasis on IP in various business transactions ranging from selling products to providing services, Companies in India are now focussing on building IP portfolios that provide direct business advantage. The emphasis today is moving from protecting any kind of IP to acquiring IP having business value. There is no doubt in the minds of most business leaders that IP provides great business and competitive advantage. However, deriving value from their IP creations and investments has for most companies been an unsolved puzzle.

One option to put the pieces together for business benefit has been IP Audit. Unlike in regulated markets, an IP Audit in India has assumed a different meaning. In addition to ensuring IP compliance and uncovering IP, which is the primary object of an audit in regulated markets, IP Audits have helped many companies in India achieve a variety of business goals. Such goals range from identification of intellectual property in the company and setting up IP processes to Using IP to beat competition, raising investments and exploring licensing opportunities. As companies grapple with the transition from an aggressive protection strategy to a business driven IP strategy, IP Audit has been able to provide a business solution for many companies.

Considering the unique nature of Indian organizations, bottom to top approach has proved to be very useful for performing IP Audits in India. Generally, an audit starts with understanding a company's business and technology processes and ends with a report on IP status, inventory, policy and strategy of the company. It involves activities such as business document review, interviews with personnel

at different levels in the organization, visits to company's facilities, due diligence on public and private databases and other IP activities. Depending on the nature of a company's business, audits are generally performed by a team of experts having technology, law and management expertise. Considering the results they can provide, many companies looking to gain business value from IP are using audits as the first step.

Dispute Resolution

Intellectual Property enforcement has taken a step forward in India since 2008. Companies have started filing cases aggressively against IP infringers to retain their business advantage. Appreciating the need for quick resolution of disputes in IP, some courts in India have been responding at a quick pace to law suits against infringers. Realizing the value of time in IP cases, Supreme Court of India has emphasized the need for speedy dispute resolution and has directed courts to resolve IP disputes without undue delays. A Bill seeking to set stringent timelines for IP cases among others is also pending before the parliament.

While litigation is used as a strategy to prevent competition, cases are often filed with the objective of forcing parties into settlements. Alternative dispute resolution has off late assumed very high importance and many IP disputes are being settled out of courts. Many courts in fact encourage such settlements to avoid long drawn disputes and unnecessary expenses. In the recent past, the number of cases being filed has noticeably increased in the entertainment and pharma sectors. While IP owners have been quite successful in the entertainment industry, innovator companies have not been so successful in pharmaceutical IP cases.

Pieces of the Puzzle

The integration of various activities ranging from building culture to effective portfolio management enables a company maximize business benefits from IP. Business advantage from IP is the outcome of putting together various pieces of the IP puzzle rather than taking independent IP actions. Every step in the IP life cycle is closely related to the other and any gap in the process can result in loss of business value. Therefore, IP departments in companies endeavour to blend various measures to yield optimum business value. They use policies and systems to put pieces of IP puzzle together.