

Risk Management Plays a Critical Role in Protecting Intellectual Property

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Abstract

The aim of this paper is to have an in-depth analysis and collate the key elements and processes necessary for the development of an intellectual property risk management framework. Thus, it is considered what kind of activities should be conducted when managing intellectual property risks, i.e, the risk management process, and what kinds of tools and techniques exist to support intellectual property risk management. To be able to answer the research questions, several objectives need to be fulfilled. The objectives of the study are to: Identify the distinctive character of intellectual property. Define the concepts 'risk' and 'risk management". Identify and classify intellectual property risks Identify and describe different intellectual property risk management processes, approaches, and assisting tools and techniques.

The study will analyse major risk prevention strategies (ex-ante risk management), risk mitigation strategies (ex-ante risk management), and risk coping strategies (ex-post risk management) that can be employed by business when dealing with intellectual property risks. The paper will further seek to understand the determinants of these different risk management strategies.

Keywords:- Risk-Management, Intellectual Property, Virtually and Globalization

Introduction

In an economy powered by knowledge and creativity, intellectual property is a significant corporate asset for companies virtually in every industry. Intellectual property enables businesses to create value in different ways and helps them gain sustainable competitive advantage. Intellectual property, a prerequisite for modern commerce, is the mechanism used by companies to exploit and protect their innovations. It defines what a company is and what it does, yet it is the least understood, most fragile asset a company possesses. Achieving and maintaining the value of intellectual property requires an understanding of what assets can be protected, how they can be protected and how they can be used to generate revenues.

Intellectual property is the term used to describe the intangible assets associated with a company's technological innovations, ideas, inventions, designs, artistic and literary works, goodwill, and information. Intellectual property laws give monopoly rights to those who possess the assets. Given the economic importance of these intangible assets, companies need to take appropriate steps to ensure that they qualify for the maximum amount of legal protection to benefit commercially.

A reasoned intellectual property strategy is crucial to any business and the key to the same is total awareness combined with adequate planning. There are various risk factors that companies must deal with while evolving an intellectual property strategy. This is further complicated with increasing volume of business and commercial transactions.

Moving online, giving rise to inherent risks of validity and enforcement of electronic contracts and new intellectual property issues. It is therefore pertinent that companies look at mitigating the risks associated in creating an intellectual property portfolio.

Risk is a peril or the possibility of exposure to harm and depending on the nature of risk the effects could be minimal or catastrophic. A lot of definitions have been presented for risks. The main commonality between many of these definitions is that risks are uncertain events thus having a probabilistic dimension. On the other hand, the most prevalent difference is the positive aspect of risks. Basically, when things are uncertain, there is always a chance that things may go better or worse than expected. Risk being an uncertain event with a probabilistic character, provides the opportunity

to manage risk with the goal to eliminate or mitigate or minimize the risk. Risk management is the process of controlling the risks. Risk management is the process for identifying and determining which mitigation method can be employed to minimize the effects of risks.

Risk Management plays a critical role in protecting intellectual property assets and resources in order to ensure that intellectual property portfolio risks are managed effectively. Risk Management is the process of identifying, assessing, and evaluating risk. The essence of risk management is to reduce the risks and to monitor them continuously, which requires well-structured processes and systems.¹

Several authors have listed benefits of risk management and reasons for risk management being as popular a topic at present as it is. There are several reasons that increase the need for more systematic and effective approaches to risk management. Increasing global competition, more demanding customers, increasing pace of technological development and complexity of business opportunities, and reduced lifetimes of products have contributed to this.

Intellectual property risk management allows a company to balance its operational and economic cost of preventive measures of protecting the intellectual property assets that supports the organization Identification, evaluation, and valuation of intellectual property for downside risks and upside potential can help companies to enforce their intellectual property rights as well as prevent and defend against claims of infringement, develop risk-mitigation and risk-transfer solutions for potential liability loss and loss of profits; strengthen due diligence in mergers and acquisitions; facilitate deals in joint ventures and licensing agreements in which there are representations, warranties, and indemnification issues; comply with new accounting regulations for recognition of intangible assets; make more informed strategic investments in R&D, and increase revenues from licensing and related activities.

To create an intellectual property management program, it is essential to classify or categorise the related risks. Several categorisations of risks are presented

¹ Lhotsky, Gary Joseph, An Analysis of Risk Management at NCAA Division 1-A Football Stadiums. A Dissertation submitted to the Department of Sport Management, Recreation Management, and Physical Education. Available at <http://etd.lib.fsu.edu/theses/available/etd-04072006-125002/unrestricted/02 GJL. text.pdf>. Pg 32

in the literature. These are based on either the risk source, effect of the risk or level of control.

Categorisation of risks according to their impact and where their control lies brings about two categories under the heading of impact of the risk: business risks and insurable risks. Another classification of risk is based on their source i.e. internal or external risks. One further categorisation of risk is to classify them into known risks, known risk but unknown effects, and unknown risk with unknown effects. A further division of risks based on their effect: scope risks, quality risks, schedule risks and cost risks are also presented. In addition, risks can be categorising according to functions. Technical, market, financial, and human risks.

All these categorisations while acceptable do not comprehend the unique nature of intellectual property risks which is essential for developing a framework for intellectual property risk management. Intellectual property risks need to be classified by outlining different kinds of risks based on their fundamental nature taking into consideration the legal aspects which provide for these intellectual property rights.

The challenge for companies is to approach intellectual property risk management in a more integrated and systematic way.² On meeting this challenge, companies can fulfil their increased responsibility to demonstrate sound decision-making, in line with increasing expectations of due diligence, more intense public and media scrutiny, and initiatives for transparency and open policies in relation to intellectual property.³

Intellectual property risk management is now seen as one of several co-ordinated initiatives that will improve decision-making, enabling the shift to results-based management of intellectual property.⁴

Intellectual property risk management requires looking across all aspects of an organization to better manage risk associated with creating, protecting, utilising and

² Wideman, R.M. (Editor) 1992. Project and Program Risk Management: A Guide to Managing Project Risks and Opportunities Upper Darby, Project Management Institute. Frame, J.D. 1994. The New Project Management: Tools for an Age of Rapid Change, Corporate

³ Turner, J.R. 1999. The Handbook of Project-Based Management: Improving the processes for achieving strategic objectives, 2nd edition. London, McGraw-Hill. Pg. 529

⁴ Reengineering, and Other Business Realities. San Francisco, Jossay-Bass, Inc., Publishers. 328 p.

enforcing intellectual property. Organizations that manage intellectual property risk have a greater likelihood of achieving optimum benefits out of intellectual property.

A systematic, integrated but adaptable approach to intellectual property risk management requires an organization to build capacity to address risk explicitly, to increase the organization's and stakeholders' confidence in its ability to achieve its goals. It contributes to better use of time and resources, improved teamwork and strengthened trust through sharing analysis and actions within the organisation.

Intellectual property risk management requires an ongoing assessment of potential risks associated with intellectual property in an organization at every level and then aggregating the results at the corporate level to facilitate priority setting and improved decision-making. The identification, assessment and management of risk associated with intellectual property across an organization helps reveal, the true nature associated with risks.

Intellectual property represents a volatiles subject matter that is dependent on its environment. In essence intellectual property is sovereign regulated, the increasing global trend of harmonization makes the situation more complex and regulated than other subject matters on which most risk management research has hereto focused. Intellectual property thus poses a challenge for traditional risk management theory and is a valuable object of study.

In today's world, change and uncertainty are constants. With increased demand for greater transparency in decision-making, better educated and discerning employees, globalization, technological advances, and numerous other factors, adapting to change and uncertainty while striving for operating efficiency are fundamental to a company. Developing an intellectual property portfolio in such an environment requires a stronger focus on intellectual property risk management practices within organizations to strategically deal with uncertainty and capitalize upon opportunities related to intellectual property and inform and increase involvement of stakeholders, to ensure better decisions in the future.

It is in this context that the researcher makes a sincere attempt to classify intellectual property risks and methods for managing these intellectual property risks. This study also tries to cover the evolution of intellectual property law, projectisation of

intellectual property and legislative, judicial and international conventions which have shaped intellectual property to what it is today. This study responds to the need for incorporating intellectual property risk management as a priority on the corporate management agenda.

Importance of IPR in India

The importance of intellectual property for businesses today along with need for managing the risk related to intellectual property to attain competitive advantage. The chapter covers the introduction consisting of the previous studies relating to intellectual property risk management, the research methodology consisting of the aims and objectives, scope of study of the problem, the research question, hypothesis, the research approach, and methodology adopted, review of literature (sources of data) and the plan/scheme of study.

Thus, the primary focus is on the enforceability of intellectual property rights and the resultant uncertainties. This chapter will essentially deal with concept of intellectual property with the help of case laws and try to explain how this has resulted in the present intellectual property system. The paper also looks at international conventions such as the Paris and Berne convention which internationalised the intellectual property regime. This research paper also looks at the various dispositions that are unique to intellectual property such as the Anton Pillar orders, Mareva injunctions and John Deo orders. It also examines the doctrine of equivalents with a focus on the Festo case and the concept of "Prosecution History Estoppel". It addresses the overlapping nature of various intellectual property tools using the Coca Cola case. Furthermore, it also sets out how enforcement of intellectual property is increasingly attracting the criminal provisions of law in relation to acts of piracy.

The various types of intellectual property risks

It brings out the risk impediments relating to intellectual property that paves way for litigations. The paper brings out why intellectual property risk classification cannot be facilitated by applying the traditional concepts of risk classification looking at heterogeneous parts of each of the intellectual property tools namely copyright, patents, trademarks, designs, and geographical indications, in the context of the global intellectual property system all along mapping the developments in the Indian context.

The paper also exhaustively will be examining the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), its predecessors and its negotiation process to give an overview of the TRIPS. The general principals of TRIPS are dealt alongside discussing elaborately the specific provisions of TRIPS in relation to patents, copyright, trademarks, geographical indicators, designs, layout designs of integrated circuits and protection of undisclosed information. The paper also investigates the enforcement and dispute settlement mechanisms under the TRIPS, with the intention of identifying the evolving nature of intellectual property law.

This paper will examine the evolution of property law and how rules in socio-politico-economic-technological milieu necessitated the development of intellectual property. The research paper focus on the concept of *res nullius* wherein possession is the basic criterion for asserting the right of property and how the same concept does not fit within the model of intellectual property. This chapter also focus on how the concept of "bundle of rights" of property law has transformed from a situation where originally property was not allowed to be transferred anything less than the entire bundle of rights, privileges, and powers in the property, to the situation today wherein property rights can be truncated during transfer. This paper also deals with the risks associated with property and attempts to deal with the notion of risk by looking at the variants of risks. It also discusses why risks should be dealt with at the earliest to effectively mitigate intellectual property which elicits diverse risks and warrants an idiosyncratic classification. The paper analyses the various intellectual property risks by classifying them into direct and indirect risks encompassing all types of intellectual property risks.

The research paper concentrates on presenting the overall setting of this study by exploring intellectual property risk management. The paper aims at answering the study objective, i.e. identifying the current trends in the theory and best practice relating to risk management with particular focus on intellectual property. Furthermore, the various tools are approaches that are available to effectively manage intellectual property are explored. The chapter in a structured manner presents several intellectual property risk management processes and develops an intellectual property risk management framework. Based on this fame work all intellectual property risk management approaches are discussed outlining the content and tools that can be used in each approach.

Conclusions

Which makes a summary of the research paper, in general and in specific with respect to intellectual property risk management wherein the theoretical and empirical contribution of the study is assessed together with the validity, reliability and generalisability of the research approach and results. Finally, recommendations for further studies are presented.

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