

Intellectual Property Rights

Abstract

Intellectual property rights (IPR) may be defined as ideas, inventions, and creative expressions based on which there is a public willingness of bestowing the status of property. IPR provides certain exclusive rights to the inventors or creators of that property, in order to enable them to reap commercial benefits from their creative efforts or reputation. Various types of intellectual property protection are there like patent, copyright, trademark etc. Patent is a recognition for an invention, which satisfies the criteria of global novelty, non-obviousness, and industrial application. IPR is prerequisite for better identification, planning, commercialization, rendering, and thereby protection of invention or creativity. Each industry should evolve its own IPR policies, management style, strategies, and so on depending on its area of specialty. Pharmaceutical industry currently has an evolving IPR strategy requiring a better focus and approach in the coming era.

Keywords: Intellectual Property, Trademarks, Patents, Copyrights, Trade Secrets.

Introduction

Intellectual property is a general term for the set of intangible assets owned and legally protected by a company from outside use or implementation without consent. Stemming from its ability to provide a firm with competitive advantages, defining IP as an asset aims to provide it the same protective rights as physical property. Obtaining such protective rights is critical as it prevents replication by potential competitors—a serious threat in a web-based environment or the mobile technology sector, for example. An organization that owns IP can realize value from it in several ways, namely through utilizing it internally—for its own processes or provision of goods and services to customers—or sharing it externally. The latter can be achieved through legal mechanisms such as royalty rights.

There is an extensive international system for defining, protecting, and enforcing intellectual property rights, comprising both multilateral treaty schemes and international organizations. Examples of such treaties and bodies include the Trade-Related Aspects of Intellectual Property Rights (TRIPs), World Intellectual Property Organization (WIPO), World Customs Organization (WCO), United Nations Commission on International Trade Law (UNCITRAL), World Trade Organization (WTO), and European Union (EU). Nonetheless, there are variations in the respect for and enforcement of rights at a local level.

Types of Intellectual Property

IP as an asset category can be divided into four distinct types namely Copyrights, Trademarks, Patents and Trade Secrets.

Copyrights

Copyrights, among the most widely used types of IP, are a form of protection granted to the authors of original works of authorship, both published and unpublished. A copyright protects a tangible form of expression (i.e. a book, work of art, or music), rather than the idea or subject matter itself. In the United States, under the original Copyright Act of 1909, publication was generally the key to obtaining a federal copyright. However, the Copyright Act of 1976 changed this requirement, and copyright protection now applies to any original work of authorship immediately from the time that it is created in a tangible form.

Trademarks

Trademarks are another common type of IP. A trademark, as defined by the U.S. Patent and Trademark Office (PTO), is “any word, name, symbol, or device, or any combination, used, or intended to be used, in commerce to identify and distinguish the goods of one manufacturer or seller from goods manufactured or sold by others.” While it is not as robust as the international protection regime for copyrights, the Trademark Law



Madhumita Gupta

Assistant Professor,
Deptt.of Commerce,
Maharaja Bijli Pasi Govt. P.G.
College, Ashiana,
Lucknow

Treaty Implementation Act provides some international protection for U.S.-registered trademarks.

Patents

As compared to other types of intellectual property, patents are among the most valuable, costly, and difficult to obtain. A patent is defined by the PTO as “the grant of a property right to the inventor,” providing the owner “the right to exclude others from making, using, offering for sale, selling, or importing the invention.”

Patentable items may include objects or processes such as new technology or business methods, but excludes more abstract items such as web sites or ideas. Sufficient documentation from the applicant coupled with verification of originality by the PTO is required before the grant can occur, and is then typically valid for 20 years from the date of application.

Once received, a patent owner may grant licenses to others for use of the invention or its design and may charge a fee for such usage. Patents are valid only within the United States, including territories and possessions; however, 130 countries have agreed to honor patents across borders through instruments such as the Patent Cooperation Treaty (PCT).

Trade Secrets

Any idea or fact that is not disclosed by a business comprises the fourth type of intellectual property: trade secrets. A trade secret is a unique form of IP in that it does not have a defined time horizon—an issue could remain secret simply while filing for a patent, or it could remain closely guarded for the lifetime of the firm (i.e. Coca-Cola’s recipe).

A trade secret, by definition, is proprietary or business-related information that a company or individual uses or to which they possess exclusive rights. To be deemed a trade secret, the information must meet several requirements: that it is genuine and not obvious, provides the owner with competitive or economic advantage and thus has value, and is reasonably protected against disclosure. Examples of trade secrets include the aforementioned recipes, business methods, strategies, tactics, or any other piece of information that gives the business a competitive advantage.

Why Value Intellectual Property?

Changes in the global economic environment have influenced the development of business models where IP is a central element establishing value and potential growth. In addition to these systemic changes, U.S. and international accounting practices place pressure on firms to recognize and value all identifiable intangible assets of a firm as part of a transaction (in a merger or acquisition, for example). As a result of these trends, proper valuation of IP, followed by measures to protect that value, have become a key element of the success and viability of a modern firm. Federal Reserve Chairman Ben Bernanke recently validated this notion during the “New Building Blocks for Jobs and Economic Growth” conference, where he discussed the importance of intangible capital and that its accumulation has

accounted for more than half of the increase in U.S. output-per-hour during the past several decades.

Intellectual Property Valuation: Methodology

There are three methods of valuing intellectual property: cost-based, market-based, and income-based valuations.

Cost-based valuation takes into consideration both how much it cost to create the asset historically and how much it would cost to recreate it given current rates.

Market-based valuation looks at comparable market transactions, whether sale or purchase, of similar assets to arrive at conclusions of value.

Income-based valuation looks at the stream of income attributable to the intellectual property based on the historical earnings and expected future earnings.

These methods can be applied concurrently in a combined approach to arrive at a final valuation. There are several important factors to establish and take into consideration when performing an IP valuation. These include:

1. Clear identification of the IP
2. Unambiguous title to the asset
3. Qualitative and quantitative characteristics of the IP
4. Earnings capacity and profitability relating to the IP
5. Market share supported by, or as a result of, the IP
6. Legal rights and restrictions, competition, barriers to entry, and risks associated with the IP
7. Product life cycles and positioning
8. Historical growth and prospects for the future.

What Should Be Valued & When?

Different types of IP assets are treated differently when it comes to the frequency, focus, and organizational level where the valuation will occur. The table below outlines exactly when IP should be valued.

When Should Assets be Valued?	Goodwill	Indefinite-lived Intangible Assets	Amortizable Intangible Assets and Other Long-Lived Assets
Frequency	Annual test/ trigger-based	Annual test/ trigger-based	Trigger-based
Level at Which Impairment Test Is Performed	Reporting unit	Individual asset/ combined unit of accounting	Asset group
Focus	Implied fair value of goodwill	Individual asset fair value	Recoverability of carrying amount of the asset group

In addition to annual testing, many asset classes have guidance requiring impairment testing to be performed when a triggering event—defined as an event or change in circumstance indicating that the carrying amount of an asset may not be recoverable—occurs.

A disaster such as the Attack on Trade towers, natural calamities like earthquakes, floods etc. can impair assets. In some cases, buildings or other assets have been severely damaged or destroyed. In

other cases, a company's operations or financial performance may be significantly affected by the loss of an essential supplier or customer.

Assets potentially affected and in need of review include goodwill, intangibles, other long-lived assets, investments, inventories, and receivables. Due to the complexities involved in an IP valuation, it is important to engage a qualified, independent valuation specialist. Auditors are unable to perform these services for their audit clients as it constitutes a conflict of interest under the Sarbanes-Oxley Act of 2002.

Risk Transfer for Intellectual Property

There are four basic types of policies for risk transfer of intellectual property, namely as follows:

IP Infringement Coverage

IP infringement coverage, also known as intellectual property liability coverage, defends from patent infringement claims against the insured and defends the insured's ownership rights in the IP. It also provides insurance to indemnify customers and distributors for allegations that the insured's IP is in violation of another's IP rights and indemnifies against damages the insured is legally liable for as a result of a verdict or settlement. This is the most typical type of coverage purchased when customers think of or ask for IP liability insurance. This is also the most elusive as insurers have historically experienced substantial losses with this type of coverage due to the self selection of purchasers, who tend to be those who are more litigious or subject to more frequent litigation.

IP Enforcement Coverage

IP enforcement coverage is a fund provided by insurers to indemnify the insured for its legal expenses in seeking to enforce or protect its IP rights against infringement. It provides IP owners with the financial resources to fund professional fees and expenses when pursuing infringers. This coverage does not insure against counterclaims or against any loss. It can be expanded with optional extensions to include contractual disputes and action against a third party for non-payment, enforcement of an agreement to indemnify the insured, and action against the insured for breach of a declared agreement. This extension can also include investigation costs to determine if there are grounds for pursuit.

IP Representations and Warranties

One of the least known and most used types of coverage is IP representations and warranties infringement liability insurance, which is generally associated with mergers and acquisitions or a purchase agreement. It certifies that the IP involved in the transaction is valid, similar to the function of title insurance in home purchases. This type of coverage defends against infringement/misappropriation liability and provides reimbursement for defense expenses and/or loss (awards or settlements). It is designed specifically for the representations and warranties applying to intangible assets, whether the sale or purchase of a single asset, a portfolio of assets, or as part of a corporate sale or merger.

IP Value Insurance

The last type of risk transfer product is IP value insurance, which is a direct loss cover rather

than a defense cover. It is triggered by legal claims against the IP that result in loss of revenue or value associated with invalidity of findings or other legal claims against patents in an insured's portfolio. This type of coverage is generally associated with IP-rich products' future revenue streams, licensing revenues, royalty receipts, valuation by IP experts of patent portfolios, research and development expenditures, and financial arrangements involving IP such as IP loans, securitization, monetization, and investments in IP-rich companies.

Intellectual Property Risk Management

An important element in the discussion of intellectual property valuations and protection in the modern economy involves the strategic management and mitigation of IP risks. Firms of all sizes and purpose are motivated by similar goals in the creation of such programs:

1. To identify what constitutes a risk sensitive intangible asset
2. To address new and emerging threats to IP
3. To properly allocate available risk resources given limited funds
4. To achieve compliance within the legal and regulatory environment in which they operate.

In this context, there are several trends emerging within the space. First, IP is transitioning from exclusively a legal matter to that of a business/strategic issue; this is evidenced by the increasing number of organizations trying to leverage the value of their intellectual property, launch joint ventures utilizing IP, gain from the value of their patents, and utilize IP as a central tenant of a M&A strategy.

Second, IP risk management is migrating from a defensive to an offensive effort, which will have significant implications for firms' overall risk management strategies.

Third, a "collective relationship" model for managing risks is developing and its maturity is being accelerated through technological advancements. Enabling technologies, such as cloud computing, will allow for greater sharing of intellectual property in defined ways as firms look for heightened efficiencies. Concurrent to this trend, the increased sharing of proprietary material creates complex questions that will be central to defining risk management strategies. Namely, who is the custodian for maintaining the integrity/security around the IP while in electronic, sharable form?

While IP risk represents, at times, an opaque and ambiguous topic, developing risk management strategies to address the issue involves the implementation of several programmatic fundamentals- defining the value of its IP, and then identifying, assessing, and evaluating risk impacts. With this foundation established, organizations are better positioned to focus on properly executing mitigation programs by ensuring necessary levels of leadership commitment, aligning the program with strategic goals, creating the program framework through publication of policies and standards, reviewing network architecture, and education and training.

While such measures can prove challenging, the realities of the contemporary business environment require a robust valuation and risk mitigation effort to realize the upside potential of an organization's intellectual property.

References

1. Boldrin, Michele and David K. Levine. "Against Intellectual Monopoly", 2008. dklevine.com
2. Hahn, Robert W., *Intellectual Property Rights in Frontier Industries: Software and Biotechnology*, AEI Press, March 2005.
3. Branstetter, Lee, Raymond Fishman and C. Fritz Foley. "Do Stronger Intellectual Property Rights Increase International Technology Transfer? Empirical Evidence from US Firm-Level Data". NBER Working Paper 11516. July 2005. weblog.ipcentral.info
4. Connell, Shaun. "Intellectual Ownership". October 2007. rebithofffreedom.org
5. Greenhalgh, C. & Rogers M., (2010). *Innovation, Intellectual Property, and Economic Growth*. New Jersey: Princeton University Press.
6. Kinsella, Stephan. "Against Intellectual Property". *Journal of Libertarian Studies* 15.2 (Spring 2001): 1-53. mises.org
7. Lai, Edwin. "The Economics of Intellectual Property Protection in the Global Economy". Princeton University. April 2001. dklevine.com
8. Lindberg, Van. *Intellectual Property and Open Source: A Practical Guide to Protecting Code*. O'Reilly Books, 2008. ISBN 0-596-51796-3 | ISBN 978-0-596-51796-0
9. Mazzone, Jason. "Copyfraud". *Brooklyn Law School, Legal Studies Paper No. 40*. New York University Law Review 81 (2006): 1027. (Abstract.)
10. Moore, Adam, "Intellectual Property", *The Stanford Encyclopedia of Philosophy* (Summer 2011 Edition), Edward N. Zalta (ed.).