

IPR CREATION, DEVELOPMENT, PROTECTION AND INFORMATION DISSEMINATION

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1.0 Introduction

It is being increasingly acknowledged world over that competitiveness of an enterprise and its ability to capture the market, depend largely on its ability to manage “internal” environment on developing innovative technologies. The development of new technologies and industries not only depend on the ingenuity of the scientists, engineers and others but also on investments, particularly, on research & development and setting up of new enterprises. The investments costs in research & development is also increasing rapidly along with the competitiveness. Under the circumstances, protection of the innovations resulting from R & D programs, gain greater importance in the modern times.

1.1 Technology as a tradable asset

In the recent years, the definition of “competition” itself has undergone a change. One need not have to export the products to face international competition as the international products are becoming available in the local market place of a country. Technology is also increasingly becoming a valuable commercial or tradable asset and a dominating factor in determining international competitiveness.

Economic progress of a country requires continuous development of new ideas in order to improve the standards of living and efficiency in production. Many countries these days are giving increasing attention to encourage creative and innovative activities. Those who have recognized the importance of such activities have opened up the doors to the new technological, managerial and social approaches to achieve economic development.

Invention is not a single linear step-by-step process whereby one starts at step one and ends in step ten making one rich! Success in inventing and patenting is based on your piloting of your success ably. They can be expressed by four important and overlapping continuous and flexible timelines. They are (i) inventing (ii) patenting (iii) manufacturing & (iv) marketing.

2.0 Intellectual property

Human beings are distinguished from animals by the intellectual faculty endowed by the Almighty. The human beings are thus, elevated themselves to the present civilized state solely due to the exercise of such intellectual faculty. Intellectual Property (IP) is another class of property emanating primarily from the activities of the human intellect. Intellectual Property relates information, which can be incorporated in tangible objects and

reproduced in different locations. Examples: Patents, Designs, Trade Marks & copyright.

It is common that any property, moveable or immovable is to be legally protected in order to prevent it from stealing. Similarly the rights in the intellectual property created need also to be protected to prevent it from infringement. Like the moveable & immovable properties for the use of such a property by others, legal authorization of the owner of the property is required. The enforcement of the rights in the Intellectual Property, which is termed as Intellectual Property Rights (IPR), are also governed by the law of the country which is for the time being in force in that country, namely the Law of Intellectual Property Rights. Such rights can be enforced only within the territorial limits of the country, which grants such rights, and not outside.

In other words, Intellectual property relates to information, which can be incorporated in tangible objects and reproduced in different locations. Examples: Patents, Designs, Trade Marks & Copyrights. Like the moveable and immovable property, intellectual property is also governed by the law of the country which is for the time being in force, namely Law of Intellectual Property Rights.

2.1 What is meant by Industrial Property & Intellectual Property

Historically patents for inventions, designs for industrial designs and Trademark, which are concerned with industrial products, are commonly referred to as Industrial Property. When the copyright such as literacy, artistic, software etc. are included amongst the subjects of Patents, Designs & Trademarks (Industrial Property), all together is referred to as Intellectual Property. However, the term Intellectual Property, in the modern times, is used to include all property resulting from the exercise of human intellect. The rights accrued on such a property is termed as Intellectual Property Rights.

2.2 Intellectual Property Rights (IPR): Meaning

The legal rights in the intellectual property generated are termed as “Intellectual Property Rights” popularly referred to in short as “IPR”. Protection of the legal rights of the intellectual property, especially by way of patents, has come to be recognized, in the modern times, as an important tool, not only to promote inventiveness but also to ensure adequate returns to the investments made. IPR has also become important for the technological industrial and economic development of a country.

As compared to the rights in moveable & immovable properties, Intellectual Property Rights (IPR) as a system of rights is a relatively new comer. It is to be noted that IPR is concerned with the subject “technology” which is not tangible. Considering the role technology plays in the modern highly competitive world, the subject of IPR demands much more and careful attention and requires to be understood by many people in different cross sections of the society.

As mentioned earlier, just as ownership and transactions in other forms of property is governed by law, so is the case with IPR. Thus, specific laws to protect IPR in a country are enacted based on the degree of balancing the conflicting interests explained above. The degree of balance to be maintained varies from country to country and in the same country from time to time, depending upon the state of development of the country. It is to be noted that

justification of the enforcement of the rights accrued is confined to the country which grants such rights and cannot be extended beyond the territory of the said country.

2.3 Different forms of IPR

There are various different forms of IPR. The TRIPS provisions of WTO recognizes seven forms of IPR which are the following: Patents, Designs, Trademarks, Copyrights, geographical indications, Integrated circuits and Trade secret. In addition to these forms, there are many other forms like Utility model Plant variety protection etc. Out of these, Patents, Designs, Trade marks and Copyright are the most important and common forms of IPR.

2.4 Patents

Patents are legal rights granted for new inventions employing scientific and technical knowledge. A patent confers on its holder certain exclusive right for a limited period (usually called “term”) for the new inventions disclosed in the patent. Examples: TV, new drugs, process for preparation of a new substance, new pigment composition, etc.

The subject of Patent, which involves scientific & legal issues, is relatively complicated as compared with the other species of intellectual property like designs, trade marks & copyrights. Moreover the grant of patent rights has to strike a balance between different conflicting interests such as: between keeping valuable technical information as trade secrets and disclosing such information, between public and private interests of the inventor / industry, between exclusive rights and promoting competition and particularly in developing countries between the interests of indigenous industry and transnational corporations.

2.4 (a) What are the main criteria for securing patent?

The main criteria for securing patents are that the invention which is to be protected (i) should be novel (ii) should have the inventive step (otherwise referred to as non obvious) and (iii) should have utility.

A patent confers on its holder the exclusive right for a limited period (usually called “term”) the rights to the new inventions disclosed.

2.5 Industrial Designs

A design is an idea or conception as to features of shape, configuration, pattern or ornament applied to an article. A design can be either two or three-dimensional. In short a design in order to secure legal protection must consist of a shape which is in three dimension or of a pattern which is in two dimension and that the shape or pattern must be applied to an article or articles. The main criteria for securing protection for a design is novelty and originality of the design. Examples: Designs as applied to shoes, TV, textiles, etc.

2.6 Trade Marks

A trade mark is a visual symbol in the form of a word, device, or a label applied to an article of manufacture or commerce with a view to indicate the purchasing members of the public about the origin of the manufacture of the goods affixed with that mark. It distinguishes such goods from the goods

manufactured by others in the trade. In other words, a trademark enables a customer to distinguish the products of one manufacturer from that of others. When properly advertised, the mark becomes an effective instrument to attract customers and by its proper use, the trademark acquires goodwill of the customers.

A trade mark, through its widespread and extensive use in public, becomes popular and eventually results in acquiring an exclusive right on the mark which can be legally enforced by the owner of the mark. The main criteria for securing a trademark registration is its originality. Examples: Coca Cola adopted in relationship with a soft drink, SONY applied to electronic goods, etc.

2.7 Copyrights

Copyright is basically the right to copy and make use of the literary, dramatic, musical, artistic works, cinematographic films, records and broadcast. Copyrights is a proprietary right and comes into existence as soon as the work is created. In early days the concept of copyright had its origin under the Common Law. Subsequently it came to be governed by the statutory laws of each country. The main criteria for the copyright registration is its originality. Examples: poems, artistic drawings, paintings, computer software / programs, etc.

2.8 Geographical Indications

Geographical Indications are indications, which identify a good as originating in the territory of a country or a region or locality in that territory where a given quality, reputation or other characteristic of the goods is essentially attributable to its geographical origin. The TRIPS agreement requires the member countries to enact legislation for the protection of Geographical indications. An office for the registration of the Geographical indication in India has been opened at Chennai. This legislation is also expected to be brought into force in the very near future.

3.0 Laws relating to IPR

Just as ownership of and transactions in other forms of property is governed by law, so is the case with IPR. Thus, specific laws to protect IPR in a country are enacted based on the degree of balancing the conflicting interests explained above. The degree of balance to be maintained varies from country to country and in the same country from time to time, depending upon the state of development of the country. It is to be noted that justification of the enforcement of the rights accrued is confined to the country which grants such rights and cannot be extended beyond the territory of the said country.

There is nothing called World Patent / World Trade Mark / World Design or International Patent / International Trade Mark / International Design etc. As explained earlier, the rights in a patent, trademark and/or design secured can be enforced only in the country of grant. Even under the TRIPS provisions of WTO Agreement there is nothing called world patent / trade marks / or design or international patent / trade marks and/or designs. In other words to secure a patent, trade marks and/or design protection in a country or countries, separate applications have to be filed as per the rules, regulations and practice of the individual country(ies).

In certain cases an invention / product can be protected under plurality of IPR legislations. For example a new drug and a process for the preparation of the drug can be protected under the Patent Law. If the drug is enclosed in a container having a design, which is new and original, the design of the container can be protected under the Design Act. If the drug is to be sold as a brand name (mark) like ANACIN, the said mark can be protected under the Trade Mark Act and finally if there is a pamphlet giving details of the composition of the drug, its dosage etc., the copyright for the contents of the said pamphlet can be protected under the Copyright Act.

In other words, while considering securing IPR protection it is very important to consider seeking protection under all the possible IPR legislations.

The details of securing protection for inventions, industrial designs, trade marks, copyright, utility models and plant variety are contained in the appropriate legislations of the concerned country(ies) Intellectual Property Rights.

4.0 Creation of IPR

For creation of IPRs planning is very essential. Simple creation of an IPR without determining its importance and use by the public will not do any good. Such an IPR will not have any value also and only will remain in paper. It should be noted that the importance of an IPR has dual objectives namely (i) the creator getting some benefit – financial or otherwise – for the intellectual inputs given in such creation and (ii) the society getting the benefit of the IPR created. The responsibility of the State in giving protection to such an IPR is to balance the rights and obligations of the above said two parties in such a way that these are not misused or abused. While planning the creation of an IPR consider the following issues:

1. In what way the invention will be than what is already in the market? Is it less expensive, does it have more options? Is it more efficient, lasting? Easier to use? And how much so?
2. How crowded is the market with the same type of inventions as of yours? Is your product sufficiently different to warrant taking up shelf space in a store (Market place)?
3. How easy for the public to accept your product? Will it require a radical change or long leaning curve? Does it align with accepted engg principles for its manufacture? Is it an improvement of the existing product? If so is the improvement substantial?
4. Is the market large enough to support the amount of anticipated investment for the development & promotion of your product?
5. Is market timing sensitive? Is this the right time to commercialize the product?
6. Is it a short fad or long trend?
7. Can the product be reasonably produced in an acceptable and affordable price range?
8. Are there any known attempts to market similar items that have recently met with success or failure?

The R & D for developing the invention (IPR) has to be started only if the answers to the above said questions, if not for all the questions but for the majority, the answer is in your favour.

Normally these questions are not at all considered and various R & D projects are being taken without any consideration or survey. Such a procedure leads to wastage of time, energy and most importantly the finance as the results (IPRs) of the work does not reach the commercialization stage, as there is nobody to benefit for the work.

5.0 Protection strategy

If a decision is taken to protect an invention by filing an application for patent, the usual first step is to file a single application in the national patent office of one's own home country. For example in the case of an Indian applicant, in the Indian Patent Office. This filing establishes a priority date. Then, the Inventor or the applicant, as the case may be, has one year (12 months) during which he can apply for patents in one or more of the other WTO member countries, if he so desires claiming priority from the Indian filing. It is to be noted that the criteria of patentability in all the countries in the world wherever patent system exists are the same namely novelty, inventive step (non obviousness) and utility. The only difference may be in the degree of their consideration. Generally it is observed that in the developed countries like USA, Europe, Japan etc. the degree of the consideration of these criteria is very strict and high as compared to those in the developing or least developed countries. Further filing, processing securing the grant and maintaining the patents in countries abroad are very expensive. Therefore, the mere fact that the invention in question satisfies all the above-mentioned three main criteria should not alone be the yardstick for deciding to protect the invention in various countries in addition to India. There should be other important considerations.

At this point of time, at least the under-mentioned four important questions must be considered.

1. What are the criteria other than novelty, non-obviousness and utility of the invention, which justifies securing protection in foreign country(ies)?
2. In which foreign country(ies) should a patent(s) be secured?
3. Does the invention patentable in the foreign country(ies) where protection is desired?
4. By which filing route seek this patent some of the criteria which may be taken into account in selecting the foreign country(ies) where protection is to be secured are the following:
 - Whether the applicant has any plans to market the invention desired to be protected in the country. If so what is the size of the said market (**Market oriented approach**)
 - Whether there is a possibility of licensing the invention desired to be protected in the country (**License oriented approach**)
 - Whether there is a possibility of manufacturing the invention desired to be protected in the country (**Manufacture oriented approach**)
 - The cost of obtaining and maintaining the patent for the invention desired to be protected (**Cost oriented approach**)

While considering the above aspects it is also important to consider whether the invention is patentable, according to the Patent law of the country where protection is desired as well as the strength of enforceability of the legal rights on the patent in the country.

6.0 Modes of selection of filing route

Having arrived at the decision of securing patents for the invention in foreign country(ies) as well as deciding the country(ies) where protection is to be secured, it is very important as to the route to be taken for seeking such protection. Currently there are many routes available, which an applicant can avail of by making a judicial selection. The decision regarding selecting a particular route may be taken based on any one or more of the following criteria:

- Considering the cost involved for securing the protection
- The urgency (speed) in securing patent rights in the country

Generally, if filing is to be effected only in very limited countries like Germany, UK, Japan & USA, the cheapest and the simplest route may be to file applications in each of the desired individual countries separately and directly. In these applications the applicant can claim priority based on the application filed in his / her home country, if the applicant's country is a WTO member country. For availing this benefit the applications have to be filed within 12 months from the date of filing the application in the home country.

Similarly, the applications for patents can also be filed following the Patent Cooperation Treaty route (**PCT – see below**) designating the above-mentioned countries. In this case also the applicant can avail the benefit of priority based on the application filed in his / her home country. For availing this benefit the applications have to be filed within 12 months from the date of filing the application in the home country.

7.0 Patent Cooperation Treaty (PCT)

As the name suggests PCT is an Agreement for international cooperation in the field of patents. It is said that it is the most significant and advanced international cooperation in this field and is a Treaty for rationalization and cooperation with regard to the filing, searching, dissemination of the technical information contained in patents and examination of the applications.

It is to be noted that PCT does not provide for the grant of international patents even though the filing of applications under PCT is termed as international patent filing. The responsibility of granting patents in the individual national member countries vest exclusively with the individual country concerned. The PCT is concerned only with procedural requirements so as to simplify the filing, searching for novelty of the invention and publishing of international patent applications. By filing an application for patent under PCT, multiple filing in different countries is avoided consequently avoiding duplicate filing costs. The membership to PCT is open only to members of the Paris Convention.

8.0 Conversion of IPRs into wealth

8.1 Importance of valuation of IPRs

Many inventors believe that patenting their inventions is a necessary first step to sell it. Many also think that when they have a patent their invention is protected and easy to market it. Both the above views are true to a certain degree but it is more complicated than one thinks. Securing patent is very expensive and time consuming. Market and industry research often reveal that an invention won't sell enough to warrant filing and/or securing a patent. Therefore many inventors have developed revolutionary inventions but have remained paupers.

It should be kept in your mind that no one values your invention as much as you do. Further you may also learn that your estimation of the value of your invention is also unreasonable and unrealistic. The most important task, therefore, before commercialization of your invention should be to evaluate the true & perceived value of your invention in the marketplace.

The fact which is to be determined is not as to whether the invention has value but (i) how many other people perceive the value and who are they? (ii) who could supply the invention to such people and (iii) how much will they pay for it? In short one should be realistic about ascertaining the demand for your invention.

Most inventions developed in the present day are non-essential ones. Vast majority of today's inventions do not also address to the basic needs of the public such as food, shelter or clothing. Therefore it may be possible, that your invention is not only non-essential but also may require users or manufacturers and distributors change their present habits & practice. Most inventions also necessitate other changes and change is very difficult to achieve, as people resist to change their habits & practice, especially those which are not very essential. For convincing the people for effecting such a drastic change so as to use your invention, you would agree that the invention should have significant enough improvements in comparison with the existing ones.

8.2 The common mistakes committed by inventors

Very often, the inventors also tend to work in a vacuum. Many inventors decide to commercialize the invention after the expiry of about 5 to 6 years after getting a patent. The first question, which is to be asked, is what were you doing for such a long time? When one is interested to profiting from Intellectual Property (IP) the clock has started ticking from the day the application for the protection of the IP is filed. The more you delay the greater will be the chance for others to develop a similar invention or superior invention, which might stand in your way. Timing is an important factor in invention development. Being first and the fastest does not always work. Therefore timing is an important element in the invention development, protection and commercialization and may vary from case to case.

A dilemma which most of the inventors face is the question of what to do first, make a prototype, apply for a patent or determine the marketability. The best answer to these questions is to do whichever one requires least resources and will take least amount of time. One should note that each case is unique and the answer applicable in respect to one case may not necessarily apply to another one. Industry experts may be able to guide you in these matters.

9.0 Dissemination of IPR

9.1 Importance of Patents as a unique source of scientific information

For obtaining a patent for an invention, the national patent law of each country requires full disclosure of the essential details of the invention to be protected. This information is disclosed in the document commonly known as Specification. The information contained in patent specifications includes information regarding the field to which the invention relates, background of the prior art knowledge on the subject, drawback connected with the said prior art, the future demands of the invention, the best mode of carrying out the invention, detailed working examples of the invention based on the experiments carried out in the laboratory and the claims defining the scope of protection and legal rights secured. The information provided in the specification should be such that it would be sufficient for a person having ordinary skill on the area to which the invention relates, to carry out the invention without any assistance of the inventor / applicant.

The patent specifications throughout the world usually have uniform structure. For the preservation of the novelty of the inventions developed, the information in respect of the invention is first published in patent documents. Therefore 80% of the information contained in patents are not available in any other document. The specification is, therefore a valuable and unique source of scientific information. One of the important objectives of the Patent System is to disseminate the scientific & technological information contained in the patent documents (specifications) as soon as possible. Therefore in many countries in the world the procedure of publication of the information contained in patent applications even before the grant has been adopted.

The information contained in patent documents published anywhere in the world can be freely used for R & D work and/or for educational purposes without seeking permission from the patent right holder anywhere in the world, including the country where the patent is in force. Any patent which has lapsed due to non-payment of the prescribed renewal fees or where the term of the patent has expired can also be commercially worked by any interested party anywhere including the country which had granted the patent without seeking the permission of the original patentee.

9.2 Beneficiaries of patent information

The degree of use of the information contained in patents varies from user to user. Most often the potential users are the R & D scientists. In the industries, scientific & academic institutions, the information is used not only for determining the new areas of R & D work to be initiated and for the protection of the R & D results, but also for determining the strength of the competitors, the trends taking place in a particular area, to identify the unexplored areas, to determine the protected areas so as to avoid any infringements and the like. A comprehensive state of the art search through published patent documents provides up to date and comprehensive technological and scientific information in respect of a specific technology. Based on such valuable information gathered, many important decisions can be arrived at.

9.3 Volume of patent documents

So far about 38 million patents have already been published globally. The publication is increasing at the rate of approximately 1.6 million per year. Due to the increasing importance given for patent protection, in the near future, the number will be increasing multifold.

9.4 Classification of patent documents

The patent documents are classified according to the subject matter of the inventions disclosed therein. This is done to retrieve the desired information easily and expeditiously. Most of the countries in the world where patent system is in force have their own national patent classification system. In addition, they also follow the International Patent Classification System (IPC).

9.5 International Patent Classification System (IPC)

Most patent specifications, which are published, carry a classification symbol, which apart from the national classification of the country concerned also include IPC. For example the notifications issued by the Controller on the acceptance of the complete specifications, both the Indian classification and the IPC are provided. Currently IPC is being used by almost all countries in the world. IPC divides the entire field of S & T into 8 main Sections as given below.

- A. Human Necessities
- B. Performing operations: Transporting
- C. Chemistry and Metallurgy
- D. Textiles & Paper
- E. Fixed Construction
- F. Mechanical Engineering, Lighting, Heating, Weapons, Blasting
- G. Physics
- H. Electricity

These main Sections are further divided and sub divided into more than 90,000 minute groups and subgroups in various fields making it easy to retrieve the required specific information in a specific field precisely, quickly & easily. A copy of the Handbook of IPC can be procured from World Intellectual Property Organization (WIPO), 34, Chemin des Colombettes, Geneva. It is also available in CD-ROM. It can also be retrieved from the website of WIPO, which is www.wipo.org.

9.6 Use of Patent information

Patent documents can provide three main types of information. They are the following: (i) Commercial (ii) Technical and (iii) Legal.

A subject matter search of patents helps to identify the owner of a particular piece of technology. To learn more about the product or to identify its owner with a view for collaboration, a patent subject matter search can give valuable information.

9.6.1 Sources of patent information

At present several international agencies are involved with the dissemination of information contained in patents on a worldwide basis. Some of the important one include:

- Chemical Abstract Services of USA
- Derwent Publication UK
- EPIDOS, Vienna
- Electrical Patent Index (EPI)

9.7 Retrieval of patent information

Patent searches are normally carried out through different media which include online information systems, magnetic tapes, CD ROMs, microfiches, patent gazettes, etc. Currently there are many commercial organizations world over which are involved in retrieval and dissemination of information contained in patents in a user-friendly manner. Networks of Information Centers have also been established in many countries for the dissemination of the information contained in patents. In India the following agencies do searches and provide information on making a request therefore:

- National Informatics Center (NIC), A Block, CGO Complex, Lodi Road, New Delhi 110003
- Managing Director, NRDC, 20, Zamroodpur Community Centre, Kailash Colony Extension, New Delhi 110048
- TIFAC, Ministry of Science & Technology, Technology Bhavan, New Delhi

In summing up it can be said that there are various agencies and sources, which can provide the information contained in the published patent documents. To avail of these facilities it is urgently required to enhance the awareness of the importance of the patent information as well as to educate and train to retrieve the required information quickly and easily. A culture and habit to use the information contained in patents has to be created amongst the people which will certainly not only enhance the creative activity in the country but also will greatly enhance the quality of the intellectual property created.

10.0 Importance of commitment for success

Commitment is one of the important criteria to bring success to your invention. You have to consider how serious are you as regards your invention? How much effort and resources are you willing to spend on your invention? Will your end gain from the invention make your efforts worth it? These are to be considered earnestly and carefully. You have to identify your strengths and weaknesses. You must remember that where there is a will there is way.

11.0 The role of IPR in R & D and the transfer of technology

IPR has an important role both in R & D and in the transfer of Technology. When IP is generated and consequently wealth is generated by the commercialization or otherwise of the IP, the sharing of the generated wealth will depend upon the intellectual contributions made for the generation of the IP. Therefore in undertaking R & D, entering into any collaboration and in the transfer of technology the IPR will be an important component. It may be observed in many of the agreements which are being executed in the recent times there is Clause indicating the ownership, sharing and other related issues relating to IPR.

12.0 Management of the portfolio of IPR

Innovations without inventions are like a tree without roots. The trajectory of innovation is unpredictable and there is a risk involved for those who undertake this journey. It takes courage and vision to look beyond vicissitudes and find hope in this context. Not only the generation of intellectual property but also its adequate protection, evaluation and exploitation assumes a crucial importance in the present day environment of high competition.

As explained above, Intellectual Property is just one part of the successful marketing equation, and its true importance varies greatly according to each specific invention or idea. No one can predict certainly whether the cost of securing intellectual property protection is justified in a particular case. Protecting an invention or idea is often a difficult exercise. Some ideas and invention simply cannot be protected while others can be protected. The new inventions / work have uncertain commercial value and the IPR system provides a degree of protection from competition for a limited period, thus encouraging investment in new technology. Additionally, the IP system assists in bringing new knowledge into the public domain rather than keeping the knowledge in a state of secrecy.

The dissemination of the new knowledge facilitates kindling new ideas by facilitating creativity. The scientific and technical information contained in the patent documents are being increasingly used by researchers, professors and industries to retrieve information there from which has helped in disseminating knowledge and consequently stimulating higher degrees of innovations.

The importance given to the portfolio of IPR in the modern era requires efficient management of this portfolio so as to derive maximum benefits from it. For such a management it is required planning, conception of the invention / idea, identification of the IP created, appropriate protection of the IP created / dissemination of the information contained in the IP generated in a user-friendly manner and manufacture of the new products (IP) / commercialization of the products (IP).

For the coordination of all the above said aspects of an organization, in the competitive world, a separate Division / Unit has to be established with appropriate knowledgeable IP professionals. In short the subject of IPR should not be taken as an isolated subject.

The Government of India has emphasized the importance of IPR by incorporating a Para in the Science and Technology Policy announced very recently. In order to achieve the vision emphasized in the said Policy relating to IPR, it may be necessary to frame an appropriate national IPR policy.