

Role of Intellectual Property during Recession

Sheetal Chopra[†] and Astha Negi^{*}

Federation of Indian Chambers of Commerce and Industry, Federation House, Tansen Marg, New Delhi 110 001

^{*}ILS Law College, Law College Road, Pune 411 004, Maharashtra

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Recession indicates downsizing, shrinking markets and increasing competition. Recession has hit global economy very hard in the recent past. The year 2007 marked the beginning of recession and it is not yet certain whether it has ended. Several industries have suffered largely because of the global meltdown. More and more industries are turning to their intangibles to keep afloat to ride this recession tide.

The paper attempts to study how the companies have excessively relied on the IP assets to remain competitive during the tough time when there is increasing resource crunch. The paper also attempts to identify how some smart companies have used downturn effectively to position themselves even better when the tough times of recession are over and the markets are again available by bringing in innovations which filled the needs of the market. The paper offers few key recommendations based on some of the best practices adopted by companies during economic meltdown. This study was done by selecting companies on random basis and interviewing IPR experts via e mail and telephones.

Keywords: Intellectual property, recession, IP audits, innovation models, IP as collateral

Society is currently moving through a transition, from a community whose wealth is based on tangible assets, to a community whose true wealth lies in intangible forms of property. Intellectual Property Rights (IPR) have become extremely important due to the changing trade environment which is characterised by global competition, short product cycle, and high investments in Research & Development. It is during economic meltdown, that intellectual property assets give enterprisers a kind of business stability. Times like these encourage innovation, new ideas, methods and IP based activities.

According to Tyron Stading,¹ when money becomes tight, companies look for alternatives to increase their cash flow and find two paths: (1) product innovation, and (2) litigation. Product innovation means creating indispensable products that people cannot live without, which can be achieved by increasing R&D. Through litigation companies try to enforce their IP rights to protect their product revenues by asserting their patent positions. Whatever the reason, patent activity (litigation, innovation, etc) only surges in response to a recession. The flip side of this increase is that companies may face increasing litigation costs as they defend their products and market positions.

The slowing economy pushes more companies to become rigorous in protecting their ideas and find ways to expand and generate revenue. IP assets can be leveraged to access markets, generate dependable revenue and provide a significant boost to a company's bottom line. As a result, a growing number of corporations focus on the strength of their patent portfolio. This is not only an indication of the high value associated with IP, but also a sign of how buying others' patent is being used as a weapon in IP litigation.²

IP can mitigate the impact of economic crisis in three major ways. First, it can serve as a stable asset in times of uncertainty, to continue to serve the purposes of investment and growth when consumer and investor emotions run amok. Second, IP can serve the role of visionaries who emerge in times of crisis, enabling dramatic innovative change in response to the causes of crisis while ensuring the incentives to change remain strong. Third, IP can enable adjustment and adaptation to changing local conditions, by providing a reason and means by which induced innovation can occur.³

"History has shown... that companies and countries which continue to invest in new products and innovation during times of economic recession will be those that will be best positioned to take advantage of the recovery, when it arrives," said WIPO Director General, Dr Francis Gurry.⁴

[†]Email Corresponding author: sheetal.chopra@ficci.com

Following facts prove the remarks made by Dr Francis Gurry that companies innovate and spend on R&D during recessionary period. Infact downturn is the time to invest on R&D so that companies are in a better position when the economy improves.

Consider the following timeline of recession-era inventions:

- 1929-1939 – Television, Nylon, Neoprene, Photoopiers, Electric Razor.
- 1973-1975 – Japanese auto industry, Personal Computers.
- 1990-1991 – Internet Economy.
- 2001-2003 – iPod. When Apple launched the iPod in 2001, its revenues were down \$2.6 billion from the year before.
- 2007-present – green energy, telecom computing convergence, and Nanotech.⁵

Some of the major corporations which were born during the period of recession are Microsoft, Lexis Nexis, General Electric Company, HP (Hewlett-Packard Development Company LP), MTV Networks, CNN, FedEx Corp, etc.

Freshfields Bruckhaus Deringer Global IP Survey 2009

In 2009, Freshfields Bruckhaus Deringer, an international law firm, surveyed the attitudes of 130 senior executives from leading European and US companies operating internationally in more than 25 jurisdictions and with average annual revenue between \$500m and \$5bn to gauge their approaches to managing IP issues—portfolio management, IP collaboration and IP litigation – during the downturn.

At the time of survey, 61% of companies were either reviewing or had completed reviews of their IP portfolios. This demonstrates that renewing portfolios and monitoring resources in the difficult economic environment is best practice for IP owners.

The survey also suggested that there was a greater appetite for IP licensing and collaboration during difficult economic conditions. Eighty per cent of companies thought that the level of licensing activity will either remain consistent or rise during recessionary trading, with a quarter of that group confident of an increase in licensing activity either as licensor or licensee.

Nearly a third of all companies were more interested in identifying and pursuing IP collaborations or joint ventures during difficult trading conditions. Licensing or collaboration arrangements are often an alternative

to litigation, which is perceived as risky and expensive. In any jurisdiction or economic environment, IP litigation involves cost and risk; two things that downturn planners do their best to avoid. Conversely, the assertion of properly obtained and aligned IP rights through litigation can afford companies the strategic advantage they need to trade successfully in more competitive, tighter markets. E.g. Sony has acquired German media giant Bertelsmann's 50 percent stake in Sony BMG Music for US\$900 million. Sony and Bertelsmann originally formed the 50-50 joint venture in August 2004. The new company, Sony Music Entertainment Inc, will be a wholly owned subsidiary of Sony Corporation of America, a unit of Tokyo-based consumer electronics company, Sony. Upon completion of the deal, Sony will control several premier music labels, including Arista Records, Columbia Records, Epic Records, J Records, Jive Records, RCA Records and Zomba. Sony is trying to make up ground against competitors, especially Apple, which dominates the industry with its iTunes online music store and the iPod portable music device.⁶

More than four out of five companies (82%) are either as likely or more likely to enforce their IP rights during a downturn. Among UK companies, this figure rises to 94%.

Companies neglecting innovation or protection of innovation for the sake of cutting costs or avoiding risk will be at a disadvantage— both in current downturn markets and, to a greater extent, when the economic storm passes and trading activities increase again. Companies that continue to focus on their IP assets during the downturn will definitely gain a competitive edge after it.⁷

IP Statistics and Analysis

The trend in patent filings and grants in India after the onset of period of recession is given in Table 1. The statistics indicate that in year 2006-2007, the domestic patent application filing increased by 17.54% as compared to 24.55% increase in 2005-2006. However, post the onset of period of recession, the percentage of domestic filings increased by only 13.66% during 2007-2008 as compared to 17.54% in the year 2005-2006. Thus overall there has been a regular patent filing but the increase is marginal.

There has been reduction in the number of domestic patents granted from 2006-07 to 2007-08 (from 25.3% to 20.7%) but this number has increased in 2008-09 (from 20.79% to 26.48%). Internationally, the number of patents granted have increased consistently but from

Table 1—Trend in respect of patent applications filed and respective grants

| year | Domestic applications | Foreign applications | Total filings | Domestic grants | Foreign grants | Total grants |
|-------------------------------|-----------------------|----------------------|---------------|-----------------|----------------|--------------|
| 2005-2006 | 4521 | 19984 | 24505 | 1396 | 2924 | 4320 |
| % increase | 18.45% | 81.55% | 40.30% | 32.31% | 67.69% | |
| % increase over the last year | 24.55% | | | 87.13% | | |
| 2006-2007 | 5314 | 23626 | 28940 | 1907 | 563274.70% | 7539 |
| % increase | 18.36% | 81.64% | 18.10% | 25.30% | | |
| % increase over the last year | 17.54% | | | 36.60% | | |
| 2007-2008 | 6040 | 29178 | 35218 | 3173 | 12088 | 15261 |
| % increase | 17.15% | 82.85% | 21.69% | 20.79% | 79.21% | |
| % increase over the last year | 13.66% | | | 66.38% | | |
| 2008-2009 (upto Oct. 2008) | 3865 | 17699 | 21564 | 2112 | 5863 | 7975 |
| % increase | 17.92% | 82.08% | | 26.48% | 79.52% | |

Source: Intellectual Property Office India through D.O No. CG/GE/2009/142, page 10

Table 2—Comparative trends of IPR granted/registered in India

| | 2003-04 | 2004-05 | 2005-06 | 2006-07 | 2007-08 |
|-------------------------------|---------|----------|----------|----------|----------|
| Designs | 2547 | 3728 | 4175 | 4250 | 4928 |
| % increase over the last year | | 46 | 11.9 | 1.7 | 15 |
| Trademark | 39762 | 45015 | 184325 | 109361 | 100857 |
| | | increase | increase | decrease | decrease |
| | | 13.2% | 309% | 40% | 7% |

Source: Intellectual Property Office India (www.ipindia.gov.in/cgpdm/annualreportenglish2007-2008.pdf at page 7)

2007-08 to 2008-09, the grants have increased only marginally from 79.21% to 79.52%.

As can be seen from Table 1, post-recession, there has not been significant growth on the rate of patent filings. It is however a matter of debate whether lesser rate of growth with respect to patent application filings and patent grants can be attributed to economic recession. It has been suggested by the experts⁸ that during the period of recession, companies in lieu of resource crunch, scrutinize the inventions carefully and file applications for only those inventions which provide some commercial value. During the period of recession, companies do not opt for filing 'Requests for Examinations (RFEs)' in many cases which thereby leads to lesser number of grants as India follows the Practice of Deferred Examination.

According to UN sources, the number of international patent filings dropped in the year 2008 for the first time since 1978 as companies hit by the global economic downturn sought fewer new protections on their intellectual property.⁹

Table 2 indicates the overall trend of trademarks and designs granted and registered in India post the onset of period of recession. Percentage of designs granted and registered in India increased only marginally from 2005-06 (when it was 11.9%) to 2006-07 at the rate of 1%. From 2006-07 to 2007-08 during the recession period it increased at the rate of 15%. On the other hand, trademarks granted and registered in India have decreased since 2005-2006. There was a tremendous increase in the percentage from 2004-05 to 2005-06, almost 309%. But from 2006-07 it decreased to 40% and further in 2007-08 to 7%.

Patent Litigation

The number of reported patent cases during the years 2005, 2006, 2007, 2008 were 1, 6, 8, 22 respectively. There is an upward trend in filing of patent suits covering the ambit of the Patent Act including infringement actions. There has been a considerable increase in IP litigation from 2007 to 2008 mostly in the area of drugs and pharmaceuticals.¹⁰ In 2008, a number of patent-related cases were pending in various Indian courts; more than 75 cases were pending in the Delhi High Court.¹¹

It has been observed that during recession, Brazil, China and India spent more money on security than Germany, UK, US and Japan. 74% of Chinese and 68% of Indian companies invested in securing their intellectual property for competitive advantage.¹²

New Strategies and Innovation Models

It is pertinent to note as to what strategies and new models major companies are coming up with to

combat recession. The big IT vendors like Infosys, Satyam, Wipro, Microsoft, Apple, etc are feeling the pinch of global economic downturn. The only way these companies can sustain global competitiveness is by moving up the value chain, and investing more in innovation approaches built around partnering and collaboration. Following is a case study of few companies selected on random basis that have, despite recessionary trends, strived to identify the customers' needs and to fulfil the needs successfully through the latest innovations in technology and at the same time given priority to intellectual property protection.

Microsoft

Microsoft views economic slowdown as an opportunity to come out stronger. Microsoft tries to benefit from the potential increase in the availability of PhD-level researchers and other engineering talent. In addition, it seeks to seize the opportunity to acquire strategically valuable intellectual property which may be divested by companies looking to generate a short-term monetary return. Microsoft builds an IP portfolio because it has a massive R&D engine that produces significant innovations and outputs, as is reflected by the consistent line of product updates and introductions the company makes. Thus for Microsoft its IP and R&D are complementary. If there is investment in R&D, its IP will automatically develop and if they build a good IP portfolio, R&D spending will increase to sustain it.

General Motors

In 2008, General Motors invested billions of dollars and supported patent litigation for its electric automobile programme, hoping that the new Chevrolet Volt would be the catalyst that keeps the automotive giant afloat and helps it to grow. The Volt will be launched in 2011. Volt will cost GM around US \$320million for setting up four plants in US.¹³ This indicates that even during recession GM is spending some considerable amount of money in R&D and investments by coming up with this high end car.

Wockhardt

Wockhardt Limited, a renowned Indian Pharmaceutical and Biotechnology company, has its base in Mumbai. Wockhardt's IP policy states that being a research and technology driven organization, they strongly believe in creating, maintaining and respecting IP.

On 24 September 2009, the Indian Government awarded the company the prestigious title of the 'Pharmaceutical Company with the maximum number of patent filings and grants from India'.¹⁴ As per the analysis of authors, Wockhardt has filed more than 1200 patent applications worldwide. In addition, Wockhardt has about 70 patents granted worldwide, 15 from the Indian Patent office and 55 from the American and European Patent offices. This suggests that financial recession which although has impacted the investments of pharmaceutical giants, significant investments were made by this visionary company in IP.

During recession, budgeting was a major concern for most of the industries. However, IP budgets of companies such as Wockhardt, which put a lot of focus on creating the intellectual wealth, increased by 7 to 10% and hovered in the range of Rs 15-20 crores.¹⁵

During recession, Wockhardt's product portfolio was built with the objective of selecting products having the potential of generating more revenue and at the same time requiring less initial investment.

Symantec

Symantec is world's fourth largest software company with more than 17,500 employees in more than 40 countries. Symantec was founded in 1982 and provides security, storage and systems management solutions to help customers secure and manage their information-driven world against risks.

Symantec focuses on investing in internal R&D along with strategic acquisitions which makes them leverage existing strengths into new opportunities, while also capitalizing on emerging industry growth trends.

Symantec believes that IP has following benefits:

- 1 It justifies investments in R & D.
- 2 Freedom of operation, i.e. once one creates and owns 2.IP rights one can work on that technology without any interference.
- 3 P increases company's value and worth.
- 4 It leads to revenue generation, especially in tough economic conditions.¹⁶

Coca Cola

Nicholas Studler, the trademark counsel for Eurasia and Africa at Coca-Cola, believes there are various ways to achieve and protect innovations while keeping a tight control on expenditure. Studler suggests leveraging the advantages of modern

software; allocating work for multiple countries to one law firm to reduce the administrative burden and obtain lower legal rates; reviewing and adapting internal processes and procedures; and optimizing existing portfolios etc as ways to sustain during recession.¹⁷

Thus studying the above strategies it can be concluded that:

- 1 Spending in R&D and IP has not stopped during recession.
- 2 Innovation is the way to emerge.
- 3 Cost cutting in the areas where it is necessary will be helpful during recession. Since cash flow is less, investments should be limited to selected areas.
- 4 There is huge concentration on maintaining only those patents which promises to generate potential products or have high market value however rest are being abandoned.

Solutions to Mitigate the Impact of Recession

Companies should look towards innovation as a key to increase margins and maintain market presence. Without innovation, companies will have decreased sustainability and will be susceptible to competitors undercutting them on costs and beating them on functionality. Possible ways for companies to strategically manage their IP portfolio include: conducting IP audits, looking out for commercialization opportunities and tightening up enforcement measures.

IP Audit

An intellectual property or patent portfolio audit identifies core, non-core and obsolete technologies. Conducting an audit will help narrow down and provide a good indication of the assets that can be leveraged to generate additional revenue such as licensing, franchising and exploitation through sales, joint venture. Pruning patent and trademark registration by identifying those which may be obsolete would not only reduce annuity cost but would indirectly reduce the administrative cost of monitoring the registrations.

For example, the economic downturn in the early 1990's became the catalyst for the IAM Group at The Dow Chemical Company to develop a new process for evaluating and, where applicable, pruning the company's patent portfolio. An analysis of their existing patent management process indicated two key gaps. First, the company did not have a patent

strategy in place. Second, business and product interests were not effectively aligned with ownership of the patents. As a result, the Dow's patent portfolio increased to more than 20,000 patents. The first step by the IAM group was to align every patent to a business within Dow. A significant portion of the patents were listed as unaligned because there were no businesses that would take ownership of them. Then the IAM group, working through multi-functional teams, sought to evaluate every aligned patent's business use. It emerged that 43% of patents were being used by a Dow business unit, while a further 32% had potential business use. This left 25% as having no business interest.¹⁸

IP Identification and IP Mining

IP mining is digging deeper into the intellectual property assets. A mining program includes a search for:

- New applications of the technology
- New markets for the technology
- Extensions of the technology
- Infringement candidates
- Hot technology and/or divisions for spin-outs and joint ventures.¹⁹

Patent mining is a multi-step process that begins with listing and organizing a company's patents and ends with a boost to its bottom line. That boost comes through IP partnering, licensing and litigation that might otherwise have remained unearthed. IBM Corporation brought in \$1 billion in business in 2005 through IP management. Licensing accounted for 39 % of that and joint-development deals with other companies made up another 36 %.²⁰

Commercial Opportunities

IP asset can be monetized and turned around to generate revenue in the form of royalty payments and through assignments and licenses of trademarks and patents that have not been exploited. In order to effectively manage the portfolio of patent information, companies may use the services rendered by organizations such as Ocean Tomo which provides a platform to organizations to manage and maintain their patent-to-product information. One such platform has recently been launched is 'Patent Marking'. Online marking allows for efficient updates and integrates the ability to search across patent numbers, licensees or products.²¹ Venturing into overseas markets may also be more cost effective

through licensing arrangements by minimizing cost and by widening the market. Companies during these times can also acquire IP at lower prices as many businesses and start up companies with limited resources may discard their valuable IP in order to increase cash flow.

Tightening Enforcement

Counterfeiting and infringement activities often escalate during these times as offenders try to make a quick commercial gain at the slightest opportunities. A relaxed attitude in enforcing IP rights can result in the company losing its valuable IP. Rather than embarking upon a litigation suit at the first instance, IP owners can opt for pre-emptive measures like publishing warning notices in the media to publicly declare their proprietary rights.²²

Abandoning Non-Performing Patents

The relevance and rate of return of each asset should be assessed to see if it is still needed. Some companies are hesitant to abandon an unneeded patent for the fear that it may later be found necessary to protect an important product or technology. If so, a thorough and blame-free identification process can be established, whereby patents identified as unneeded are reviewed and signed off by the legal, technical and business groups within the company before being abandoned.¹⁷

For example, at Dow, attention was placed on the 25% of the portfolio that was found to have no business interest. Therefore some of these patents were out licensed, but many were abandoned. The total savings on future annuities and other fees was over US\$40 million.¹⁸

Link the Patents More Closely to Trademarks

A unique method for lowering costs is also to abandon or eliminate patents in areas where the trademarks carry the product. This is rarely done because those owners of trademarks in the company are not aligned with the patent owners and, therefore, the value of synergistically linking one with the other is never established. However, there is a strategic intent to use trademark in this way. As both brands and trademarks stop copiers from the high end of the market, there is less need for complete patent protection because the marks may provide adequate protection.¹⁸

IP as Collateral

Collateralization of IP has emerged as a new credit enhancement tool during recession. In 2009, the China

Banking Regulatory Commission decided to let small technology companies use patents and other types of IPR as loan collateral.²³ Recently, Vijay Mallya, chairman of UB group convinced State Bank of India (SBI) to accept kingfisher airline brand as collateral to raise Rs 2000 crore in debt. Globally, many companies have used their brands' value to open lines of credit. The most famous example being Walt Disney, which raised about USD 725 million from Industrial Bank of Japan in 1988 through issuance of bonds against future earnings of the park for the next 20 years. The deal was structured in such a way that the investors had to bare any shortfall in the revenues and Disney continued to get its royalties without losing any money. It was the Walt Disney brand in which investors showed faith and responded positively in the markets.²⁴

IP Auction

Auctioning patents is another way of generating revenue during recession. But the failure of Ocean Tomo's patent auction in 2006 indicates that auctioning patents is not really a great idea. The sellers of patents generally fall in three category:

- 1 Institutions (including universities and corporations),
- 2 Individual inventors, and
- 3 Speculators / patent holding companies.

The patents which are auctioned are not of great value to the companies and the bidders are those firms and companies which buy the patents and then enforce them against infringers and go in for aggressive prosecution. These companies are also called 'patent trolls' or patent enforcing companies. e.g: Zoltar Satellite Alarm Systems, a small-inventor firm, plans to auction off its patent on personal alarms with navigational receivers in cell phones that was granted in 1997.²⁵

However there are following challenges:

- 1 *Patents are tough to value*: Value of a patent is directly related to the commercial value embodied in the idea. Historical licensing activity can also affect value. If a previous owner successfully licensed the patent, that may establish a precedent and value comparable that could be leverage against future licensees.
- 2 *Patents are wasting assets*: Patents are only good for 20 years. Other auction asset types (real estate, collectibles, jewellery, etc.) are appreciating assets.

- 3 *Most patents lack broad buyer appeal:* Patents, by their very nature, focus on narrow subject areas. A given patent or set of related patents may only be of value to a handful of people: patent holding companies with a deep understanding of the domain and license potential, a company looking to bolster an existing patent position, a company looking for material to counter-assert, or a company seeking defensibility for a new product or market.²⁶

Legal Process Outsourcing (LPO)

The general trend during recession is to outsource legal services like IPR. The primary purpose is to cut costs. However, the disadvantage of such outsourcing is that confidential information like formulas, trade secrets etc may leak out. Therefore there is a need to ensure that classified data is not outsourced.

IP Solutions Suggested by Thomas Reuters²⁷

- 1 Research global collection of patents and trademark, scientific generals, business information and industry standards to stimulate new ideas. Understand industry best practices and identify possible licensing partners.
- 2 Spot emerging trends and patterns before the competitors do, by analysing technology landscapes.
- 3 Capture and track all of the company's IP assets throughout the lifecycle.
- 4 Access non-English patents following a fast and accurate translation e.g. Chinese and Japanese. This will ensure that the companies do not make investments in area which has already been protected under these patents.
- 5 Identify which IP is critical to business through cutting-edge thematic mapping resource that analyses data and identifies prevalent concepts.

Conclusion

In India IP is at a very nascent stage. The global economic recession, has slowed down the growth of patent application filings in India. During the fiscal year 2008–09, 36,877 applications were filed in the country, which is just a 5% increase over 35,218 filed in the the year 2007-08. Though there has been an increase in the filing of patents overall, Indian companies have not been able to keep pace with their foreign counterparts. This has been primarily due to multinational companies setting up and expanding their markets in India. The positive aspect is that patenting

activity in India has grown significantly in recent years. The administrative measures taken by the Indian government have helped strengthen the country's IP infrastructure. IP awareness is improving, which is evident from the growing number of patent filings and IP litigations. Since patent life cycle spans 20 years, it is clear that Indian corporations need to formulate their patenting strategy carefully to stay competitive. This will entail creating more innovations, protecting all innovations with the relevant form of IP, respecting others' IP and extracting value from own IP through licensing, commercialization and enforcement.²⁸

The good news for the IP sector is that, though it is not recession-proof, it is remarkably buoyant.²⁹ Curtailing innovation efforts in tough times is a long-term strategic mistake. As the economic cycle inevitably shifts upward, companies who have dropped the innovation ball will find their fortunes sagging just as the economy surges. When a company is making profits, it prefers to utilize resources on creating wealth and developing products rather than enforcing its IPRs. But during an economic downturn there arises a need to generate more revenue in order to maintain stability. Thus during such times a company has to focus on its available assets and maximize revenue using them. IPRs should not be looked upon as life guards, only to be used when a company is going through loss. It is very much a commercial property capable of generating wealth and can prove to be a useful weapon if properly managed and planned.

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