Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rishikesh Dave; Publisher – Ayush Pandey

A Study of the Evolution of Universal Intellectual Property Rights Over Time and Their Growing Importance in Commercial Transactions

Gaurav Mishra[a]

[a]V.T. Choksi Sarvajanik Law College, Surat, India

Received 10 November 2022; *Accepted* 22 November 2022; *Published* 03 December 2022

The evolution of intellectual property (IP) did not happen overnight; rather, it is the result of years of non-stop economic and legal reforms. To put it another way, IP in the form of patents and trademarks has existed for hundreds of years. However, after industrialization, it gained widespread acceptance. M&A is widely regarded as an important aspect of company strategy around the world. Corporations are more likely to participate in M&A transactions during times of market difficulty, according to previous experience. Furthermore, unlike in the past, merger waves have become increasingly common in recent years. With this information, it must be determined whether IP plays a significant role in driving cross-national M&A deals. This article sheds light on the enhancement of IP rights and increases in IP-driven M&A as well as asset realization of IP.

Keywords: *intellectual property, mergers & acquisitions, trips, due diligence.*

INTRODUCTION

Mergers and acquisitions (M&A) have been commonly used as a form of company restructuring to withstand the market's fierce competition. There could be other factors driving such deals,

such as diversifying enterprises. Notably, the factors that impact such transactions change in response to market conditions. Intellectual Property (IP), which includes patents, trademarks, and copyrights, is one of the most recent drivers driving M&A agreements. IP is now widely acknowledged as one of a company's most valuable assets. However, such acceptance did not happen by chance. The incremental advancements on the international and national levels culminated in the acknowledgement of intellectual property as an asset.

The growth of other assets must be considered to comprehend the various stages of IP evolution. Even during the early Middle Ages, the IP (particularly Patents) transaction market was a secretive, private market that valued exclusivity rights over cooperative rights transfer. However, much has changed over time, and the scope of corporate value has shifted from simply covering tangible resources to intellectual capital. This is owing to the widespread awareness of intangible assets as the digital age progressed, resulting in a new knowledge-based- economy and periodic legal reforms.

Previously, IP was only valued in a few conventional IP-intensive areas, like life sciences, where the valuation of medications is often linked to the scope of patent protection. Corporations failed to undertake sufficient due diligence on IP assets due to a lack of awareness, thus impacting the acquirer's commercial prospects. The acquisition of Rolls Royce Motor Cars (Vickers PLC) by Volkswagen is a typical example of such failure. The most valuable asset in the deal was the name (Rolls Royce), which was missing. Vickers PLC did not hold the Rolls-Royce trademark, but it did possess the Rolls-Royce name. As a result of Volkswagen's failure to discover the existence of the license arrangement over the aforementioned mark, BMW eventually became the guardian of Britain's most prestigious automobile brand. There has been a clear shift in the trend towards IP-centric M&A transactions as corporate IP awareness has increased.

The question that has to be answered is what reasons led to this shift in IP policy. The formation of a few international treaties and accords, such as the Paris 13 and Berne Conventions, and, most crucially, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, provided homogeneity to the national and international IP framework to some extent. A variety of Free Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs) have also toughened

the IP enforcement framework. Accordingly, the major goal of this research is to follow the evolution of IP rights from an opportunity to an asset-based strategy to determine whether there is a link between both the strengthening of IP rights and the growing significance of IP in M&A negotiations.

THEORETICAL PERSPECTIVE, ANALYSIS, AND INFERENCES

1. EVOLUTION OF IP RIGHTS

Overview in General

The evolution of intellectual property (IP) did not happen overnight; rather, it is the result of years of non-stop economic and legal reforms. The recurrent origin of intellectual property was signified long before other notable laws such as company law[1]. To put it another way, IP in the form of patents and trademarks has existed for hundreds of years. However, after industrialization, it gained widespread acceptance. Only IP rights were created long before the development of the IP industry. As a result of the need to enhance and encourage creativity.

Justification for intellectual property rights

In its most basic form, intellectual property (IP) can be defined as the creative efforts or implementation of human intellect to produce a work with potentially lucrative value. The cost of creation, product viability, and market structure all have an impact on the value exchange derivable from such IP. These are the IP's operational aspects. To control how much IP can be used, a legal right over the IP work is conferred; this right is known as an IP right. The four most popular theories used to justify the basis of IP rights have been subjected to extensive scrutiny. These are utilitarian theory, Lockean labour theory, personhood theory, and the promotion of a just and appealing culture.

To begin, utilitarian theory demonstrated how intellectual property rights can be critical in achieving "the greatest good for the greatest number."[2] It took off with the advancement of a

[1] Julie E Cohen, 'What Kind of Property Is Intellectual Property?' (2014) 52(2) Huston Law Review 691- 707, 698
[2] *Ibid*

"modern state" with interstate trade channels and a growing dependence on capitalist economic theory[3]. The rationale for granting rights to protect IP-induced works was that it was thought to awaken an individual's intellect and incentivize him to invent goods that could potentially benefit mankind. The inclusion of the social welfare component made it even more deserving of protection. The justification for copyrights was inspired by the ease with which the job can be copied without incurring any significant costs, allowing it to be sold at a cheaper price.

Another justification for intellectual property rights stems from John Locke's labour theory. Anyone who creates something using resources that are available to everyone has a natural right over the mentioned property. Whereas this theory was initially developed to rationalize property rights. Theorists of intellectual property rights have expanded their implementation for seeking approval of IP as well as its rights. A conclusion has been derived on the basis that intellectual property also includes raw materials in the form of ideas and concepts that are converted into goods through the application of human labour, thus falling within the theory's scope. The theory had been criticized for being too broad in terms of rights, so a limitation was recommended to enable the conferral of rights as long as no damage has been done to others.

The third hypothesis emphasized the importance of protecting personal rights, including meeting a person's basic needs. In this justification, the concept of moral rights emerges by acknowledging the creator's right to protect its property, even after surrendering rights over the work, from being dwindled in the course of using or changing it. The fourth and least acknowledged hypothesis promotes the idea that property should be used in ways that promote societal growth. In the sense of intellectual property, the theory implies that rights are only justified when works address social advancement. Allowing more original content, for example, by reducing control over "derivative work" and promoting compulsory licensing to find a balance between the creator's right and consumer interest.

[3] Peter S Menell, 'Intellectual Property: General Theories, 1600' [1999] Berkley Centre for Law and Technology 131

The Economic Aspects of Intellectual Property Rights

The justification behind the affiliation of exclusive rights and economic gains can be simply understood as rights being conferred to reward the creator for the time, labour, risk, and innovation involved in the creative process.[4] According to the Copyright Law of the Commonwealth of Massachusetts (1782), "there is no characteristic more peculiarly a Man's own than that which is generated by the Labor of his Mind." The recognition of the need for a universal right to intellectual property can be linked to economic benefits. With the advancement of IP, however, states started to acknowledge IP rights, but only to protect citizens and not foreign nationals. Even the United States, which claims to be an impassioned IP enthusiast, did not recognize foreigners'[5] IP rights, though protection was later extended to foreign IP holders as well. A sequence of such occurrences culminated in the worldwide acknowledgement of intellectual property rights. The argument that severely weak IP protections may provide short-term gains from publicly available information while discouraging authors from investing in building IP might be used to justify recognizing foreign countries' IP even though the United States could readily reproduce their works.

Furthermore, it will affect the market as a result of the availability of lower-quality items (which are likely to lack the efficiency that the original product possesses), and hence have a negative influence on economic growth. The basis for recognizing foreign IPs even though the United States could simply copy their works can be founded on the premise that severely weak IP rights may allow for short-term gains from publicly available knowledge while discouraging innovators from investing in building IP. Furthermore, it will affect the market owing to the availability of lower-quality items (which are likely to lack the efficiency of the original product) and so have a negative influence on economic growth. On the contrary, an excessively repressive IP regulation would distort the market by restricting knowledge diffusion to a greater extent.

---

[4] James Gathii & Cynthia Ho, 'Regime Shifting of IP Lawmaking and Enforcement from the WTO to the International Investment Regime,' (2017) 18 MINN J L Sci & Tech 427-515

[5] Mike W Peng & Ors, 'History and the Debate Over Intellectual Property' (2017) 13(1) Management and Organization Review 15-38, 22

As a result, both circumstances are severe in character and would not be beneficial to a state in the long run. Instead, the state would benefit from developing a well-thought-out IP framework that balances the interests of both parties. This might be accomplished by supporting suitable "market-based incentives" for producing IP, such as providing rebates to R&D firms to reduce research costs and allowing a limited time of IP protection to allow for knowledge distribution to satisfy social demands. A nation's complementing economic and regulatory policies, as well as its IP system, would provide a favourable climate for industries and improve the country's growth chances. Thus, it is important to trace the voyage of strengthening IP rights by researching the influence of numerous international treaties and conventions, as well as the local legal framework of IP enforcement in the United States and India, on the growth of IP as an asset.

INTERNATIONAL AND NATIONAL REGIMES IN THE EVALUATION OF IP ASSETS

Overview in General

The international and domestic legal frameworks for protecting IP rights are intertwined, and both have a significant impact on turning IP into a commodity. As mentioned previously, countries realized in the early 1990s that intellectual property is a crucial component in driving economic growth and can shape the global market. This was based on IP's critical function in boosting the value of a product and resulting in wealth creation comparable to traditional property. In particular, 2010 research by the Organization for Economic Co-operation and Development (OECD) found that developing nations saw positive outcomes when they implemented IP reforms and policies that promote innovation and ease of doing business. For example, the aforementioned research shows a link between robust trademark protection and increased export turnover. Copyrights and export turnover have been found to have a similar relationship. Stronger patent rights have also been linked to the rapid rise of IP-intensive industries including pharmaceuticals, automobiles, and telecommunications.

The Paris Convention for the Protection of Industrial Property in 1883 and the Berne Convention for the Protection of Literary and Artistic Works in 1886 are two important intellectual property

treaties that helped define the international IP framework. The World Intellectual Property Organization was in charge of them (WIPO). These were some of the first multilateral treaties to control international intellectual property in member countries. As previously stated, increased awareness of IP protection led to more developing nations ratifying these agreements[6]. The TRIPS Agreement incorporates a significant component of the Berne, Paris, Rome, and Washington conventions, as well as addressing issues that the aforementioned treaties did not touch. It was proposed that all World Trade Organization (WTO) members adhere to a consistent standard of IP protection. Most countries have ratified TRIPS, and it is usually regarded as the primary governing source of the IP framework since it establishes a baseline standard of IP rights and protection that signatories must uphold. All of these international accords and agreements have increased IP protection and led to its transformation into a valuable asset for businesses. Furthermore, the TRIPS agreement's flexibility gave nations the ability to design their domestic IP regime. As a result, the level of IP protection provided by members varies depending on their status in many ways. Least developed countries (LDCs), for example, are excused from adopting TRIPS standards because of their economic incompetence and lack of infrastructure.[7]

International Intellectual Property Regime

The Background of the TRIPS Agreement

There was no uniform IP framework in place before TRIPS to regulate the implementation of IP between nations. In the post-World War II era, there was a strong desire to establish an International Commercial Organization, but the United States refused to give up its sovereignty over its trade activities. Nonetheless, the General Agreement on Trade and Tariffs (GATT)[8] was

[6] Examples of increased ratifications from1990 from 1995 include • The Berne Convention (concerning copyrights) experienced 36 new ratifications (as of 19 January 2005, the total number of ratifications was 159). • The Paris Convention (concerning patents) experienced 36 new ratifications (as of 31 January 2005, the total number of ratifications was 169)

[7] Peter DRAHO, 'Developing Countries and International Intellectual Property Standard-Setting' (2002) 5(5) Journal of World Intellectual Property 775-789

[8] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994)

enacted between the contracting parties to control trade between member countries. Though there were laws governing the movement of IP-protected items, they were limited to cross-border measures, i.e., steps to prevent IP-infringing goods from entering the member country. The members were granted the authority to regulate themselves. Furthermore, the two basic conventions, the Paris Convention and the Berne Convention, overseen by the WIPO, dealt with intellectual property rights.

Both treaties failed to create a framework for IP enforcement or judicial redress and remedies if one member country's IP rights were violated by another. The Paris Convention was thought to be weaker since it did not impart any intellectual property rights, but the Berne Convention had clauses that identified particular rights granted to contracting parties. With the increase in market prospects and trade liberalization, manufacturing units have been relocated to various developing countries, and several global value chains in various sectors have been established. However, after many talks and negotiations, the TRIPS agreement was implemented as the first comprehensive agreement dealing solely with intellectual property rights and enforcement, and it established criteria that member nations were required to follow. IP rights enforcement was given top priority, and efforts were made to strike the right balance between IP holders' rights and the public interest. As a result, there appears to be a shift in the approach to regulating IP rights from WIPO to WTO. TRIPS broadened the scope of protections to include not only patents, trademarks, and copyright, but also trade secrets, design protection, and geographical indications, as well as assumed enforcement obligations.

The development of commerce was also discussed to create a link between trade and intellectual property. It has been claimed that trade has evolved and is no longer simply about products, but also about information flowing from one location to another[9]. As a result, a minimum level of IP rights protection is required to facilitate trade. That's why the TRIPS agreement did not include any features irrelevant to trade. Non-trade-related components of the Berne Convention, such as Moral Rights, were removed because these rights are unrelated to the IP owner's

[9] Beatrice Lindstrom, 'Scaling Back Trips-Plus: An Analysis of Intellectual Property Provisions in Trade Agreements and Implications for Asia and The Pacific' (2010) 42 International Law and Politics 917- 980, 917

economic rights. Because they are non-economic, the trade-related components do not involve any inalienable rights of the authors.

TRIPS Agreement's Impact on IP

It should be emphasized that the TRIPS agreement kept a significant amount of the Paris and Berne Conventions, as well as a few others, but it also included several unique aspects. The agreement included a mechanism for any member to register complaints with the Dispute Settlement Body about other members' violations of the agreement's provisions (DSB). This was the first time that failure to comply with required IP responsibilities might be challenged, with retaliation or compensation as a possible remedy, based on the surrounding circumstances. Furthermore, the members no longer had the freedom to enable local manufacturing techniques while ignoring IP rights holders.

The inventive step has been associated with non-obviousness, which is a pre-condition for patent registration, although the term has not been defined as such in the agreement. This has permitted members to construe it in such a manner that some types of innovations, such as inventions involving novel uses of a known material in India, are not protected. Furthermore, a member can use exceptions to exclusive IP rights as long as they are limited in nature and meet the conditions outlined in the relevant provision. For example, under Article 30, members have been allowed to limit the rights of IP holders as long as they do not unreasonably interfere with a patent holder's normal exploitation or prejudice his legitimate interests. As a result, exceptions should be limited in scope and used only where necessary to protect the right holder's legitimate interests. It's worth noting that when the TRIPS agreement went into effect, it had a positive impact on the enforcement of IP rights, especially in developing countries.

The combined effect of Articles 7, 8, and 66.2 obligated developed countries to not only engage in technology trade with members who have an IP enforcement mechanism in place but also to provide incentives to industries for promoting and encouraging technology transfer to least developed countries to ensure their economic development. Figure 1 shows the progression of

growth rates in IP indexes, as well as significant improvements in patent, copyright, and trademark enforcement in the post-TRIPS period compared to the pre-TRIPS period.

period / country	1960-1965	1965-1970	1970-1975	1975-1980	1980-1985	1985-1990	1990-1995	1995-2000	2000-2005
Developed countries	4.59	4.88	0.65	16.15	5.13	8.05	**25.52**	9.84	1.56
Developing countries	1.17	1.75	1.61	6.17	2.46	3.00	**45.27**	32.00	16.12
Developing countries that have signed the agreement in 1995	1.24	1.65	0.92	6.71	2.56	3.19	**49.25**	29.84	15.72
Developing countries that have signed the agreement in 1996	0	3.63	0	3.96	2.66	2.94	16.79	**33.93**	18.73
Jordan*	0	0	36.92	0	0	0	44.94	**182.17**	13.18
Nepal**	-	0	0	0	0	0	0	0	**22.40**

Figure 1: Evolution of growth rates of IPRs protection indicator (in percent)[10]

The aforementioned premise is supported by an OECD study that found that in the case of patents, countries that modify their patent enforcement laws are more likely to be approached for licensing deals by partners from industrialized countries. As a result, the findings of the study backed up the argument that enhanced IP rights will likely accelerate technology transfer across member countries.

Following the TRIPS Era

The preceding discussion is about the TRIPS agreement's immediate impact. Other agreements had a vital part in boosting the value of IP in the ensuing period, though. As we transitioned from WIPO-managed treaties to the TRIPS agreement, nations were given little latitude in defining their domestic IP framework. This trend became even more pronounced in the post-TRIPS period, thanks to the introduction of several bilateral agreements such as free trade agreements (FTA) and preferential trade agreements (PTA), as well as multilateral treaties such

[10] Fatma Mrad, 'The Effects of Intellectual Property Rights Protection in The Technology Transfer Context on Economic Growth: The Case of Developing Countries' (2017) 2(23) Journal of Innovation Economics & Management 45

as the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), and the Marrakesh Treaty to Facilitate Access to Published Works for Blind Persons, Visually Impaired or Otherwise Print Disabled (Treaty for the Visually Impaired).

The following are the focal points on which these agreements are likely to go TRIPS-plus: they require strict enforcement mechanisms and strict penalties for IP rights violations; they usually compel the partners to provide broader protection of pharmaceutical patents while also limiting their power to frame domestic IP laws on parallel imports; and they require patent laws to include protection for inventions related to plants, which in the case of the TRIPS agreement is not included in the TRIPS agreement.

Bilateral Agreements Towards IP Asset Recognition

The TRIPS agreement paved the way for the monetization of intellectual property. On the one hand, it compelled developing countries to strengthen their domestic IP enforcement regimes, while on the other hand, it allowed for limited exceptions to the exclusive rights conferred on right holders subject to compliance with the principles and conditions enumerated in the provisions, such as Article 3 (Principle of National Treatment), Article 4 (Principle of the Most Favored Nations), and Article 5 (Principle of the Most Favored Nations) (for patents). As seen by the reports of many disputes before it, the WTO panel guaranteed that such standards are met.

In the Havana Club Case, the panel ruled that Section 211 of the Omnibus Appropriations Act of 1998 violated Article 3.1 because there was discrimination in the trademark renewal process between US citizens and foreign nationals. In the European Communities (EC)-Trademarks and Geographical Indications (GI) case, the panel used the "Effective Equality Test" to determine the validity of GI regulations imposed by European Communities on foreign countries to which the GI owner belonged, requiring them to enact certain laws for GI inspection. The observations made in the preceding cases have served as a guideline for governments when drafting IP-related legislation and regulations. However, some nations continue to operate an inadequate IP enforcement system under the guise of TRIPs flexibilities, which have historically been a huge

setback for IP holders. The US submitted a complaint about violations of Articles 9, 41, 46, 59, and 61 of the TRIPs agreements in the China-Enforcement report.

One of the difficulties was China's criminal law and the Supreme People's Court's interpretations of these laws, which had the effect of establishing a minimum limit for criminal procedures and punishments for infringements of IP rights (copyright and trademarks). Article 61 does not compel members to impose criminal penalties for all copyright and trademark infringements, according to the panel, so China did not breach it. The exclusion of those infringements that do not fall within the specified thresholds in terms of turnover, profit, sales, or copies of infringing goods is not sufficient to constitute a violation of the aforementioned clause. The meaning of the word "commercial scale" must be determined by market conditions. As a result, members have frequently construed the agreement's flexible phrasing to avoid the requirement of enforcing effective IP enforcement.

As a result, these agreements can be regarded to have played a critical part in transforming IP into an asset by setting strict IP regulations. The cumulative effect of those agreements accelerated the development of IP standardization, and by explicitly recognizing IP as an asset, they created a perception among investors that IP should be considered when making any investment. The US-Korea Free Trade Agreement, for example, defined investment as "any asset that an investor possesses or controls, directly or indirectly, that has the characteristics of an investment," and listed IP rights as one of the ways to invest. Furthermore, the introduction of BITs clarified the role of IP creation as a type of investment. By embracing IP protection requirements as a type of investment, BITs also raised the problem of IP protection standards. One of the challenges in considering IP as an asset was determining the criterion for expropriation, which is critical in investment disputes. As a resolution, the notion of "indirect expropriation" was adopted, which indicates that an investor's IP value is reduced due to interference in its correct realization. As a result, the significance of an extensive IP enforcement mechanism in the host country has been emphasized to ensure that remedies are available in the event of an infringement. Furthermore, unlike the TRIPs, which lack clarity on compensation,

compensation in investment disputes is based on the "fair market value of the expropriated investment shortly before the expropriation took place," which is often higher.

Furthermore, unlike the TRIPs, which lack clarity on compensation, compensation in investment disputes is based on the "fair market value of the expropriated investment shortly before the expropriation took place," which is often higher. However, it was observed that the scope of the positive right conferred under the TRIPS agreement and balancing it with the state's obligation to regulate public health involve legal issues to be appropriately dealt with by the WTO as per the norms of international IP law. Later, the WTO panel upheld the conformity of the TPP Act with the TRIPs agreement as the complainant failed to establish that the act unjustifiably encumbered the use of trademarks in contravention of Article 20 which was the strongest ground for the complaint. Similarly, in the current investment battle between Canada and a US-based pharmaceutical corporation, Eli Lilly100, for revocation of Zyprexa and Strattera patents for lack of utility under Canadian patent law, based on the 'promise utility theory.' The corporation asserted that the utility concept intended under the Canadian Patent Law had undergone a significant change in the time between the award of the challenged patents and their subsequent revocation, claiming that this was a violation of NAFTA terms. The tribunal, however, dismissed these claims because the changes were not judged to be significant enough to materially alter the effect of the legislation.

DOMESTIC IP REGULATIONS

India

Since its foundation, India's intellectual property regime has seen significant changes. IP law has long been a fascinating topic in India, and it has always been a part of legal and political arguments. The importance of preserving intellectual property was recognized early on, and laws were enacted to protect all types of IP. Multiple changes and rules were subsequently enacted to conform to worldwide IP standards and properly control IP rights. India has ratified several important international treaties, including the Berne Convention, the Paris Convention,

the World Trade Organization, and the TRIPS Agreement, as well as accords dealing with procedural issues of intellectual property.

The original debates around India's opposition to extending patent protection for "product" patents to safeguard the generic business have faded away[11]. The administration, legislature, and court have all worked hard to increase intellectual property enforcement in India. The time it takes to fill out and register patents, trademarks, and copyright has been reduced to a greater extent, and faster procedures have been implemented to promote more filings. Rebates in fees have been offered at various stages of the IP registration process, as well as funding options, under the start-up India initiative, to create a conducive climate for start-ups to engage in producing IP assets. The below table and graph reveal the growth of IP filings along with the constant rise in GDP from 2010 - 2019.

IP Filings (Resident + Abroad, Including Regional) and Economy

Year	Patent	Trademark (class count)	Industrial Design (design count)	GDP (Constant 2017 US$)
2010	14,870	190,326	6,738	5,217.54
2011	15,897	194,796	8,179	5,491.01
2012	18,201	197,877	7,137	5,790.62
2013	20,906	204,987	7,006	6,160.42
2014	22,444	237,484	8,021	6,616.92
2015	23,990	283,497	9,256	7,146.03
2016	25,853	294,412	7,682	7,736.02
2017	28,009	272,707	10,374	8,280.94
2018	30,035	333,447	15,211	8,767.69
2019	34,015	369,905	12,753	9,229.18

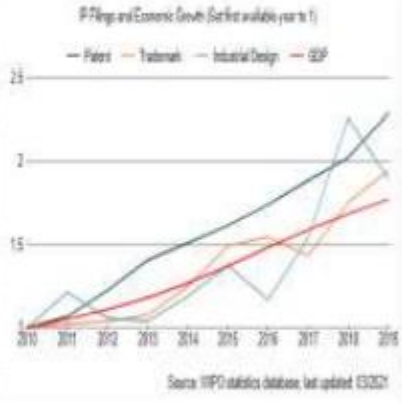

Figure 2: IP Filings and Economic Growth in 2010-2019

In addition, recent developments include a commitment to implement the National IP Policy, 2016, to build the entire edifice of a revamped IP regime, though the same has received

[11] Jayashree Watal & Antony Taubman, 'The Making of the TRIPS Agreement Personal insights from the Uruguay Round negotiations' [2015] WTO

widespread criticism for being devoid of substance; establishing commercial courts[12] to handle IP matters as well as other commercial disputes; and ratifying the Lisbon, Nice, and Locarno WIPO Agreements. Let us address the specific steps made to increase IP enforcement in light of these changes.

Strengthening IP Enforcement: Balancing IP Rights and Public Interest Protection

The current global IP index report commended India's efforts to improve the enforceability of IP rights. According to the report, the national IP environment grew steadily from 2012 (IP index score: 24.96 per cent) to 2021, the 9th edition (IP index: 38.40 per cent), representing a 13.44 per cent improvement. This expansion has been linked to ongoing efforts to participate in international IP activities, such as the WIPO internet treaties noted in the preceding paragraph.

As previously noted, India's IP laws are TRIPS compliant, and the grounds and processes for enforcing IP rights are derived from the separate legislations for each IP. Piracy and counterfeiting of goods have been regarded as the major concerns in IP enforcement, with India being ranked as the world's third-largest source of counterfeit and pirated goods. Except for patents and designs, all types of intellectual property have both civil and criminal remedies. Injunctions and damages are among the civil remedies[13] available. The Maharashtra Cyber Digital Crimes Unit has also contributed to the prevention of digital piracy, in addition to the judiciary's efforts. In addition, the Cinematograph (Amendment) Bill, 2021, has been proposed to include additional clauses criminalizing recording or transmitting a film without written permission from the film's producer. Even the patent judgment on Section 3(k) has been praised for stressing that technical contribution must be considered when considering the patentability of the computer software-based invention[14].

Though the world community has praised these efforts, there have been rare instances where India has been chastised by foreign IP holders. For example, the Delhi High Court's division bench adopted the theory of fair use to allow the use of material from the appellants' books,

[12] Commercial Courts Act 2015
[13] Copyright (Amendment) Act 2012, s 55
[14] *Ferid Allani v Union of India & Ors* WP C 7 of 2014

regardless of quantity, as long as it was reasonably necessary to utilize the content for academic instruction[15]. Similarly, the pharmaceutical sector has consistently criticized Section 3(d) of the Patents Act for limiting the breadth of protection and for discriminating based on the field of innovation, which is banned under Article 27(1) of the TRIPS agreement. However, the provision has been justified by saying that it does not violate the agreement and only serves to inhibit patent evergreening. So far, no WTO dispute has been brought against India in this regard, but it is expected that once the restriction on non-violation complaints is lifted, nations such as the United States and Switzerland will follow suit. Moreover, India has always been a proponent of access to lower-cost medications and has promoted this concept in different international forums. These policies strike a compromise between protecting IP rights and safeguarding the public interest.

India's Stand on BITs and Free Trade Agreements

India's experience with investment agreements has been less than ideal. Many investment arbitrations have been filed against India[16] in the hopes of compelling it to take a "protectionist stance" in the model investment treaty released by the Indian government. In contrast to the asset-oriented definition, the model treaty for investment has an enterprise-based definition of investment that excludes intellectual property. However, the agreement includes patent-based protection for such businesses if they are recognized by the state party's laws. Furthermore, in contrast to other investment treaties, which typically include the United States and the United Kingdom as one the parties, compulsory licensing only be used in limited circumstances.

The model treaty allows for the issuance of a compulsory license on TRIPS-compliant terms. The lack of MFN clauses in the treaty raises more concerns, as it would mean that investors would be unable to seek the highest level of protection available in other BITs to which India is a party, as well as a possible violation of the TRIPS agreement, which met to ensure with the MFN principle. Negotiations for a free trade agreement between Europe and India began before the

[15] *University of Oxford v Rameshwari Photocopy* 2016 SCC OnLine Del 6229

[16] Since the opening of the economy, India has been a party to BITs with 83 different countries. As demonstrated by the UNCTAD, there are a total of 17 known investor-state dispute settlement (ISDS) cases were filed against India by the end of 2015

model treaty was announced, but they have yet to be completed. The deal is said to have a part that establishes stronger IP protection rules for investors than the TRIPS agreement. However, after the model treaty, India has indicated its opposition to implementing most of the suggested TRIPS-plus elements in domestic IP laws in the Regional Comprehensive Economic Partnership (RCEP) for a free trade deal. As a result, for the time being, India cannot be claimed to be willing to provide a higher level of protection to investors' intellectual property rights.

INTELLECTUAL PROPERTY IN M&A TRANSACTIONS

Overview in General

M&A is widely regarded as an important aspect of company strategy around the world. Corporations are more likely to participate in M&A transactions during times of market difficulty, according to previous experience. Furthermore, unlike in the past, merger waves have become increasingly common in recent years[17]. With this information, it must be determined whether IP plays a significant role in driving cross-national M&A deals.

The enhancement of IP rights has been connected to an increase in IP-driven M&A[18] as well as asset realization of IP. The concept of evaluating IP as a major consideration in a deal aligns with the acquirer company's ultimate goal of M&A, which is to increase shareholder value. There was a considerable surge in cross-border mergers as the fifth merger wave progressed. The desire to acquire intangible assets was one of the most compelling reasons to engage in M&A. Furthermore, surveys say that firms with intangible assets are seen to have a higher value than organizations without intangible assets, particularly firms looking to diversify their portfolios. The rise of IP-driven M&A as a result of the previously described reforms has resulted in a

[17] MC de Jong, 'Global merger waves and cultural distance the effect of cultural distances on cross-border M&A transactions' (2018) Erasmus University Rotterdam 5-6. It is to be noted that the growth of M&A has been factored in based on merger waves which have been noticed to occur during market distress. Till 2000, the world had faced 5 Merger waves, with one being highly global. Subsequently, the 6th and 7th waves occurred within a very short span

[18] Iftekhar Hasan, 'The impacts of intellectual property rights protection on cross-border M&As' (2017) 17 Bank of Finland Research Discussion Papers

growing range of industries becoming IP-intensive.[19] Furthermore, unlike in the past, when only patents were granted, trademarks in the form of a brand value are developing as relevant assets.

M&A deals with the main driver a few of the first examples of brand value-driven mergers and acquisitions are as follows: The Grand Metropolitan of Great Britain decided to purchase Pillsbury to obtain well-known brands such as "Burger King" and "Haagen Dazs" at $5.7 billion purchase price. The amount of time and money required to establish a brand with such great value was the motivating force behind such a deal. The business sector[20] has gradually realized the need of focusing on organizations having a stronger IP portfolio as a source of growth. The soaring desire to increase investment in developing and purchasing IP stemmed from the certainty that IP reforms were being implemented around the globe to comply with the TRIPS agreement. Later on, the inclusion of an IP enforcement chapter in some FTAs and BITs to bestow higher-level IP protection accelerated the current trend. Despite the growing understanding of intellectual property, businesses continue to ignore it.

The soaring desire to increase investment in developing and purchasing IP stemmed from the certainty that IP changes were being implemented around the globe as part of an international mandate to comply with the TRIPS agreement. Later, the introduction of an IP enforcement chapter in some FTAs and BITs to provide higher-level IP protection accelerated the current trend. Despite growing IP awareness, corporations often overlook or fail to thoroughly analyze the target companies' IP assets. On the flip hand, the target firm may overlook its IP assets while calculating the entire worth of its corporate assets to negotiate transactions. Though the situation is improving over time, intangible assets remain vulnerable to erroneous appraisal due to their complex structure.

[19] The IP-intensive industries are defined as "those having above-average use of IPR per employee". See in European Union Intellectual Property Office, IPR-intensive industries and economic performance in the European Union

[20] Katrin Hussinger, 'Resource complementarity and value capture in firm acquisitions: The role of intellectual property rights' (2014) 35 Strat Mgmt J 1763

Valuation of IP in M&A Transactions

The exponential growth of corporate intangible assets has altered the landscape for calculating asset value. In the five largest worldwide companies, as seen in the graph below, there has been a dramatic transition from tangible to intangible assets during the last 45 years. IP has gained the status of an autonomous and valuable economic asset as a result of a steady shift in world perspective. As a result, the approach to intellectual property has moved from an "ex-post-facto" (ancillary component) to an "ex-ante model" (main component). The increasing value of intangible assets has brought attention to the need to define an effective IP valuation system to maximize profits.

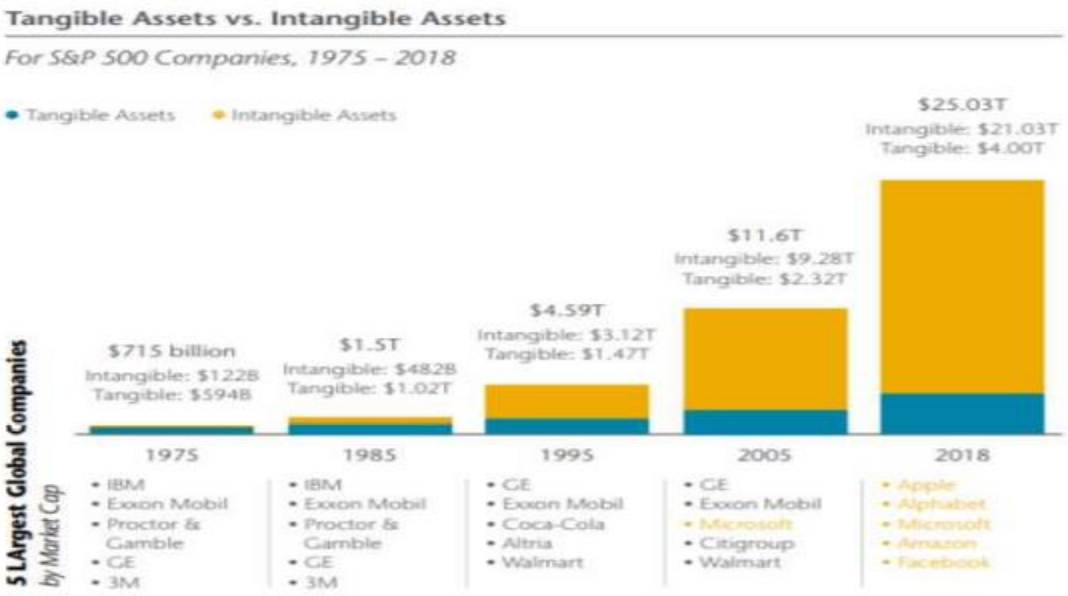

Figure 3: Shift from Tangible to Intangible Assets

Corporations have failed to appreciate the potential worth of IP[21] despite increased IP awareness, according to the experts. Previously, organizations failed to effectively capture the value of IP due to the lack of an alternative technique for assessing it, resulting in lesser returns when compared to the cost of producing it. This has prompted many businesses to focus on

[21] Jan Friese & Ors, 'Intellectual Property: An underestimated and undermanaged asset? (2006) 3(1) Journal of Business Chemistry 42-48

creating and preserving their intellectual property portfolios. Revenues are generated by selling or licensing IPs after identifying a potential market[22]. As a result, the method of realizing the value of IP must be extremely efficient, as it affects the amount of income that can be harvested. These mechanisms have also changed over time and become more efficient as states' attitudes toward intellectual property have shifted in the last decade.

The difficulty with IP valuation[23] is that it must be separated from other types of intangible assets, making the task extremely difficult. Another important consideration in IP valuation is the way it can be portrayed. There are other elements to consider in the process, such as the industry in question, the company's overall market share, annual turnover, the competitive nature of the market, the extent of IP protection, the remaining period of IP protection (in the case of patents and copyrights), and so on[24]. The following are a few examples of when determining the true value of IP requires further consideration.

A. The value of IP is also affected by ongoing technological and legal improvements. Counterfeit and pirated items, for example, have a negative influence on the value of IP-protected commodities. The goods' worth is diminished, which has an impact on their price. Any corporation looking to buy a company with IP that is vulnerable to such operations should keep this in mind when negotiating the deal value[25].

B. Certain factors influence the value of IP from the acquirer's perspective, but this is not represented on the balance sheet or in any other way. As a result, an acquirer firm may easily fall for a greater value while the true value is far lower. This can occur when competitors can create a comparable product without infringing on the target company's intellectual property.

[22] Ash Nagdev & Ors, 'IP as Venture Capital - A Case Study of Microsoft IP Ventures' [2008] WAKE Forest Intell Prop LJ 197

[23] It needs to be understood that the value in the case of IP is connected with its intrinsic feature of imparting exclusive use for a certain time to circumvent competitors in a marketplace. The quantitative value of IP is proportional to the revenue generated by the product developed by applying such IP

[24] Parr, 'Singapore-WIPO Joint Training Course for Asia and the Pacific Region on Intellectual Property and Technopreneurship Development, Module 6: IP Valuation Issues and Strategies' (1999) WIPO 11

[25] Daniel Glazer, 'Intellectual Property: Stock Purchases and Mergers' (2012) 102 Trademark Rep 1050

As a result, the value of IP assets will be reduced, and such variables must be considered when determining a more accurate value for IP assets.[26]

C. The sale of Nortel Networks Corporation's patent portfolio exemplifies the ambiguous nature of IP valuation. The value indicated by the external auditors and the ultimate bidding value were found to be vastly different. Google offered to purchase the portfolio for a substantially lower price during the bidding process but was refused. As a result, the corporation not only sold the patents for more than expected worth but also at a higher price than other corporate assets were sold for. In contrast to the target company's interests, it can be claimed that depending just on an independent expert may not be sufficient, and as M&A deals are conducted in the corners of a room, there is a risk of miscommunication.

As a result of the aforementioned considerations, determining the true worth of the IP is difficult. Regardless of the complexities, it is the acquirer's responsibility to examine the potential risk and liabilities associated with the target company's IP asset, which will diminish its value. On the other hand, to ensure a good return, the target business must do a separate valuation for the entire IP portfolio. In the next section, we'll look at certain legal difficulties that arise from the inherent nature of IP assets in M&A deals.

Legal issues related to Intellectual Property in M&A

Due diligence is at the heart of every M&A deal because it decides the deal's fate. When assets include IP, the stakes are higher since, as previously said, determining IP valuation is difficult. Corporations frequently make the mistake of believing that since they understand how markets work, they can properly do due diligence. However, they are unaware of the complexity of the process, which is exacerbated by the growth in IP valuation following TRIPS[27]. IP due diligence benefits both buyers and sellers by ensuring that they are not paying money to preserve useless IP and informing them of any potential danger or issue with IP that could stymie sales. The most

[26] Camelia Gardot, 'Intellectual Issues in Mergers and Acquisitions' (2017) 10 Int'l In-House Counsel J 1, 3
[27] Charles R McManis, 'Intellectual Property and International Mergers and Acquisitions' (1998) 66(4) University of Cincinnati Law Review 1036

well-known example of poor IP due diligence is the Volkswagen-Rolls-Royce Motor merger. Volkswagen was humiliated in this transaction due to its lack of IP due diligence.

Volkswagen paid 780 million dollars for Rolls-Royce Motor Cars, only to discover that the Rolls-Royce trademark was controlled by Rolls-Royce PLC, not Vickers LTD, and Rolls-Royce PLC - transferred its name to BMW for 66 million dollars. Volkswagen owns the Rolls-Royce automobile company and produces its cars, but it is not allowed to use the Rolls-Royce brand. Later, Volkswagen reached an agreement with BMW, allowing them to utilize Bentley.

The following is an overview of the most important intellectual property actions and challenges associated with a typical purchase of a privately owned firm. The seller must have expert IP counsel to advise on and oversee these concerns, working closely with its principal M&A counsel. The sellers will be better equipped and go through a product sales process if these actions are meticulously planned and related concerns are correctly anticipated.

Due Diligence of IP assets

a. The acquirer must first analyze outflow, which is the amount necessary to employ IP assets for use in the companies, and then proceed to figure yearly inflow, which is the income earned from the IP portfolio, to assess net cash flow (expected profit from a deal). The target firm's previous earnings might be used as a benchmark for estimating prospects. Many variables might affect the net flow, including legal and technical advances, competition in the relevant industry, and, in the case of international M&A transactions, foreign currency exchange rates, and legal compliances, among others.

b. IP Protection Status and Ownership Confirmation: The validity of any IP has a direct impact on IP worth. This is also true when it comes to ownership. Cross-checking the application status of all IP assets, as well as their matching status in other nations and ownership, is a must to avoid any problems later. (For example, Section 6 of India's National Biodiversity Act (NBA) of 2002 requires an applicant to get clearance from the NBA authority before using biological material in an invention, and a patent issuance is contingent on such approval.) In the absence of a comprehensive inquiry, the purchaser will very certainly fail to obtain such information).

c. Current and Future Litigation: The acquirer must maintain track of all existing litigation involving the target company's IP assets. It must also be aware of the possibility of approaching patent invalidation, trademark passing off challenge, or dispute by a third-party claiming IP of the target firm, as was the case with the YouTube purchase detailed above. Furthermore, trademarks are vulnerable to reputational dilution.

d. Looking for more information about applications that have not yet been published: Many IP petitions filed by the target entity are unlikely to have been published according to the filing procedure timeline. As a result, the acquirer is expected to validate the presence of such applications as well. Furthermore, the acquirer must actively seek details concerning unprotected IPs and keep a separate database for that purpose.

Due Diligence Failures in the Recent Past

Even though corporates are becoming more cognizant of IP, the exhaustive nature of the due diligence process causes them to overlook important data. Due to their ignorance, most corporations fail to determine the true worth of their IP assets and end up paying more. The "Winning Curse" has been used to describe this behaviour. Apart from that, three examples of improper due diligence are given further down.

a. Sanofi neglected to cross-check product approval information in all of the geographic regions where the target firm was engaged during the IP-driven merger between Sanofi and Aventis Pharmaceuticals. As a result, patent challenges were filed against three of Sanofi's most popular medications.

b. Viacom filed an infringement lawsuit in response to Google's notorious acquisition of YouTube. The contradicting nature of YouTube's business with third parties was overlooked by Google.

The foregoing examples demonstrate that even worldwide firms, such as the ones described above, that routinely engage in commercial transactions, such as mergers and acquisitions, are subject to making due diligence mistakes.

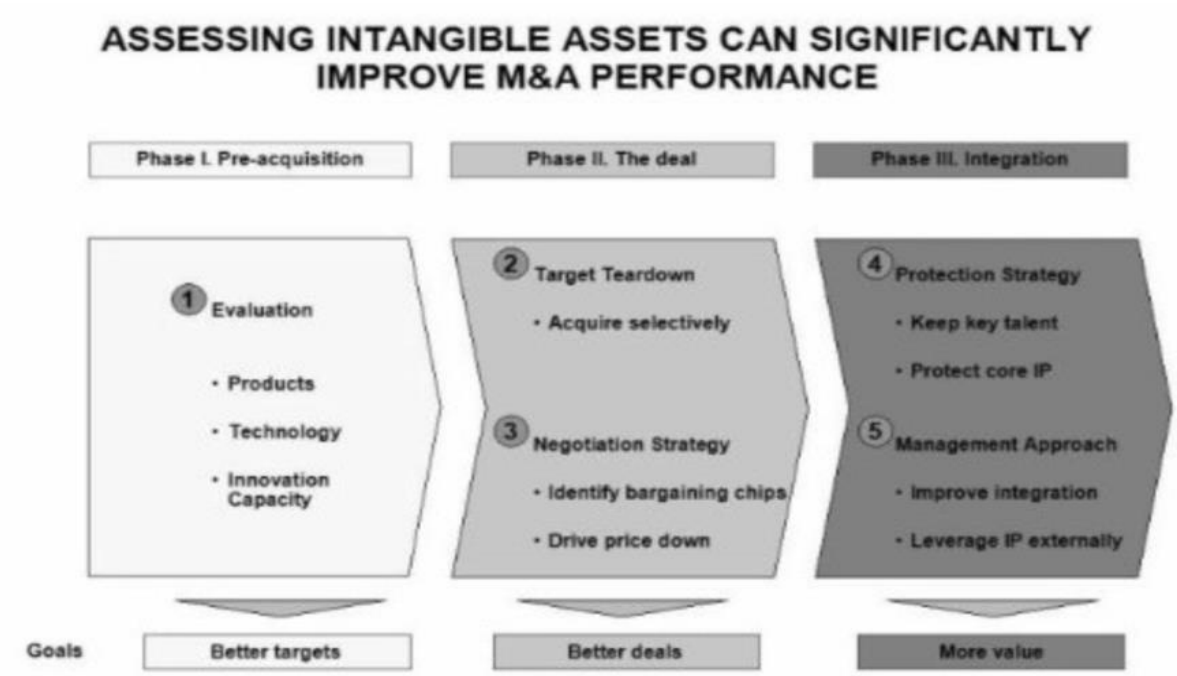

Figure 4: Stages of IP evaluation in M&A transactions.

IP-driven M&A transactions are seeing increased growth

M&A is a common strategy for growing a company's business and establishing a larger market presence. This might be accomplished by obtaining valuable IP assets from another firm. As previously said, IP assets are quite valuable in most businesses nowadays, therefore having a strong IP portfolio has become a must to succeed in the market. The demand for businesses to stay ahead of the competition in the technology industry requires a strategic strategy. One such incident occurred in 2012 when Google had to purchase Motorola Mobility to withstand aggressive attempts against Android[28] by competitors including Microsoft and Apple. Similarly, companies in IP-intensive sectors frequently employ M&A to increase their IP portfolio to stay competitive. It is necessary to address the question of whether IP strengthening has any influence on the role of IP-driven M&A.

[28] Philip Stenholm & Mark Wallertoft, 'The Value Creation of Intellectual Property in Mergers and Acquisitions' [2016] Lund University

As illustrated by the statistics below, a stronger IPR framework of a country enhances the likelihood of cross-border as well as domestic M&A[29] involving hi-tech businesses. A study was undertaken on high-tech cross-border mergers that occurred between 1980 and 2008 to see if increasing IPR affected the frequency of such transactions.

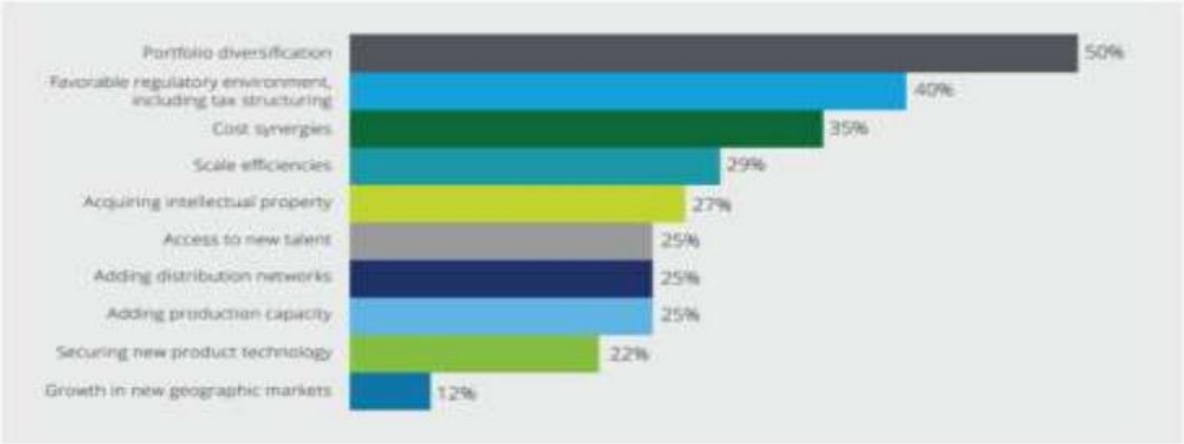

Figure 5: Key drivers of Cross-border M&A[30]

In a related issue, a new report[31] supports the rising relevance of IP assets in driving cross-border M&A internationally in recent years. According to the data in the graph above, 27 per cent of M&A deals are motivated by the desire to acquire IP assets. As a result of the aforementioned facts, it can be concluded that there is no other primary reason for the increase of IP-driven M&A transactions in the last two decades if not for the strict IP rights enforcement environment.

[29] Mika Pajarinen, 'Does Patenting Increase the Probability of Being Acquired? Evidence From CrossBorder and Domestic Acquisitions' (2004) 891 ETLA Discussion Papers; However, it is to be noted that as per patient-specific research, it was found that where a target company has a strong patent portfolio, there is a higher likelihood that it will be acquired by a foreign acquirer as compared to a domestic acquirer. But since the research is old so deviations from the findings can be reasonably expected (A limitation of the research is that it was conducted in the context of Finland)

[30] Source: Deloitte analysis through primary survey

[31] M&A Institute Deloitte, 'Cross-border M&A: Springboard to global growth' (*Deloitte*, 2017) <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/mergers-acqisitions/us-m-a-crossborder-pov-spread.pdf> accessed 01 November 2022

In the pharmaceutical industry, M&A is being pushed by the patent cliff

Patents have undeniably been the driving factor behind the majority of M&A deals involving IP-intensive businesses. The effort and money spent designing something and eventually obtaining patent protection, as well as the benefits, are enormous (if commercialized). As a result, the prospect of investing so much in a new product without knowing if it would be profitable is quite daunting. This is especially troublesome when a pharma company's essential patent covering blockbuster pharmaceuticals is ready to expire. The "patent cliff" refers to a dramatic drop in revenue right after a patent expires, and the fear of losing revenue has prompted the need to prepare and mitigate the loss. The most common technique for avoiding the loss is to diversify its patent portal through M&A deals. A few such mergers and acquisitions have been completed to combat the patent cliff phenomenon.

Acquirer Company	**Target Company**	**Year**	**Value**	**Reason**
Pfizer	Wyeth	2009	$68 billion	Approaching the expiration of Lipitor in absence of any drug in the pipeline triggered Pfizer to diversify by acquiring Wyeth
Merck	Schering-plough	2009	$67 billion	For acquiring several valuable drugs
Bristol-Meyer Squibb	Celgene	2019	$74 billion	Combining drug portfolios etc., to expand business

Abbvie	Allergan	2020	$63 billion	Diversification of market portfolio.

Table 1: M&A is being pushed by the patent cliff.

Brand Value-Driven Mergers and Acquisitions

Brands have long played an important role in shaping customer perceptions, which have a direct impact on a company's market value. Even though trademarks are a significant asset for a firm, it is generally assumed that they do not drive a transaction[32]. This view appears to have the impact of undervaluing brand value. The target company's brand might be blended with the acquirer's brand or utilized separately to enter a new geographical market in the context of M&A driven by brand value. Otherwise, the purchased mark might be licensed for revenue. [33]M&A from two industries are highlighted in the table below. The goal is to examine how corporations justify going into deals in two very different sectors. The fundamental reason, as can be seen, was to get brand value/trademarks linked with the target firms. In addition, Indian FMCG businesses are upping their game by purchasing brands from overseas corporations.

Acquirer Company	**Target Company**	**Year**	**Share (In %)**	**Value**	**Reason**
INDUSTRY FOR LUXURY FASHION GOODS					

[32] 'How Should Trade Marks Be Incorporated into M&A' (2014) 239 Managing Intell Prop 110
[33] Su-Lin Ang, 'Trade Marks in Mergers and Acquisitions' (2008) 2 Int'l In-House Counsel J 732-739, 737

Michael Kors	Jimmy Cho	2017	100	$1.2 billion	For diversification in the luxury shoe market.
Michael Kors	Versace	2018	100	$2.1 billion	For diversification of luxury brands and enhancing the production of which Versace has a great deal of expertise.
FMCG INDUSTRY					
Havells India Ltd.	Lloyd Electric	2017	--	INR16 billion	The deal includes absolute, exclusive ownership and rights to the entire intellectual property of Lloyd consumer durables, its logo, trademark, goodwill and attendant rights
Hindustan Unilever Ltd	GlaxoSmithKline Consumer Healthcare Limited	2020	--	INR 317 billion plus	For acquiring major brands like Horlicks, Boost, Malkova, etc.

				30.45 billion	

Table 2: Brand Value-Driven Mergers and Acquisitions.

As can be observed from the preceding discussion, the aforementioned M&A agreements in the respective industries including the United States or India as at least one of the parties have been predominantly driven by various types of IP, such as patents, trademarks, and copyrights. The justification for acquiring the target company's IP portfolio has been stated as either maintaining market competitiveness or increasing market share with the anticipated increase in revenue creation. Furthermore, while American corporations from all of the aforementioned industries are purportedly engaging in these transactions, Indian companies from the FMCG industry are also actively participating. In the end, M&A for IP acquisition has been increasingly prevalent in recent years.

LIMITATIONS

***There are certain limitations to this study which are as follows*:**

a. Intellectual Property Documentation

The seller must have a detailed list of all IP (and accompanying paperwork) that is significant to the seller's business ready for the acquirer's assessment, including:

- Patents and applications for patents (including patent numbers, jurisdictions covered, filing, registration, and issue dates)
- Trademarks and service marks
- Key trade secrets and intellectual know-how
- Confidentiality and invention assignment agreements with workers and consultants
- Third-party technology licenses to the selling firm
- Third-party technology li to the selling company

A variety of these elements will almost always need to be mentioned in the purchase agreement's disclosure schedule. To make due diligence easier for an acquirer, the seller will normally keep all of these papers (excluding trade secrets) in a virtual data room. Assembling these papers, as well as setting up and maintaining the data room, is a time-consuming operation for the seller, therefore it must be done as soon as feasible throughout the selling process.

b. Intellectual Property Development and Acquisition

The degree to which the selling company owns (or has the right to use) all of the IP that is crucial to its present and projected operations will be checked by the acquirer. It is not rare for private enterprises, particularly those that did not retain IP counsel early in their development, to discover that ownership of (or the right to use) crucial intellectual property is unclear. If the seller's IP was generated in collaboration with another party or with government, academic, or military resources, these agreements may limit the seller's ability to transfer the IP, require third-party sharing or ownership of the IP, or require payment in connection with the acquisition.

c. Issues with Open-Source Software

Many software engineers and developers use open-source software or incorporate it into their product or technology development. However, a selling company's use or incorporation of open-source software might cause ownership, licensing, and compliance concerns for an acquirer. One difficulty is that certain open-source licenses compel users who alter and distribute open-source software to make their source code publicly available and to license their software to third parties under the same conditions as the open-source license. Open-source concerns could be a deal-breaker for an acquirer who relies on the ability to use the seller's technology entirely. A seller considering an acquisition might use software such as Black Duck or Palamida to check for open-source issues ahead of time. These tools can scan large amounts of code and compare it to open-source code databases, allowing for a fast assessment of any issues.

d. Ownership of Intellectual Property Representations and Warranties

IP representations and warranties, like other representations and warranties in the definitive purchase agreement, often serve two goals in a private firm acquisition. First, if the acquirer discovers that the IP representations and warranties were false when made (or will be false as of the scheduled closing date), the acquirer may not be compelled to complete the transaction. Second, if the IP representations and warranties are false at either of these times, the acquirer may be entitled to post-closing indemnification for any damages resulting from the seller's deception. The seller will wish to restrict this risk to a small fraction of the purchase price (kept in trust by a third party), while the acquirer may demand the right to reclaim the full purchase price if the IP claims and warranties prove to be false.

However, the seller will want to make sure that it is not obligated to make any representations or warranties about its IP ownership that pertain to the period after the closing, when factors beyond its control (such as prior agreements entered into by the acquirer) may limit the seller's or acquirer's ability to exploit the IP. The following are some examples of issues that may encumber or impede the seller's capacity to use its IP once an acquisition closes:

- Third-party claims that patents are invalid (because of the existence of "prior art" or other reasons).
- Rights of first refusal, exclusivity, or other similar rights in the IP in favour of third parties.
- Rights of the first refusal, exclusivity, or other similar rights in the IP in favour of third parties.
- Failure to secure the essential third-party consent for the IP to be transferred to the vendor (if not originally developed by the company).
- Broad IP rights are granted to third parties who compete or may contest with the seller.

e. Disputes related to IP

An acquirer will investigate the seller's participation in any current or previous intellectual property lawsuits or other conflicts. This examination may include determining if the seller is

vulnerable to IP claims and how aggressively it has attempted to defend its rights. Unsettled third-party claims that have not yet led to litigation, procedures before the USPTO, and the conditions of previous claims, disputes, and lawsuit settlements are all of the particular relevance (including releases and covenants not to sue).

Current IP litigation, as well as unsettled claims, may prompt the acquirer to demand a specific indemnity to shield itself from the danger of a large judgment. When attempting to negotiate the terms of an acquisition, the selling company and its advisors must be prepared for the acquirer's attempts to erode an agreement purchase price through one special indemnification provision as compensation for purchasing a company with pending litigation or risk of later IP-related litigation. In conjunction with a requirement for indemnification, the selling business should expect the acquirer to want an outright price decrease or an extra holdback or escrow of some percentage of the acquisition price above the amount held in escrow or held back for general indemnity claims.

Between the signing of a purchase agreement and closure, the seller must additionally consider the implications of a substantial IP-related claim. The acquirer's preferred negotiation stance is that if such a claim is made, the acquirer should not be required to consummate the transaction. A closing condition like this is difficult for the seller to accept since the selling firm and its investors demand a high degree of assurance of closure. Third parties may be enticed to file claims during this time, believing that the anticipated purchase would provide them more power for a rapid settlement.

CONCLUSION

The path to IP recognition did not follow a straight line. The most common issue was that IP would be difficult to recognize due to its abstract character. However, as the value of ideas and concepts rose, so did the necessity to provide exclusive rights to them. The goal of providing such rights to exclude others was to motivate people to produce IP for mankind's intellectual advancement and to engage in producing socially important technologies. By giving exclusive rights for a short time and then releasing them into the public domain, a utilitarian balance of

interests between the two sectors may be maintained, a utilitarian principle that provided the basis for states awarding IP rights. Regardless, it is unsurprising that even after being recognized as a legislative right, the exclusive rights provided to IP owners are still resisted.

Furthermore, the emergence of the internet had a significant impact on the Media and Entertainment sector, since it altered the general functioning of the industry and boosted competition from organizations that manage online music platforms. Based on the discussion and analysis, it can be stated that intellectual property plays a critical role in M&A transactions and has become a major motivator for companies to pursue such agreements. In the absence of a strong enforcement system, the benefits of purchasing a target firm to acquire its IP portfolio would be nullified by acts of infringement and the propagation of counterfeit/pirated goods, it is underlined that the strength of IP rights is of vital importance to incentivize such mergers. However, countries must keep in mind that efforts to improve IP reforms will always be at odds with the public interest, and the only way to resolve this conflict is to maintain a balance of interests.