

GLOBAL IP AND LITIGATION

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Internationalization or Globalization is the buzz word for today in any business concerns and Intellectual property rights are territorial in nature; though the international community has taken steps to harmonize Intellectual Property Laws around the world; it still varies in most countries because of its social, economic, cultural and geographical variations. After the implementation of WTO, TRIPs Agreement and commencement of WIPO (World Intellectual Property Organization) several reforms have been introduced to uniform Intellectual Property law around the world. Common classification systems like IPC (International Patent Classification) for patents, NICE – Trademark Businesses Classification, Vienna figurative trade marks classification, Locarno Classification – Industrial Design Classification and common filing processes like PCT (Patent Cooperation treaty) for filing Patent Applications, Madrid Systems for filing Trade Mark applications, Hague System for the International Registration of Industrial Designs, Lisbon System for the International Registration of Appellations of Origin were already introduced and successfully adopted by most member countries.

Several Regional organizations like EPO, OHIM, ARIPO, OPAI are supporting and coordination for simple filing and enforcement of Intellectual property rights in their regions.

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International associations like the International Intellectual Property Alliance (IIPA), International Trademark Association (INTA), International Association for the Protection of Industrial Property (AIPPI), Asia Pacific Intellectual Property Association (Intellectual Property Information Service) - (APIPA) and other associations are also struggling to uniform the law of various countries.

With the growth in intellectual property rights filings and reciprocity of member states in protecting intellectual property of their citizens have paved path to creation and enforcement of Intellectual Property Rights in the Global markets; which in turn required cross-border solutions for intellectual property right disputes.

Diversified languages, social, economical cultures, geographically issues and municipal laws are troubling proprietors of the Intellectual property to enforce their rights.

Also with growing complex international relationships in terms of Licenses, acquisitions, strategic alliances, cross licensing, patent pools etc. required expertise in adjudication of disputes.

Thought the commercialization of Intellectual Property Rights is global; protection and enforcement is territorial. Proprietor of the Intellectual Property has to file and enforce his rights in each and every country where he is commercializing his intellectual property rights.

Overview of Litigation in Different Jurisdictions - Patents as an Example²:

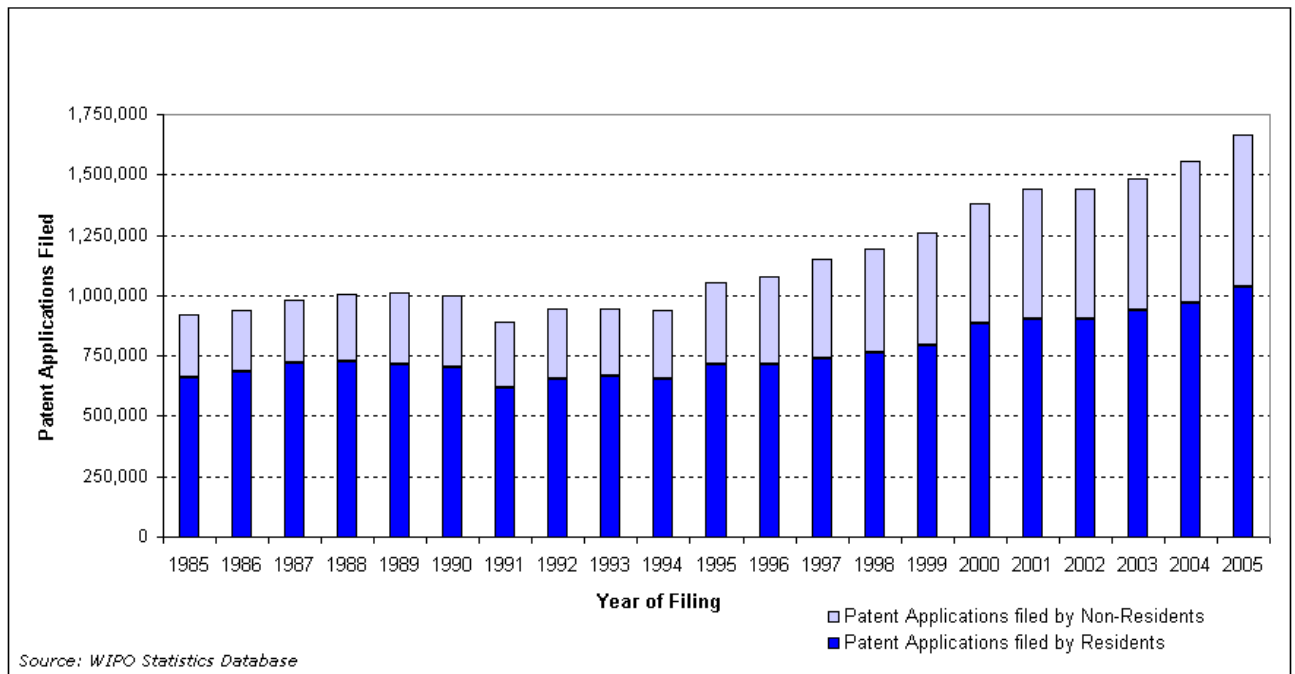
Country	Characteristics of Legal System	Average Duration	Average Cost
France	<ul style="list-style-type: none"> - Civil law - Unified litigation - No specialized courts 	First Instance: 18-24 months Appeal: 18-24 months	€80,000-150,000 (1st Inst.)
Germany	<ul style="list-style-type: none"> - Civil law - Bifurcated litigation - Specialized court for invalidity 	First Instance: 12 months Appeal: 15-18 months	€50,000 (1st Inst.) €70,000 (App.)
Italy	<ul style="list-style-type: none"> - Civil law - Unified litigation - Specialized courts 	First Instance: few months - 24 months Appeal: 18-24 months	€50,000-150,000 (1st Inst.) €30,000-70,000 (App.)
Spain	<ul style="list-style-type: none"> - Civil law - Unified litigation - Commercial courts 	First Instance: 12 months Appeal: 12-18 months	€100,000 (1st Inst.) €50,000 (2nd Inst.)
U.K.	<ul style="list-style-type: none"> - Common law - Unified litigation - Specialized courts - Mediation promoted 	First Instance: 12 months Court of Appeal: 12 months House of Lords: 24 months	€750,000-1,500,000 (1st Inst.) €150,000-1,500,000 (App.) €150,000-1,500,000 (House of Lords)
China	<ul style="list-style-type: none"> - Civil law - Bifurcated litigation - Specialized courts 	First Instance: 6 months (in law) Appeal: 3 months, no limit when foreigners litigate	US\$150,000 (1st Inst.) US\$50,000 (App.)
Japan	<ul style="list-style-type: none"> - Civil law - Bifurcated litigation - Specialized courts 	First Instance: 14 months Appeal: 9 months	US\$300,000 (1st Inst.) US\$100,000 (App.)
U.S.	<ul style="list-style-type: none"> - Common law - Unified litigation - Specialized court of appeals (CAFC) - Jury trial available - Mediation promoted 	First Instance: up to 24 months Appeal: 12 + months	Up to US\$4,000,000 (1st Inst.) US\$150,000-250,000 (App.)

WTO as platform allows the member countries to discuss and complain against a member state which does not protect Intellectual Property Rights of proprietors of other member states. However this is at a policy level debate by the member states. An individual Intellectual property rights proprietor often faces obstacles in enforcing his rights.

² Source: WIPO Magazine - http://www.wipo.int/wipo_magazine/en/2010/01/article_0008.html visited on 01st November 2010.

WIPO Arbitration and Mediation Center itself offered as an option for the resolution of international commercial disputes between private parties. Developed by leading experts in cross-border dispute settlement, the procedures offered by the Center are widely recognized as particularly appropriate for technology, entertainment and other disputes involving intellectual property.

The following graph shows that there are more patents filed by non-resident applicants than the residents of particular country³.



The International Trade Commission or municipal customs law departments as empowered by Article 51 of TRIPS have monitoring imports of the infringing products and acting as medium to enforcement of Intellectual Property Rights of proprietors even before the products enter the market of the respective geographical territory

³ http://www.wipo.int/ipstats/en/statistics/patents/pub_archives/patent_report_2007.html visited on 2nd November 2010

where the proprietors are awarded with Intellectual property rights grants. However, lack of technical expertise is causing concern for proprietors of Intellectual Property Rights.

Another serious problem is the requirement of filing suits in different jurisdictions for enforcement of Intellectual property Rights for a same product grant against the same infringer. Though the legal aspects and process of law has been harmonized for compliance with International agreements; there is a need for a single litigation filing system similar to PCT patent filing system for filing infringement cases in different territories against a single infringer for a similar Intellectual Property infringement.

This thought has given rise for establishment of International Court for Intellectual Property disputes which can award or adjudicate the disputes and whose order or award can be enforced by municipal courts in member states. Maybe a review of decision by the victims of the decision should be allowed to the Municipal courts in member states before executing the order or award.

It might be difficult to prove infringement in each territory at international level when considered issues related to evidence of infringement, validity of patents, potential trans-border use, legal remedies available in each jurisdiction and confidentiality of evidence submitted to International adjudicating body.

However, these issues can be discussed and an effective mechanism through elaborate debate on every issue can bring a single adjudication body for Intellectual Property dispute adjudication.

Intellectual Property Rights litigation:

Intellectual Property Rights litigation parties concerned are as follows:-

- Plaintiffs
 - Proprietor of Rights
 - Assignee
 - Exclusive licensee – substantially all rights
 - Potential infringer (Declaratory Judgment action)
- Defendants
 - Anyone who **makes, uses, offers and/or sells** or **imports** a patented invention without permission
 - Anyone who actively induces or contributes to direct infringement
 - Patentee/assignee

Before going ahead with filing a suit; it is recommended to do ground check for validity of Intellectual property right in that territory along with your assertion rights in that territory; it is also required sending a cease and desist letters to the infringer as caution notice. Also marking on the product with Intellectual property rights in that territory would help plaintiff claiming damages along with injunction. Even before sending a Cease and Desist letter, cross check the status of the infringer some time your own Cease and Desist letters boomerang. Analyze your Intellectual property strengths and weaknesses, analyze Litigation stamina and return on Investment for such litigation.