

# Indo-German Conference on Intellectual Property Rights

Jointly organized by

Embassy of the Federal Republic of Germany in India,  
Federation of Indian Chambers of Commerce and Industry (FICCI),  
Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH,  
Konrad-Adenauer-Stiftung (KAS), and  
Max Planck Institute for Intellectual Property and Competition Law

**At FICCI, Federation House, New Delhi, March 10 to 11, 2011**

## REPORT

prepared by FICCI IPR Division







Embassy  
of the Federal Republic of Germany  
New Delhi

**giz**



Konrad  
Adenauer  
Stiftung



MAX-PLANCK-GESELLSCHAFT



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## Content

### I. March 10, 2011

1. Executive summary .....	01
2. Opening Session .....	03
3. Theme I: Intellectual Property and Innovation Policy .....	08
Topic 1 - Finding the Right Balance to Foster Innovation: Exclusive Rights vs. Access to Knowledge .....	08
Topic 2 - Factors for Technology Transfer: Legal Framework and Best Practices .....	12
4. Theme II - Intellectual Property and Competition Law .....	16
5. Theme III - Importance of Intellectual Property for MSMEs .....	21
Topic 1-Intellectual Property for Business Strategies of MSMEs .....	21
Topic 2-Proposed 2nd Tier Protection for Inventions: Utility Model and SMEs .....	23

### II. March 11, 2011-Breakout Sessions

1. Session 1 - Intellectual Property in Information Technology Sector .....	32
2. Session 2 - Intellectual Property in Pharmaceutical Sector .....	32

III. Annexure 1: Programme Copy .....	36
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# Executive Summary

Today, every nation is spending billions of dollars in research and development to innovate new technologies. Globally, IPR system has been developed to protect innovations & to incentivise the innovators. There exists a view that innovations can't happen in the absence of laws which can give them adequate protection and enable – innovators to amortize their investments. On the other side, there have been views that intellectual property is just one of the factors that encourages innovation and does not play an important role in innovation system. It only acts as a tool to avoid competition and create monopoly.

India and Germany are strongly connected by long and intensive trade relations. Intellectual property (IP) rights play an increasingly important role for trade relations and have the potential to facilitate technology transfer and impact on the innovation policy of both the countries. The exchange of innovations and inventions benefits all. Exchange, however relies on a two-way process of inspiration and ideas; where each side need to contribute new ideas for an exchange to be fruitful and in turn generate innovation.

Both India and Germany are members of World Intellectual Property Organisation (WIPO) and World Trade Organisation (WTO) and are working constructively for the enhancement of the global legal framework for the protection of intellectual property rights that are conducive to innovation. Both countries protect IP rights and have tremendous wealth of creative brains in arts, engineering, research and science. They are the ones that really drive innovation in both countries.

Today, the competitiveness of an economic and social order depends largely on the extent to which existing knowledge can be shared and hence new knowledge, innovation is felicitated, to create new products, processes and services. The goal of an innovation friendly society can only be achieved if the private sector also invests in research and development. The private sector will, however, invest only if the right investment incentives are in place. A sustainable innovation policy needs to create the right regulatory framework for investment.

India is a fast growing emerging economy with lot of innovative potential. There exists a strong culture in the private sector which respects intellectual property as much as it does for any other property. The country is aware of the necessity of an efficient intellectual property protection, as well as of the

particular needs of developing countries regarding the implementation of intellectual property rules in their respective legal and social systems.

Globally, a good IPR system forms the basis of investment decisions made by many enterprises. The Indian economic environment is moving towards stronger measures of intellectual property making it a favourable investment destination. A good IPR system in India as well as a good implementation system had made many German companies to take the decision of investment in favour of India.



Innovation is crucial for prosperity and needs a balanced legal framework, which creates the necessary incentives for innovators. It is in the national and economic interest of Germany and India, to have a strong protection of intellectual property. A number of initiatives have been taken by India to have stronger IP regime, to increase awareness amongst the people and to enhance enforcement levels of the intellectual property rights in India. The working of the Patent Offices is being made more transparent and the application submission is being made online.

There is a great scope of the collaboration between India and Germany in the field of innovation creation, technology transfers and capacity building of Patent office, industries and small and medium enterprises, for the development of both countries. The intellectual property system should encourage innovation by incentives and fulfil industry requirements of effective protection thereby also serving various societal needs. Both countries are committed to implementing WIPO's development agenda, thereby also balancing societal and intellectual property interest.



# Opening Ceremony

## **Dr. Rajiv Kumar, Secretary General, FICCI**

It is important that we are holding this conference jointly with Germany, which is one of the scientific and technological power houses in the world and probably has the largest numbers of patents in the world and the latest technologies. Today, Indian industry has reached a stage where it is now looking increasingly for these technologies and for collaboration in scientific and technological field with Germany and other partners.

Germany is an important partner for India in intellectual property space. India could adapt and adopt the experiences of Germany in the realm of technology and intellectual property.

Today, India is looking forward to stronger measures of intellectual property because Indian industry is now moving increasingly in the innovative space and also towards generation of intellectual property.

In India there exists a strong culture, which respects intellectual property as much as it does for any other property. It grants the greatest respect to other people's creations and other people's knowledge and that has been a natural and a long-standing tradition of our country.

Both the nations could think of possible collaboration through bilateral agreements post this conference for further capacity building of IP offices and industry especially SMEs.

## **Mr. Christian M. Schlaga, Deputy Head of Mission, German Embassy**

The issue of Intellectual Property is a very important topic for bilateral economic relations between India and Germany. Every business development starts with an idea, which over time develops into a product which needs to be marketed. Once businesses have put a lot of brain, sweat and money into it, then they want to market it, and wish to remain sure that their ideas are protected and that they retain the control, this is essence of Intellectual Property.

The protection of intellectual property is not an objective just by itself. It is the centre of every meaningful business interaction and as the economic and business interaction between Germany and India is growing tremendously, it is obvious that the issue of intellectual property protection also becomes important.

The trust and confidence in the protection of intellectual property rights is crucial and allows the economic interaction to grow as well. The trust and confidence which German companies have with regard to the Indian Patent Law and its implementation, is the decisive factor in favour of India as an 'Investment Destination'.

German Companies consider IP as a decisive aspect when they had to take the decision of where to invest, in India or any other third country. A good IPR system in India as well as a good implementation system had made them decide in favour of India. This issue is also as an important factor for discussions about international technology transfer and also for the development of our economies as well as our bilateral relations in the economic sector.

The nullification of great number of Patents of one of Germany's leading engineering companies has raised a number of questions which needs to be answered. The German business community also follows the issue with concern as it reaches the centre of their business decision-making process.

Since IPR plays an important role in investment decisions, the fallout could be devastating and this is certainly something which should not happen. The issue should be solved by working together and lead the way for increase in economic interaction in the years to come.

The public debates often creates impression that there should be a separate IPR legal system for industrialised countries and emerging economy countries, which is misleading, since there are vast commonalities between the two countries in particular to the issue of Intellectual Property.

Both Countries protect private property and have tremendous wealth of creative brains in arts, engineering, research and science. Those are the ones that really drive innovation in both countries. Germany is a bit more knowledge based country than India but there is no doubt that Indian Companies have the interest in IPR and the interest will grow tremendously with the development of the Indian industry.

### **Mr. V. Bhaskar, the then Joint Secretary, Department of Industrial Policy and Promotion, Ministry of Commerce & Industry**

Our IPR regime today is totally Trade Related Aspect of Intellectual Property Rights (TRIPS) compliant. It is also compliant with all our international obligations and has stood the test of both judicial scrutiny as well as TRIPS scrutiny with a number of other interested countries.

Issues relating to enforcement are primarily related to awareness and conscientization. To enforce IPR, being a private right, the people must know that their rights are being violated and then act accordingly ..

The Indian Government also creating lot of IP awareness so as to increase the levels of enforcement. It is also to making the IP offices more transparent and more efficient. Recently, Trademark search has been made free which enabled IP office to infuse more work force in the registration process.

The Government is also planning to make e-filing of trademarks and patents mandatory. Once, e-filing is made mandatory, the load on our offices would reduce. The Indian IP office, also considering to make examiner's report available to interested parties.

We are open and willing to change, if that change will be consistent with not only protection of innovators

ideas, through IPR but is also consistent with our public policy concerns. Intellectual Property protection is very important for us but also is our public policy concerns; a balance needs to be maintained.

It is desired that the dialogue about Intellectual Property Rights should go beyond this seminar and possibilities of cooperation between the Patent Authorities and/or the cooperation between our Customs Authorities in the detection of counterfeits could be explored and we should move forward together with confidence and trust to do that successfully.

## **Dr. Stefan Walz, Federal Ministry of Justice**

Both India and Germany are members of WIPO, World Intellectual Property Organisation and TRIPS and are working constructively for the enhancement of the global legal framework for the protection of intellectual property rights.

The Patent offices of both countries are cooperating on the basis of a Memorandum of Understanding and revitalizing this cooperation through programs like exchange of Patent Examiners etc.

Both countries are committed to implementing WIPO's development agenda, thereby also balancing societal and intellectual property interest, which aims at safeguarding benefits of the global intellectual property system for the countries in the Southern Hemisphere on an equal footing with the industrialized countries.

Major objective to be achieved is promoting technology transfer for example, green technologies, for safeguarding of public health by ensuring the supply of affordable medicaments and also capacity building by improving the Patent Institutions and raising awareness in the industry community.

India is playing an outstanding role in the international discussions and negotiations on intellectual property and public health, on access and benefit sharing for the use of genetic resources and on the protection of traditional knowledge and traditional cultural expressions, taking place not only in WIPO but in other international fora's as well.

India is a fast growing emerging economy with a lot of innovative potential. The country is aware of the necessity of an efficient intellectual property protection, as well as of the particular needs of developing countries regarding the implementation of intellectual property rules in their respective legal and social systems. India is in a best position to be a key player to act as a mediator between the developing and developed economies, where a fully developed patent system exists.

The intellectual property system should encourage innovation by incentives and fulfill industry requirements of effective protection thereby also serving various societal needs.

## **Dr. EMS Natchiappan, Member of Parliament (Rajya Sabha) and Chairman, Indo-German Forum of Parliamentarians**

Indian is innovating. Even at the village level, people are having innovative methods and research oriented mind. Very often, we feel that it is part of our duty to have innovative thinking and application. This attitude, we are developing now by giving the rights to them. India's bio-diversity act is making the villagers to enjoy the patented proceeds.

The Government of India is also interested to encourage research and development &D. In the last Budget, Government has already encouraged to have the weightage of 175% of the deduction, when any national Laboratorys, University and the Research Institute invest in R&D programs. The same has now been enhanced to 200 percentage of weightage for deduction. Indian Government is also encouraging the companies and corporate bodies to come forward, to invest more money on research.

Germany is very advanced in the stage of Patents. We also need to come forward with very specific and focussed guidelines as to how many Patents we are going to register through National Laboratories.

In Indian context, it is important to base innovation on the utility part as well.. India is a good destination for German companies to invest in research and development because people in India are very motivated, interested in that aspect and companies are also ready to compete. \

## **Professor Dr. Günter Krings, CDU/CSU, Member of Parliament, Deputy Chairman of the CDU/CSU group in the German Federal Parliament**

In today's knowledge society, the competitiveness of an economic and social order depends largely on the extent to which existing knowledge can be shared and hence new knowledge, innovation, is facilitated. Innovations create new products, processes and services, which can be used not just by one society but by many others too. Innovation benefits Germans and Indians alike and can improve the performance and level of development of both countries.

Only a comprehensive approach taking into account economic, legal, technical, social and cultural aspects can establish what the appropriate framework is for the country in question. Germany and India both require different frameworks, but we share a belief in the importance of promoting innovation so that both the countries can reap the rewards from it.

In principle, innovation not only results in sharing of available resources differently but also enables an overall saving of resources or it creates additional resources. Innovations are not a scarce resource, rather they can be distributed to improve the prosperity and standard of living of all. In contrast to physical goods, ideas can be passed on any number of times and can even be further developed.

The exchange of innovations and inventions benefits all. Exchange, however relies on a two-way process of inspiration and ideas, where each side needs to contribute new ideas for an exchange to be fruitful and in turn generate innovation.

We therefore want India to be as innovation-friendly as Germany so that we can work together to develop many new innovations.

The goal of an innovation friendly society, of an innovative society, can only be achieved if the private sector also invests in research and development. The private sector will however invest only if the right investment incentives are in place. A sustainable innovation policy therefore needs to create the right regulatory framework for investment.

The central issue to be considered is what regulatory framework is needed in order to create innovations, which will lead Germany and India to more prosperity. Intellectual property rights have now been recognised worldwide as the essential basis for innovation and have been introduced in most of the countries of the world by the WIPO. India too, adapted its current Patent law in 2005 to match the WIPO standards. The specific framework for protecting intellectual property continues to vary from country to country. That is a good thing because every country had its own legal system.

It is vital for international standards to be enforced in all countries equally. For example, the Anti Counterfeiting Trade Agreement (ACTA) is an important step towards coordinated enforcement of intellectual property rights.

Innovation is crucial to prosperity and innovation needs a balanced legal framework, which creates the necessary incentives for innovators.



# Theme I

## Intellectual Property and Innovation Policy

**Moderator: Mr. Stefan Helming**, Country Director, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH

### **Topic 1: Finding The Right Balance To Foster Innovation: Exclusive Rights vs. Access to Knowledge**

**Speaker1:- Dr. V. C. Vivekanandan**, MHRD IP-Chair Professor, NALSAR, Hyderabad

The theme should have been access to knowledge versus exclusive rights rather than exclusive rights vs. access to knowledge. Earlier knowledge creation was a duty for the society and community at large but now probably in the globalized era, investments are being made to gain exclusive rights i.e. intellectual property.

There are four imperatives for access to knowledge viz. 'is IP a tool or an end itself', second imperative is 'Inventor vs., inventor', third imperative is Public vs. Private Dichotomy' and fourth one is 'IP accelerate innovations'.

If IP is considered as a tool, then its end must be known. One important jurisprudence behind intellectual property rights is to incentivise innovators by protecting their inventions for a limited period and thereby bring in more innovations.

The second imperative could be talked about by considering the investor in the centre of the concentric circle, the creator as second round of the concentric circle and the society as the last concentric circle. The decision needs to be made regarding the kind of priority to be given in the public policy keeping in consideration the international obligations also.

The third imperative highlights that research cannot be driven by intellectual property. For instance there are lot of research areas in drug discovery in terms of diseases, which are neglected because of the simple reason that the returns are not lucrative to attract the research.





The people in the public sector are innovating because they are bothered about the inter-generation of equity, recognition and social benefits. On the other hand, in the private dichotomy, the people are more concerned about the return on their investments.

The fourth imperative highlights the issue that does intellectual property accelerates invention or invention gets protected by intellectual property as an investment in trade, since both rotate around each other.

**Speaker 2: Professor Dr. Reto Hilty, Max Planck Institute for Intellectual Property and Competition Law"**

Competition, as a matter of principle, fosters innovation. A market participant usually attempts to be the first one to market something new. By doing so, he tries to benefit from the so-called lead time: the time until imitators enter the market to do something comparable. Using this "advantage of the first mover", a market participant will not only be able to amortize the investments but also to earn profits.

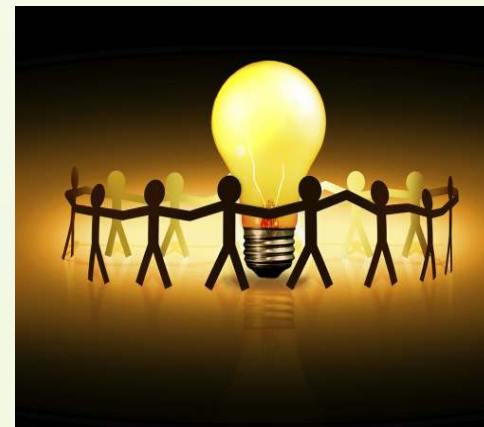
After the expiry of this naturally existing lead time, two positive impacts may be observed. First, competition will increase and consumers will have more options: more products will be available on the market, making quality increase and prices decrease. Second, the profits of the first mover will decrease with increasing competition; in order to gain back the advantage of the first mover in a new market, the market participant will invest in new products. Both positive effects are owed to competition; they are not owed to IP law.

If, however, the naturally existing lead time is too short to cover the costs and – what is more – to earn profits, the incentives to invest are at risk of being outweighed. This is particularly the case if the outcome of investments easily and cheaply can be appropriated by a third party, as may be the case for the development and reverse engineering of drugs, for instance.

In such a case, imitators may enter the market too early; the (potential) first mover will not move at all, although his investments are in the public interest. As a result, "market failure" may occur. Such failures may be avoided by providing legal protection related to the outcome of the investment, which leads to kind of an artificial extension of naturally existing lead time.

In view of this dynamic, patent law may be of great value; a number of products might not have been developed without such legal protection. However, such extension of the lead time needs to be limited. If legal protection not only hinders "market failure" but beyond that unduly delays the entry of competitors, we face a kind of reversed form of "market failure": Competition may not emerge, although its presence would provide for positive impacts. Ultimately, monopoly constellations will occur – not only leading to monopoly prices on the product market, but also to restrictions on the level of the innovation market.

It seems to be very difficult to find the right balance. This might be due to an oversimplification of a complex reality. Typically three levels of actors need to be distinguished: An upstream level (investors), a downstream level (marketers) and a middle level, the inventors. The mechanism of incentives is quite different from level to level.



In particular, players on the downstream level have different interests from those of the investors and inventors. On this level, innovations already exist. The challenge is the marketing of the related products. Such activities also may deserve legal protection, albeit not the same protection as on the other two levels: Marketers do not invest in new innovations but have to invest in the marketing infrastructure and in the acquisition of rights.

Since it is up to the marketers to generate money on the product market that ultimately (at least partially) has to be paid back to the investor, enabling the latter to reinvest in new innovation, it is obvious that it is primarily the marketer who is in need of the artificial extension of the lead time. However, dysfunctional effects of legal protection on the downstream level are considerable. These risks arise from the fact that the incentives for the marketers to maintain intellectual property protection beyond a reasonable time of amortization are very strong: As soon as competition takes place, the marketers' profits decrease.

In fact, this is exactly what we observe in many variations; certain marketers tend to utilise intellectual property rights beyond a functionally justifiable degree. We may observe this in the pharmacy industry, for instance, where first movers try everything to avoid the market entrance of generic products – even beyond the expiry of the patent protection. Likewise, blocking patents may hinder other competitors to market their new products; in addition, patents may be acquired not for the purpose of producing and marketing related products but for the sole purpose of suing certain market participants etc.

Such – dysfunctional – uses of intellectual property rights are of course of particular relevance if they do not only impede price competition, but if their enforcement furthermore hinders innovation or new business models (e.g. in the case of copyright). Since such dysfunctions derive from overshooting legal protection on the downstream level in particular, the scope of the exclusivity of such rights needs to be limited. In particular, compulsory licences may be an adequate means to facilitate contractual permission for certain use activities of third parties and thereby to foster competition – despite the existence of intellectual property protection.

**Speaker 3: Mr. D G Shah**, Secretary General, Indian Pharmaceutical Alliance

Each nation needs to decide regarding Innovation Policy being universal or national; depending on several factors that suits it most.

In Indian context, India's innovation policy in one sentence could be stated as 'More from less for more' (by R.A Mashelkar From innovation, we want to get more than what normally is available for instance 'Shankar Netrayala' in India does eye surgery and their results have been compared with the best eye institutes in the world and its success rate has been much higher than anywhere else in the world. For less, it costs only five thousand rupees so you are getting more for less for more people. This is a process innovation, which has been brought about by a doctor and he is delivering it for the societal goods.

Second instance is of 'Jaipur foot'. It is far more superior to any orthopaedic implant available in the world today. A Jaipur foot costs only around thirty thousand rupees





and can be used for more people at this price. This would be India's philosophy of Innovation Policy which would encourage innovation and would be accepted by the society at large.





transfer of green technology – that is technology which either slows climate change by reducing green house gas (GHG) emissions (mitigation technologies), or which helps to adjust to and cope with the effects of climate change (adaptation technology).

Interestingly, the first international instruments addressing green technology date back about 40 years: Already in 1972, the Declaration of the UN Conference on the Human Environment stated in its principle 20 that 'environmental technologies should be made available to developing countries on terms which would encourage their wide dissemination'.

Further references which address the importance of incentives, access and dissemination and the role of IP can be found in Article 4 of the United Nations (UN) Framework Convention on Climate Change (UNFCCC), Article 18 of the UN Convention to Combat Desertification (UNCCD) and various drafts for reforming the UNFCCC and the Kyoto Protocol. Proposals range from excluding all mitigation or adaptation technologies from patent protection in developing countries to a 'Doha'-like Declaration on Green Technologies and hence focus on facilitating access and dissemination. Contrasting these international environmental law perspectives with those of international IP law, the WTO/TRIPS Agreement contains in Article 66:2 a legal obligation for developed countries to offer incentives for 'promoting and encouraging technology transfer to least-developed countries' (LDCs). Research shows however that so far there is no evidence for incentives effectively leading to technology transfer to LDCs.

Coming back to the central question for the role of IP, Article 7 TRIPS serves well as a normative starting point: 'The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.' It calls for a balance between innovation incentives and the subsequent transfer and dissemination of technologies. Incorporating the objectives of TRIPS, it has a horizontal function in guiding the interpretation and implementation of all other TRIPS provisions relevant for green technology. Implementing tools for access and dissemination – such as research exceptions, compulsory licenses or the control of anti-competitive licensing practices – in light of Article 7 should allow sufficient flexibility for facilitating green technology transfer.

As incentive mechanisms, patents are the most relevant IP right for which TRIPS provides harmonized standards. They certainly can function as incentives for market actors to develop new adaptation and mitigation technologies – if there is potent market demand. In case no commercially interesting market exists, IP protection fails to offer a relevant incentive for green innovation. That begs the question whether there are any 'neglected' green technology needs, especially in developing countries and what kind of additional or alternative incentives may come into play here.

One tool to look into and develop further is the so called 'Clean Development Mechanism' (CDM) under the Kyoto Protocol which allows developed countries to discharge their GHG emission reduction obligations by sponsoring emission-reducing projects in developing countries. Often, such projects lead

to transfer of green technology. Within existing national or regional (or better even future global) emissions trading schemes, one could imagine technology users to 'pay' for the technology transferred to them with emission certificates which in turn can be freely traded, hence creating a market mechanism to incentive green innovation for which otherwise no potent market exists.

**Speaker2: Dr. Anil Wali**, Director, Foundation for Innovation & Technology Transfer, IIT Delhi

Academia is repository of knowledge that is driving innovation, competitiveness and economic development and is one of the crucial factors in the process of innovation and technology transfer. But incidentally in India, the academia has not been very mature when it came to technology transfer.

The success of any academic institution is dependent on resource mobilization, technology commercialisation and collaboration with industry and entrepreneurship besides education, research and dissemination of knowledge. Whenever an academia is engaging with the industry, there have been issues with respect to confidentiality, issues related to transfer of technology and issues related to ownership of intellectual property

Technology transfer, in broader sense, means typical flow of knowledge from academia through spill-over's, licensing and spin-outs. Spin-outs is relatively newer concept in comparison to spill over's or the licensing deals.

Development of technology and its transfer to industry from academic is best accomplished in an incremental manner. It's not like a transaction deal between one industry and another industry. The technologies in the academia are conceptual ideas, which are adequately protected but the industry has to come forward and deploy them in the most suitable manner through pursuance of short-term to medium-term assignments and also importantly develop trust and confidence between the partners.

Many times technologies developed by academia are perceived as fancy and industry does not find them interesting, so a platform to the entrepreneurs is to be provided, who are willing to take the big risks, utilize these technologies and incubation platforms, to help them grow their businesses.

Unless there are effective IPR and technology transfer policies, which are well equipped with flexible models, and can manage intellectual property portfolio, right programmes, pilot programmes and enables innovations of all kind, it would be difficult for an academic institution to survive, grow and engage in meaningful technology transfer.

**Speaker 3: Dr. Ulrich Romer**, Federal Ministry of Economics and Technology

The SIGNO programme in Germany is supporting programmes for promoting the technology transfer from the Academia into the economy through the companies and this programme is based on intellectual property.

The SIGNO was started in 2008 and it combines three formally individual promotion programmes. It supports universities, companies and independent inventors and the legal protection and economic exploitation of their innovative ideas. SIGNO aims at strengthening knowledge and technology transfer in all areas rather than focussing on some special areas.

The SIGNO SME pillar offers support to SMEs, how help protect their new ideas and also in exploitation and commercialisation of their inventions. It offers free consultation inventors and give them information on how to deal with the invention process, how to get the inventions protected and so on. Besides that, there are inventor groups, all over the country who also get financial support. This is a kind of networking where innovative people, creative people come together and make exchanges.

SIGNO also finds universities in two different ways. One is the promotion of intellectual property exploitation based on the intellectual property exploitation agencies and on the other hand is the SIGNO intellectual property strategy programme.

Patent exploitation agencies are by the federal administration indirectly. The fund is given to the universities and the universities are paying to the patent exploitation agencies for patent protection and exploiting intellectual property.

These agencies are indirectly funded. The money goes to the universities or to the bodies of universities and the universities gives the money to the agencies who are getting support in intellectual property dealing.

Lack of awareness in the academia and the researchers is a big problem and they must realize importance of technology transfer, using their inventions and patents. Moreover, universities and research facilities should promote and push intellectual property.

**Speaker 4: Dr. Peter Gutschmiedl, Senior Vice President and Head of Engineering, EADS/Cassidian**

Europe has a different model, in defence programmes, than other nations. It is based on partnerships. The European countries work in partnerships with each other. This enable them to offer them a successful collaboration model with various countries like India. German companies has started partnering Indian companies in area of defence engineering activities, commercial aerospace etc.

For transfer of technologies whether tangible or intangible are subject to various regulations such as security regulations, export regulations & defend regulation of the concerned countries.

In defence sector there is an IPR ownership by the governmental customers in Europe which is covered by the internal regulations and guidelines which also covers security and exports issues.

A joint collaborative programme is being undertaken by India and Germany for development of Light Combat Aircrafts which is a billion dollar technology transfer popgramme, is an positive example establishing that Europe is capable and willing to give these rights to other countries like India provided strict regulations are followed and IPR issues are solved.







## Theme II

# Intellectual Property and Competition Law

**Moderator:** Moderator: Shri P.N Parashar, Member, Competition Commission of India

**Speaker 1:** Dr. Navneet Sharma, Director, CUTS, Institute for Regulation & Competition.

IPRs and Competition Laws are two necessary elements of an integrated system that enhances dynamic competition. The interfaces between the IPR, ownership of intellectual property and competition, have diverse views across the academics, policy fora, policy makers, legal fraternity etc. Some say, there is a definite conflict scenario between the two, while others say, both are promoting a single role of economic growth, consumer welfare etc.

Indian Competition Act 2002, claims that competition is for stimulating innovation but on the other hand, there are claims which say without adequate protection, there will not be any incentive to create knowledge. A knowledge creation market requires proper incentive structure in order to thrive and survive itself.

There is a fundamental difference between Competition law and IPR law. Competition law considers IPR as legal monopolies and as an exception to the law, whereas, intellectual property law, incentivises innovation.

The basic purpose of competition law is to promote competition and there rises the question whether intellectual property ownership is promoting competition or killing competition, whereas intellectual property has a different objective.

Competition Act of India has three basic pillars. One is control of agreements, second is to regulate abuse of dominance in India and third is to regulate combinations. All these can have appreciable adverse effects on competition.



In terms of enforcement, intellectual property has too many laws but there is limited or moderate enforcement, while Competition law is a new law and enforcement has just started. Indian has various IP laws, which create ownership of different kinds of intellectual property's and because of which, different kind of competition issues may arise. The Indian Competition law doesn't provide any remedy if an intellectual property right is violated but if intellectual property becomes a tool to kill competition then there is a problem. The law provides all the legitimate ways to recoup the investment



cost and to exercise the right but it doesn't provide a license to kill competition. The difference has to be there that intellectual property rights must be exercised within reasonable limits and the reasonable limits may be debated. For instance, there are large numbers of IP related issues especially with respect to drugs. When Patent on a drug goes off, companies, try to extend the intellectual property protection in different manners and try to evergreen or try to create a pool, which is not legitimate and which is rather a potential misuse of the laws.

Similarly, there can be restriction on competition; there have been cases on different drugs where excessive pricing has been struck down by different courts. There are hundreds of situations where IPR could be exercised but by filtering it with competition lens, there are many angles like agreements, mergers and acquisitions etc. All these angles need to be examined from competition and legal perspective.

It is interesting to note that remedies are available within the scope of the IP law and competition law. However, related remedies will emerge as the cases will be heard and determined by the Commission but there are other remedies also, which are available in the form of compulsory licenses and there are proper grounds, which are defined by the law that under what circumstances, those will be issued.

**Speaker 2: Ms. Milena Weidenfeller**, Federal Ministry of Economics and Technology

Intellectual property grant an exclusive right to the owner and the reason for that is to encourage all kinds of investment and innovation.

The objective of competition law is to keep markets open and competitive for the benefit of consumers. The consumer should have a wide range of products and should have the lowest possible price.

German competition law is applicable to all economic sectors including pharmaceutical and state owned enterprises and it doesn't have specific provision for exemption or exclusion of intellectual property rights. At the same time of course, competition law fully respects the existence of property rights. Property rights in Europe and also in Germany, offer Constitutional protection so they are protected at Constitutional level.

Like Indian, German too has three pillars of competition law. There is provision of restrictive agreements between two or more companies on horizontal level and on a vertical level.

As a second pillar, we have a fight against abuse of the dominant position, which is unilateral conduct by one firm and have merger control.

Competition law is well evened in all 27 member states of European Union, which forms the basis of European Competition law and it is applied also by the National Competition Authorities of these Member states.

The role of the National Competition Authorities is very important. One cannot gain anything by having a good law if it is not applied properly. In order to have really good competition system, one must have the independence. For example, German competition authority, which was founded in 1958, presently has about 300 officials; half of them are academics, which means Lawyers or Economists, which can work in an

independent manner, which means, independent of government interference. The competition authority is not placed in the same city as the government. It is always in a different place.

The second important thing is competition law is applied by civil servants who have life time job so they cannot be sacked if they issue a decision, which is not comfortable for individual, governmental person. Also, the President of the Authority /or other members of the government cannot give them any order, so there is really a great institutional independence.

There is also a burden sharing between the European Commission, which is also a Competition Authority and the National Competition Authority. Article 102 of the EC Treaty states that abuse of the dominant position shall be prohibited in so far as it may affect trade between Member states. For example, unfair purchase or selling prices or other unfair trading conditions etc.

The Competition law is also relevant to intellectual property matters. It is complementary to intellectual property law. There is no inherent conflict as such and the legal issues concerning intellectual property rights like transfer of intellectual property and licensing, they are subject to competition law.

**Speaker 3: Mr. Vishnu Rethinam**, Partner, Remfry & Sagar Attorneys at Law, Gurgaon, India

IPRs are monopolistic rights, where the owner enjoys exclusive right to commercially exploit and prevent all others from exploiting the right.

The Raghavan Committee Report on Competition Law (2000) was the pre-cursor to the current competition act and highlighted some very pertinent things (reproduced below).

- ❖ *All forms of Intellectual property have the potential to raise Competition policy/Law problems*
- ❖ *...there is a need to curb and prevent anti-competition behaviour that may surface in the exercise of intellectual property*
- ❖ *During the exercise of a right, if any anti-competitive trade practice or conduct is visible to the detriment of consumer interest or public interest, it ought to be assailed under the competition policy/law*

The competition policy/law is taking off in India. Litigation and judicial views are finding a foot-hold currently in India. Under Indian Trademark law, the primary defence available to a competing user of an identical/similar mark is that of *honest concurrent use*. This clearly indicates that honest adoption of a trademark and concurrent use thereof, is protectable under law.

The Hon'ble Delhi High Court, in a series of judgments, adopted a clear view on the inherent nature of descriptive trademarks, their honest adoption and fair use by third parties and declined to grant relief to plaintiffs in several cases, where plaintiffs by means of use and registration/s, sought to enforce rights in such trade marks. One such judgment related to the expression 'Yo!', where a very famous





chain of restaurants in Delhi called 'Yo China', sued Nestle who were using 'Yo!' alongside their very well-known trademark 'Maggie' for instant noodles. The decision held that the word “Yo!” only calls customers' attention to the flavours by adding affirmation to it and exclamation mark “!” adds further emphasis.

Such decisions took the spirit of Competition Law into the realm of the judiciary and specifically into the realm of the trademark law and gave a very clear signal to companies that you must not be found monopolising expressions or trying to kill competition by engaging in frivolous litigation for use of such expressions, simply because you have the power and money to make such expressions popular thereby asserting an exclusive association with them.

**Speaker 4: Professor Dr. Josef Drexl**, Max Planck Institute for Intellectual Property and Competition Law

Historically, economists developed different views on the relationship between competition and intellectual property. Already in 1942, Joseph Schumpeter, an Austrian economist, discovered that dynamic competition for better products is more important than price competition. He and his followers also argued that investment in R&D requires large firms and capital accumulation and that, therefore, economic monopolies based on IPRs would even be helpful to promote innovation. According to Schumpeter's idea of 'creative destruction', such monopolies do not harm competition. Knowing that some competitor could always enter the market with better products, the incumbent monopolist will keep prices relatively low and continue to invest in R&D. By relying on Schumpeter, many modern economists still argue in favour of strong exclusive rights as the major incentive system for innovation and warn against intervention in the use of IPRs based on competition law.

In contrast, in 1960, Nobel laureate Kenneth J. Arrow came up with a different theory according to which competition is to be considered the major driving force of innovation. Indeed, innovation can only be defined against the background of consumer demand. In a process of trial and error, firms competing with each other have to discover whether consumers prefer their new products to those of their competitors. Such dynamic competition does not necessarily have to require intellectual property protection. A good example for this is provided by the business model of Apple, which may be considered as one of the most important product innovators of our times. Apple's business strategy, by continuously offering most innovative product designs to consumers, relies more on lead time rather than on IPRs. Thereby, Apple generates its profits by simply being first. In Apple's case, Schumpeter's theory of 'creative destruction' seems to work at its best; but it works without much reliance on IP.

It is clear that there is a tension between IP law and competition law. IP law raises the market power of the right-holder by excluding competitors from the use of the protected subject-matter. In contrast, competition law can be used to limit the exclusivity of the right. Because of this tension, it was often held in the past that IP law creates an exemption from competition law and that, accordingly, competition law enforcers are not authorized to intervene in IP-related cases.

However, this theory is no longer accepted. Both in the US and the EU, it is nowadays common understanding that IP laws and competition law pursue complementary goals. IPRs are needed to enable the right-holder to recoup its investment in R&D by excluding others from free-riding on that investment.

At the same time competition law is needed to prevent right-holders from taking advantage of existing barriers to entry of other innovators and from engaging in strategic behaviour that would foreclose competitors from the market. Maintaining competition is of a particular concern in the IT sector where markets are typically characterized by network effects and where these markets, therefore, tend to lead to the emergence of technological standards. But more recently, practice in Europe has also identified the pharmaceutical sector as a target for competition law action against anti-competitive use of the IP system.

In Europe, practice tries to implement this 'theory of complementarity' in the framework of an 'effects-based approach', which includes an analysis of the allegedly anti-competitive conduct not only in the light of the effects on price but, more importantly, by focusing on the effects on the incentives for innovation of the different players. In applying this approach, EU enforcers do not necessarily attempt to predict what kind of products consumers would like most. It is indeed more important to keep markets open for firms, which are likely to compete for better products. Diversity of ideas and more people thinking about solving a given technical problem provide higher chances for innovation.

Hence, in maintaining such a system of innovation, competition policy has to play a major role. Thereby, competition law enforcers have to understand that IPRs do not only and always promote incentives for innovation. In some instances, they may also result in lowering such incentives of potential competitors and the right-holder itself. Competition law enforcers should focus on protecting the dynamic 'process of competition' and not on the 'outcome' in terms of uncertain future consumer preferences.



## Theme III

# Importance of Intellectual Property for MSMEs

**Moderator:** Dr. Henning Grosse Ruse-Khan, Max Planck Institute for Intellectual Property and Competition Law

### Topic 1: Intellectual Property for Business Strategies of MSMEs

**Speaker 1:** Dr. Alka Chawla, IPR Cell, Faculty of Law, University of Delhi.

All around the globe, one will find that 90% of the enterprises are the micro, small and medium enterprises (MSMEs) and account for almost 70% of production of goods and services.

As far as India is concerned, the figures are in fact even more significant. According to an estimate there are around 13 million MSMEs present in India, which are producing 6,500 products. So, a larger number of products are being produced by them, which are almost contributing 40% of industrial production and 30% of exports. They are also the biggest employment generators.

IP can play a significant role in the development of this sector. Micro, small and medium enterprises are store houses of intellectual property and it becomes very important that they go about acquiring and protecting it. It is extremely important for them to understand that what are the laws in existence and how can they make best use of them.

The first and the most important thing for MSMEs is to identify the intellectual property. It is important for MSMEs to understand that to which sector do they belong to and then only they would understand that what kind of intellectual property they are producing. Second is the protection of intellectual property, which they only are able to protect after identifying the IP they are generating. The third is the effective management of intellectual property and the fourth is to identify the holders of intellectual property, so as to avoid infringement of IPRs.

Presently, various innovations are made by the small industries. Industrial design is one area which is also important for MSMEs, which they fail to protect due to variety of reasons, major being the lack of IP awareness and also due to the myths that IP protection involves high cost and also the registration of IP is a cumbersome process. However, the fact is that the laws are simple, but have been made complicated.

To help and create awareness among MSMEs about IP, the Government of India has started various schemes and has also set up various IP Facilitation Centers across India. These centers provide assistance

to micro, small and medium enterprises in protecting their IPs but a lot more needs to be done to educate MSMEs about the importance of intellectual property for them to grow.

**Speaker 2: Mr. Guido Christ**, Indo-German Chamber of Commerce

The German Anti-Counterfeiting Association, known as APM, has been active since 1997 as cross-industrial alliance in the protection of intellectual property. It is a joint initiative by the German Association of Chambers of Industry and Commerce in Berlin and the Federation of Germany Industry and a number of brand associations.

Following are the strategies for prevention of IP violations, applied by the German Business community:

- ❖ Legal Measures-It includes strategies for managing and enforcing IPR, registration of intellectual property rights, resolute measures against violations and taking account of trade mark in contractual relationships
- ❖ Policy Measures- it includes informing and educating consumers, customers and manufacturing enterprises. It also fosters co-operation between the business sector and enforcement authorities at international, regional and national level (in Germany). It also assist in enhancing co-operation between the business community and enforcement authorities in third countries besides increasing co-operation between national and foreign associations, esp. in certain countries
- ❖ Business Management Measures-includes diligent planning and care in business transactions, internal company and marketing strategies & cooperation with scientific institutions
- ❖ Technical Measures includes, information from associations on technical measures for IPR protections , active use of modern safety features and information to enforcement authorities & protection of products and technologies
- ❖ Trade fairs includes preparation of specific information material, inclusion of specific rules in the terms of participation and cooperation with attorneys', courts and enforcement authorities at trade fairs

**Speaker 3: Ms. Milena Weidenfeller**, Federal Ministry of Economics and Technology

The overall objective of German Development Policy is to contribute to poverty reduction by achieving the millennium development goals. This can be achieved by building on national and local initiatives in the developing countries themselves by framing development policy.

The civil society and the private sector play especially critical role in this regard. That's why German Development policy and German aid for trade is often working together with the private sector companies in the sense of fostering progress in this regard.

There is a need improve access to health products, which is one of the objectives of the Millennium Goals and in order to create access, especially for



the poor comprises of many issues like improving the health system directly, education and strengthening of the Institution etc and German Development Corporation (GDC) is active in these areas since many years. In the last couple of years, GDC have started giving emphasis on supporting developing countries in developing their local pharmaceutical industry. The objective is to improve access to inexpensive medicines.

GDC supports local production and marketing where medicines for diseases like HIV Aids, Tuberculosis and Malaria are still very expensive and prices affect the access for the poor.

Secondly, GDC provides assurance of quality and support local pharmaceutical enterprises in developing their capacities to quickly reach the group manufacturing practice, bio-equivalence and finally the WHO pre-qualification.

The third tier of GDC measures is capacity development of national and regional quality infrastructure and of human resources. This is very important because there is a need to have high quality of registration by the controlling authorities in these countries for the medicines, which are to be brought in the market for better infrastructure for all pharmaceutical companies, producers as well as for importers.

Fourthly, GDC is trying to strengthen public institution and local as well as regional generic pharmaceutical business associations, since these business associations are gaining an influent voice in national and regional, socio-economic discussions. At the same time, these associations are offering services like training and laboratory capacities to the member companies.

Lastly, GDC believes that technology and know-how transfer is very often a pre-requisite for improving and developing local pharmaceutical production. In the last years, companies from India and from Brazil are committed in this regard and GDC supports such activities including 'on the job training' in India.

The local pharmaceutical production can play an important role in improving access to medicine. It is a combination of micro and macro approach, which can lead to this end. Support of production enterprise level shall be integrated in developing institutions and associations. It is also important that developing country governments are committed in order to facilitate the respective framework conditions.

Production is of course, not the only part of the solution. It has to be integrated in a holistic health system development strategy that tackles all the elements and competition is also the main driver of lower prices as we have heard today many times.

To be dependent only from one source is very risky for Least Developed Countries and last but not the least, the technology transfer is necessary in areas like pharmaceuticals, which are highly sophisticated products.

## **Topic 2: Proposed 2nd Tier Protection for Inventions: Utility Model and SMEs**

**Speaker 1: Mr. T C James**, Former Director, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry

Presently, India doesn't have a utility model law which can protect small innovations or incremental innovations.



The definition of utility model is a kind of protection system for innovations and inventions mostly in the fields of mechanical, electrical and agricultural fields. While novelty, inventiveness and industrial application are required for utility model inventions too, the level of inventiveness is quite low compared to patent. The term 'utility model' itself need not necessarily be the final nomenclature for this. Different countries use different terms for this kind of protection. For example Thailand uses the term 'petty patent', Indonesia 'simple patent', and Vietnam, 'utility solution'. 'Utility innovation' is the term used in Malaysia. Australia now calls it 'innovation patent' as different from the standard patent.

In some areas, the scope of protection under Utility Model is mostly restricted to mechanical innovations such as devices and in certain areas, processes and chemical products are mostly excluded. In most countries, pharmaceutical products are totally excluded from the purview of utility model protection.

The incremental innovation can be seen more in the areas of mechanics, transport, devices and such things, which may not exactly meet the requirements of a patent but it adds to the local requirement and also helps in developing the economy. Such innovations may get protected under utility law.

The small-scale industry sector is not interested in international protection; they are more concerned with protecting their innovations in nearby areas instead of distant places. They want protection which is cheaper, registration process which is less time consuming and would be happy with short term protection. Most of the Patent Offices in the world have backlogs and they are taking 36 to 48 months to process after the initial periods. By that time, the utility models may move over; so the inventors of these products want a speedier protection system, even if the period of protection is shorter compared to a patent.

The advantages, which one can find is that in most of the regimes, where there is a utility model, the registration process is very simple. There is no detailed examination. They just check the formalities, whether they have completed the requirement or not. The substantive examination is avoided unless it is challenged by somebody in certain jurisdictions. World over, there is a lot of variation in the laws and applications.

Some legislation also provide the facility of converting between patent and utility model, where you submit a patent application and if the invention doesn't meet the patentability criteria, the same application may be converted into an UM application.



In China, as per figures of 2009, more than 210,000 patent applications were there and at the same time, more than 161,000 utility model applications too.

In the last census of the small and medium enterprises in the country, there were about 26 million SMEs and they accounted for 95% of the industrial units and 45% in manufacturing sector. The stage of development is from small to big and they excel in small innovations and at present there is no system to protect what they are doing. Utility model is a good option and the time has come for India to move forward to utility model protection for small improvements.

**Speaker 2: Dr. Stefan Walz, Federal Ministry of Justice**

A utility model (UM) is exclusive rights such as a target for technical inventions. The inventor must provide sufficient teaching of his or her invention to permit a person of ordinary skill in the relevant art to perform the invention. A utility model is in terms of granting requirements very similar to the patent same as regards the legal effects of utility model. The utility model allows right holder to prevent others from commercially using the protected invention without his authorisations for limited period of time.

The utility model confers rights only due to the fact that they are registered so there are registration rights. They are not examined by skilled and experienced examiners such as the Patent. So they allow for inventions to be protected by a simple administrative procedure.

UM are granted without substantive examination and lot of incremental inventions could be protected by utility models.

In Germany, we have a particular situation that our jurisdiction require the same level of inventive step for utility models as core patents but of course the registration remains the advantage conferring rights only due to registration.

Utility model provide protection to certain field of technology and in Germany, Utility Model protection excludes Biotech. Plant and animal related utility models are not existing and only products and processes can be protected under utility models. Pharmaceutical products are not excluded as such.

The patent and trademark office in Germany is actively making publicity for using the utility model. The utility model can be obtained quickly and at low costs. The term of protection is shorter and is a maximum of 10 years.

EU legislation does not have utility model. Germany has it for trademarks. Austria, France, Spain, Italy and Germany and the EU Commission in 1997 launched a proposal to introduce utility models throughout the EU and to harmonise the respective national legislation but this initiative failed because there was not enough support by the member states and since there is no EU wide harmonisation, utility models are not part of the so-called EU intellectual property law, which is the basis for the EU when negotiating free trade agreements with the states.

Utility models are particularly attractive for SMEs. That's the consensus here that it is easy to achieve, they confer immediate protection even during the patent examination procedure but the mechanisms to prevent misuse are important, that means, reduced stock of applications, that means, keeping out some of the technology fields, which are particularly sensible and intellectual property rights should be examined thoroughly before they are confirmed and you need efficient and effective cancellation procedures and is recommendable to introduce utility models in India if these recommendations are followed.





## Day 2

## Breakout Session 1

# Intellectual Property in Information Technology Sector

**Moderator:** Moderator: Dr. Debashish Dutta, Scientist 'G' & GC (R&D in IT), Department of IT, Ministry of Communication & IT, Government of India

### Topic 1: Key Ingredients for Booming IT Sector

**Speaker 1:** Dr. D. S. Sengar, Director, Indian Law Institute, New Delhi

The protection of the intellectual property is most important but people as well as the industry don't know how to protect it. They keep on producing. Gillette is number one because of protection.

The key ingredient for booming IT sector is protection and only protection. Imagination is important than the knowledge, so if one wants to compete with other organisation, which has equal resources, then one must try to create new things and also should protect it otherwise somebody will copy.

All businesses have intellectual property regardless of the size and sector. Intellectual property can be for a brand, invention, design and can be legally owned. It could include the name of business, products, and services. Thus securing protection of the intellectual property could be essential for future growth of a successful organisation.



Intellectual properties have become important due to changing trade environment which is catalysed by the global competition, high innovation risk and the short product cycle.

Technological developments are creation of new knowledge. Incentives for creation of new knowledge are provided by the way of giving intellectual property rights in order to reach balance between the intellectual property protection of such knowledge and also its quick dissemination. So this is just like a balance between the creation of knowledge and dissemination society for the continued growth of economy.



IPR contributes to the development of IT sector by way of granting copyrights, patents, trademark and designs in order to enable the competitor to manufacture new input product and effective improvement of the process of manufacturing. The trademark enables consumers to obtain the IT product in a right quality by identifying the product by right mark. Ultimately, IPR enables the right holders of the IT sector to prevent others from engaging in certain equities related to subject matter of rights and to gain competitive advantage. IPR seeks to extend benefits and opportunities in knowledge economy world over.

In fact, there is a need to evolve a system, which ensures the development of latest and best technology but at the same time; it needs protection of best technology by commercial realisation. It needs conferring strong intellectual property rights to protect innovation in technology and effective enforcement of right and action against infringers. This can be done by modern and updated legislation to keep pace with the latest development and emerging technology and also its enforcement.

Socio-economic and technical-economic developments are meaningful if they reach masses and result in job opportunities and by use of latest technology, they should provide industry with increasing productivity and make the quality product available on competitive basis.

An information age is catalysed by increasing competition and shorter product cycle. Therefore, companies are more dependent on intellectual property and the value of intellectual property is much different from the valuation. Thus intellectual property creation is of a human mind but to know the value of trade, that property one has to value it.

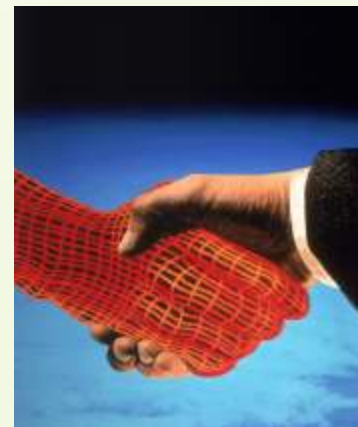
IT industry, for its growth needs connections between intellectual property protection and growth through cooperation and cross licensing. Thus most important ingredient of the booming IT sector is to develop and protect new and latest technology. Intellectual property protection of such new technology is necessary for the growth of IT sector; therefore, technology measures should be used to reduce risk of intellectual property infringement.

**Speaker 2: Professor Dr. Günter Krings**, CDU/CSU, Member of Parliament, Deputy Chairman of the CDU/CSU group in the German Federal Parliament

In 2010, the Indian economy grew by more than 8 %. This highlights India's dynamic economic development in recent years into one of the world's biggest growth markets. A particularly large share of this growth is attributable to the service sector, especially to the booming IT sector.

Services presently account for approximately 54% of the Gross Domestic Product. This is all the more remarkable in light of the fact that according to all textbooks, the service sector usually ranks last in the development of an economy.

India is thus in the process of catapulting itself from a developing society into an information society.



The IT sector is India's key industry. In 2005, India became the global leader in exports of software and IT services and by 2007, it already accounted for more than one-third of all computer services worldwide. One of its prime exports in this area is Business Process Outsourcing (BPO), also referred to as Knowledge Process Outsourcing (KPO). Examples include call centres, data centre operations and accounting services.

Thanks to BPO, German companies can outsource support processes. This support is continually adapted by service providers to meet new challenges and can even be completely wound down. This flexibility makes it possible for German companies to better concentrate on their core business and boost effectiveness and efficiency in that area.

For Indian BPO service providers, on the other hand, the outsourced support processes are their core business. Through standardisation of their own core processes, service providers can achieve efficient cost optimisation.

The best possible utilisation of their own system and processes yields economies of scale that in turn generate cost advantages for service providers. This has led to a highly successful win-win situation for German outsourcing companies and Indian Service providers alike.

Indian IT firms are already developing new concepts and methods that are highly innovative at international level. German IT companies can thus still learn a lot from Indian firms here.

The Indian companies have invested heavily in the development of these concepts in market entry in Germany. German business and industry are pleased to see these investments because they also bring innovations with them. Indian investors are of course, treated exactly the same as their domestic competitors. Strong intellectual property protection in Germany guarantees that the Indians are also able to amortize their investments. German Companies in turn assume that they would be treated fairly in India and also their Intellectual Property would be protected.

Intellectual property is just as worthy of protection as physical property. It must be protected in both the analogue and the digital world. The booming IT sector hence represents not only a great opportunity for Germany and India but also poses common challenges. The greatest challenge is certainly the international character of the Internet. Precisely German and Indian Joint Ventures show that at least two different legal systems come into play here. This can lead to uncertainty of the law and questions as to which legal regime is applicable and what the legal consequences will be like. A clear legal framework is thus necessary to ensure that such businesses can be transacted smoothly and above all with certainty as to the law.

**Speaker 3: Mr. Venkatesh D.K, Vice President, SAP Labs, India**

SAP is headquartered at Walldorf, Germany. Cost is one of the many reasons SAP decided to come to India. Proximity to Customers in Asia Pacific region and most importantly access to talent, skilled workforce and the number of 'bright, young and energetic' technical graduates coming out of Universities every year being the other. This is the story of many Multinationals – India as a low cost destination with access to 'English-speaking' talent in abundance, with location cost playing a key role in decision making process.

This was the grand beginning of the Indian IT Journey. But the Indian IT industry growth story could not just sustain on cost and resource numbers. To continue enjoying the success, Indian IT industry needs to



that it has infact created. It trades in intellectual property, it sells intellectual property. The people who hire it, actually owns the intellectual property. So the most valuable thing for the Indian IT sector is not intellectual property. It is the people, who work in it and the fact that they can innovate and distinguish themselves.

Germany is one of the intellectual property exporting countries in the world. India is a major importer of intellectual property and if you look at World Bank's statistics on this, it will take many decades for India to become an intellectual property exporting country. So, in the current scenario, weaker intellectual property protection is good for India.







# Breakout Session 2

## Intellectual Property in Pharmaceutical Sector

**Moderator:** Moderator: Dr. K.S Kardam, Deputy Controller of Patents and Designs, Intellectual Property Office, New Delhi

### Topic 1: Case Studies on Pharmaceutical Industries: Country Experiences

**Speaker 1:** Ms. Pratibha Singh, Managing Partner, Singh & Singh, Advocates, New Delhi

There are a lot of misconceptions both in India and abroad about various cases that have taken place in India. The same needs to be cleared. India joined TRIPS in 1994 and went through transitional measures between 1999, 2002 etc. In 2005, India brought in the complete product patent regime for pharmaceuticals'.

Industry has a number of concerns in pharmaceuticals cases and in patent litigations. The first and the foremost concern is that there is no interim injunction, which is granted in pharmaceuticals. The same is not true but that's the general perception about it.

Coming to pharmaceuticals patents, the industry faces large number of external pressures whether it is public interest group on the issue of pricing and access to medicines, and these external pressures are specifically for pharmaceutical industry and don't apply in the non-pharmaceutical patent regime.

The other concern is the non-availability of specialised courts to deals with pharmaceutical patent cases. Most of judiciary is not familiar with the IP laws, which delays the process.

The next concern is the delay of trials and that there is no culture of damages in India like in the U.S. and definitely, litigating parties look to get actual costs in litigations, whenever we speak of costs.

There are also concerns in the area of patent prosecution relating to duplication of oppositions. There are too many procedures and stumbling blocks, whether there is an appeal which lies against the pre-grant order and there was a distinction between any person, person interested and most people fall in both categories and therefore there can result in duplication of oppositions.



India is always looked as the black sheep in patent law, which actually is not.

The basic rule, which Indian Courts follow, is, if the patent is prima facie valid, they grant injunctions. If the challenge is credible, then there is no injunction and this rule is in every jurisdiction of the world.

There are drugs, which are yet to come in into the country, whose patents are yet to be granted, and which are block-buster drugs. It is not that the Indian Courts won't protect them. If there is a valid patent, Indian courts definitely go in favour of the plaintiff and if it is not, then, they go in favour of the defendant.

There has been a rising trend in patent litigation and patent judgements as well. The most contested parts of litigation in IPR are patent cases. A review of statistics from the Delhi High Court of IPR cases shows that there is a large number of patent cases and litigation on patents. The fact that more and more patent cases are coming to courts means that more and more patentees are getting relief in courts.

**Speaker 2: Dr. Jorg Thomeier**, Chief Intellectual property Counsel, Corporate Head of Intellectual Property, Bayer Group

The key focus issue is as to why Intellectual Property rights essential to enable sustainable access to new medicines.

The research and development cost in the pharmaceutical industry is huge. The estimated figure of development, on an average, is around 6,250 crore rupees per drug. This estimated figure includes accounting of only successful developed drugs and does not take into account of all failed projects and you need to keep in mind that on average, one out of ten projects really succeeds in the R&D industry.

The amount spent on development of medicines needs to be recaptured to enable sustainable research and development in enabling access to new medicines.

IPRs in India have definitely moved in the right direction. The drug patents law have been in India since 2005. It doesn't seem to be fully committed as Section 3(d) and compulsory licensing provisions are little bit overdoing. The Courts seems to be a little bit hesitant to grant preliminary injunctions, obviously due to the unjustified lack of trust in the quality of granting procedure.

Therefore it is felt that there is no real, reliable protection out of IPR system. The effect of IPR is much reduced, if not extinguished and therefore, there is almost, out of the Indian market, there has been no contribution to recapture these high R&D costs. The question of sustainability to develop new medicines arises. Even if you would have no patents, the drugs already available will still be there but the drugs of tomorrow are getting difficult to develop because there is no money to spend into the R&D.

There is social responsibility within the industry and the requirements of many poor people in India are to be met. The weaker IPR in India is simply denying or complicating the recapture of the cost of development of medicines. Wealthy people in India, which have the paying capacity, must contribute towards recapturing the high R&D cost and the Indian intellectual property regulations may strike a balance between the recapturing the huge cost involved and the societal needs to make available medicines





to poor people in India at cheaper rates, for sustainable development of new medicines. Therefore, India may take advantage of the new drugs and its wealthier population should contribute and in a way support the poor.

## Topic 2: Anti Counterfeit Technologies and Solutions

**Speaker: 1 Mr. Enrico Ruhle**, Managing Director, TUV Rheinland (India) Pvt. Ltd.

Counterfeiting is a global problem and is affecting majority of the sectors. Companies which are involved in the wrongful acts are spread across borders; online trade of counterfeit products especially with regard automotive parts is a big issue.

Indian companies are also the victim of counterfeit but it seems it is not on their agenda. They acknowledge this problem but they are most concerned with their growth. This approach needs to be changed.

The following are the five major pillars which can help defend the value and integrity of a brand.

- ❖ Investigating Agencies- they assist companies in identifying the problem of counterfeiting in the market and suggest them to use state-of-the-art investigative techniques.
- ❖ Information Security Assessment-lot of money goes in the development of a product and if at the design stage, the information goes out either in the form of paper or email and if such information reached the imitators , they'll start copying the products and will bring the product in the market much before than the company can.
- ❖ Supply Chain Security Management-Most of the companies manage their own supply chain but some may outsource as well. It is crucial to keep a check on such system to avoid the problem of counterfeiting.
- ❖ Labelling & Marking- A unique alpha-numeric verification code is generated which is used for product authentication and tracking. This unique code is placed onto a product or onto a package and can be used to monitor and manage disputed goods. Using this system, it is possible to identify the suspicious products from the genuine products and moving both the product security and the control itself.



Product Control and Authentication System (PCAS) - The Product Control and Authentication System (PCAS) is an online verification system with a wide range of other features. The smart platform increases the transparency of the supply chain and allows brand owners to take full control of their products.

Before implementing such a system, it must be realised that what exactly is required from the system. The emphasis should be that the system should recover the lost revenue from counterfeits. It should also improve customer communication, relationships, product control and avoid major infrastructure changes and reduce the cost of recalls.



**Speaker 2: Mr. Parminder Singh**, Government Relations, South Asia, HP India Pvt. Ltd.

Counterfeit, is a product, which has been made to look identical and is usually for the purpose of deceiving consumers, that's basic at which counterfeit industry operates. Globally it creates roughly a 600 billion dollar a year problem for various industries.

HP as you may know is the first company, which actually enabled a common man to become entrepreneur. All a common man needs is a PC and a Printer. A printer at less than 50 dollars is that what HP contributes to an entrepreneurship. There is lot of R&D that goes behind providing 500 dollars printer in 50 dollars.

HP have contributed to the economy by regularly providing innovation and technology in the last about thirty years. HP is also fighting with the menace of counterfeit. About 100 billion dollar worth of counterfeit hardware gets hacked worldwide, that's three times more than pirated software, that's ten times more than pirated music and movies.

When a counterfeit product comes into the market, one there is no incentive to continue the R&D that has already gone and secondly, it hampers the brand. When a counterfeit cartage goes into an authentic HP printer, one, it damages the printer and secondly, HP loose revenues of the cartage and third, HP loose on servicing the printer. These are some of the challenges that HP is facing now.

Strategies that are now on the ground in India to check counterfeits is one to engage with consumers, second is at the supply chain level and third is at the enforcement level.

The core of this crux is to educate the consumers on how to identify the counterfeit printing supplies. Most of the customers rely on the packaging while purchasing the product and unfortunately, packaging is something that is most easy to copy.

On the supply chain and enforcement, a systematic audit is done of the whole supply chain to protect channel partners from counterfeiting practices. The channel partners are also educated on how to check that the counterfeit products don't get into the supply chain. On the enforcement front, HP engage with the law enforcement agencies and has set up intelligence networks to stop production of counterfeit products.

Judiciary in India has also been sympathetic to this particular issue and there have been a number of judgements, which has not just penalise the counterfeit guy but also sets up a judgment that sets it as a base for future judgements.

HP is engaging with the government to undertake a number of initiatives to fight the menace of counterfeit products. First is to create awareness at the consumers level, at the society level against counterfeiting menace that the country is facing right now. Second is with enforcement agencies, police and customs. Third is with judiciary, where a number of conclaves and conferences are organised with judiciary to help judiciary to come to a global level of understanding with respect to anti-counterfeiting laws and judgements.





Embassy  
of the Federal Republic of Germany  
New Delhi

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Konrad  
Adenauer  
Stiftung



MAX-PLANCK-GESELLSCHAFT



## Annexure 1

# Indo-German Conference on Intellectual Property Rights

**Jointly organized by**

Embassy of the Federal Republic of Germany in India,  
Federation of Indian Chambers of Commerce and Industry (FICCI),  
Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH,  
Konrad-Adenauer-Stiftung (KAS), and  
Max Planck Institute for Intellectual Property and Competition Law

**At FICCI, Federation House, New Delhi, March 10 to 11, 2011**

## PROGRAMME COPY

# PROGRAMME COPY

**Thursday, March 10, 2011**

09.30 - 10.30	Registration
10.30 - 11.10	<b>Opening Ceremony</b>
	<b>Welcome Remarks :</b>
10.30-10.35	Dr. Rajiv Kumar, Secretary General, FICCI
10.35-10.40	Mr. Christian M. Schlaga, Deputy Head of Mission, German Embassy
	<b>Address by:</b>
10.40-10.45	Mr. V. Bhaskar, the then Joint Secretary, Department of Industrial Policy and Promotion, Ministry of Commerce & Industry
10.45- 10.50	Dr. Stefan Walz, Federal Ministry of Justice
	<b>Opening Address by Parliamentarians on "Intellectual Property and Innovation policy"</b>
10.50-11:00	Dr. E M S Natchiappan, Member of Parliament (Rajya Sabha) and Chairman, Indo-German Forum of Parliamentarians
11.00-11.10	Prof. Dr. Günter Krings, CDU/CSU, Member of Parliament, Deputy Chairman of the CDU/CSU group in the German Federal Parliament
11.10 - 11.25	Coffee Break

## **THEME I: Intellectual Property and Innovation Policy**

**11.25-1.40** **Moderator:** Mr. Stefan Helming, Country Director, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH

### **Topic 1 Finding The Right Balance To Foster Innovation: Exclusive Rights vs. Access to Knowledge**

11.25-11.40	Speaker 1: Dr. V. C. Vivekanandan, MHRD IP-Chair Professor, NALSAR, Hyderabad
11.40-11.55	Speaker 2: Prof. Dr. Reto Hilty, Max Planck Institute for Intellectual Property and Competition Law"
11.55-12.10	Speaker 3: Mr. D G Shah, Secretary General, Indian Pharmaceutical Alliance
12.10-12.25	Speaker 4: Mr. Ansgar Heveling, CDU/CSU, Member of Parliament, Spokesman for copyright law, intellectual property and criminal law in the CDU/CSU group in the German Federal Parliament

12.25-12.40 Coffee Break

**Topic 2 Factors for Technology Transfer: Legal Framework and Best Practices**

12.40-12.55 Speakers 1: Dr. Anil Wali, Director, Foundation for Innovation & Technology Transfer, IIT Delhi

12.55-1.10 Speaker 2: Dr. Henning Grosse Ruse-Khan, Max Planck Institute for Intellectual Property and Competition Law

1.10-1.25 Speaker 3: Dr. Ulrich Romer, Federal Ministry of Economics and Technology

1.25-1.40 Speaker 4: Dr. Peter Gutschmiedl, Senior Vice President and Head of Engineering, EADS/Cassidian

1.40-1.50 Open Forum Discussion

**1.50-2.30 Lunch Break**

**THEME II: Intellectual Property and Competition Law**

**2.30 - 3.45** Moderator: Shri P.N Parashar, Member, Competition Commission of India

2.30-2.45 Speaker 1: Dr Navneet Sharma, Director, CUTS, Institute for Regulation & Competition

2.45-3.00 Speaker 2: Ms. Milena Weidenfeller, Federal Ministry of Economics and Technology

3.00-3.15 Speaker 3: Mr. Vishnu Rethinam, Partner, Remfry & Sagar Attorneys at Law, Gurgaon, India

3.15-3.30 Speaker 4: Prof. Dr. Josef Drexler, Max Planck Institute for Intellectual Property and Competition Law

3.30-3.45 Open Forum Discussion

**3:45-4:00** Coffee Break

**Theme III: Importance of Intellectual Property for MSMEs**

**4.00-5.30** Moderator: Shri Dharmendra Prakash, Joint Development Commissioner, Ministry of Micro, Small and Medium Enterprises

<b>Topic 1: Intellectual Property for Business Strategies of MSMEs</b>	
4.00-4.15	Speakers1 : Dr. Alka Chawla, IPR Cell, Faculty of Law, University of Delhi.
4.15-4.30	Speaker 2 : Mr. Guido Christ, Indo-German Chamber of Commerce
4.30-4.45	Speaker 3: Ms. Milena Weidenfeller, Federal Ministry of Economics and Technology
<b>Topic 2: Proposed 2nd Tier Protection for Inventions: Utility Model and SMEs</b>	
4.45-5.00	Speaker 1: Mr. T C James, Former Director, Department of Industrial policy and Promotion, ministry of Commerce and Industry
5.00-5.15	Speaker 2: Dr. Stefan Walz, Federal Ministry of Justice
5.15-5.45	Open Forum Discussion
<b>7.30 onwards</b>	<b>Reception at German Embassy</b>
<b>Friday, March 11,2011</b>	
<b>10.30 - 12.30</b>	<b>Breakout Sessions</b>
<b>Session 1</b>	<b>Intellectual Property in Information Society</b>
	<b>Moderator:</b> Dr. Debashish Dutta, Scientist 'G' & GC (R&D in IT), Department of IT, Ministry of Communication & IT, Government of India
<b>Topic 1: Key Ingredients for Booming IT Sector</b>	
10.30-10.45	Speakers 1: Mr. Pinaki Ghosh,Principal IP Officer, Infosys Technologies Ltd, Bangalore
10.45-11.00	Speaker 2: Dr. D S Sengar, Director, Indian Law Institute, New Delhi
11.00-11.15	Speaker 3: Prof. Dr. Günter Krings, CDU/CSU, Member of Parliament, Deputy Chairman of the CDU/CSU group in the German Federal Parliament
11.15-11.30	Speaker 4: Mr. Venkatesh D.K, Vice President SAP Labs India

<b>Topic 2: End User Licenses and Consumer Protection</b>	
11.30-11.45	Speaker 1: Mr. Patrick von Braunmühl, Senior Advisor, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH
11.45-12.00	Speaker 2: Mr. Pranesh Prakash, Programme Manager, Centre for Internet and Society, Bangalore
12.00-12.30	Open Forum Discussion
<b>Session 2</b>	<b>Intellectual Property in Pharmaceutical Sector</b>
	<b>Moderator:</b> Dr. K.S.Kardam, Deputy Controller of Patents and Designs, PO, New Delhi
<b>Topic 1: Case Studies on Pharmaceutical Industries: Country Experience</b>	
10.30-10.45	Speaker 1: Ms. Pratibha Singh, Managing Partner, Singh & Singh, Advocates, New Delhi.
10.45-11.00	Speaker 2: Dr. Jörg Thomeier, Chief Intellectual Property Counsel, Corporate Head of IP, Bayer Group
<b>Topic 2 : Anti Counterfeit Technologies and Solutions</b>	
11.00-11.15	Speaker 1: Mr. Enrico Rühle, Managing Director, TÜV Rheinland (India) Pvt. Ltd.
11.15-11.30	Speaker 2: Mr. Parminder Singh, Government Relations, South Asia, HP India Pvt. Ltd.
11.30-11.45	Speaker 3: Dr. Praful Naik, Chief Scientific Officer, Bilcare
11.45-12.30	Open Forum Discussion
12.30-12.50	Reports from two parallel sessions
12.50-1.10	Summing Up and Concluding Remarks Representative (FICCI)
<b>Afterwards</b>	Buffet Lunch



## ABOUT FICCI-IPR Division

The Intellectual Property Rights (IPR) Division at FICCI is intensively involved with issues pertaining to protection and enforcement of Intellectual Property Rights. It has taken decisive steps in raising the levels of awareness about Intellectual Property Rights amongst the citizens of India. In this regard, FICCI's constructive contributions span various capacity building exercises and training programs for the industry, the judiciary, and the law enforcement agencies. Further, the IPR division is a platform for continuous interaction between the industry and the Government with a view to providing an interface for businesses to resolve their issues pertaining to IPRs. Most importantly, FICCI is also instrumental in offering substantive and comprehensive inputs and feedback to the Government on policy-related matters.

ACTIVITIES	
Facilitate the Industry	Facilitate the Government
Providing strategic policy and advice	Providing Policy Development through continuous research and global networking
Increasing awareness about the role of Intellectual Property in today's knowledge economy	Assisting Intellectual Property Offices in raising their standards at par with International level
Training police and custom officers on effective protection of Intellectual Property Rights	Providing with inputs on current IP issues and on effective protection of national interests at International fora
Sensitizing Judiciary on adjudication of IP disputes	Reviewing the existing IP regulations/ legislations and advise amendments, if any
Ensuring enhanced effectiveness of Intellectual Property Rights	Providing blue prints of Strategies for Developing a Vibrant IP culture related to Geographical Indication, Patents, Designs and Trade Marks

### Contact Us

Ms. Sheetal Chopra/Mr. Abhishek Bajaj/Mr. Deepak Arora

Tel: +91-11- 011-23487477

Fax : +91-11-23766930

Email: [ipr@ficci.com](mailto:ipr@ficci.com)

### **Contact Us**

Ms. Sheetal Chopra/Mr. Abhishek Bajaj/Mr. Deepak Arora

Tel: +91-11- 011-23487477  
Fax : +91-11-23766930  
Email: [ipr@ficci.com](mailto:ipr@ficci.com)