



INDIA IN 2017

FOUR IN-HOUSE COUNSEL, A MEDIATION SPECIALIST AND PARTNERS AT THREE LAW FIRMS SHARE THEIR VIEWS ON THE DEVELOPMENTS THAT ARE LIKELY TO SHAPE INDIA'S BUSINESS AND LEGAL CLIMATE IN THE COMING YEAR.

Privacy, data protection and cyber-crime-related issues will take on even greater importance in 2017.

An International Association of Privacy Professionals study recently concluded that losing customers' or employees' personally identifiable information (PII) ranks first among disclosed information-related risks faced by companies. The study looked at disclosures of potential risk factors made by more than 100 publicly traded companies to the US Securities and Exchange Commission (SEC). It found that 86% of companies that disclosed privacy and security risks in their annual filings to the SEC included the risk of hacking or cyber incidents.

The recent hacking of Twitter accounts of prominent political leaders in India and the Yahoo data breaches have shown that cybercrimes and security incidents can lead to increased costs, liability claims and reputational losses for companies.

We can expect interesting conversations on the interplay between security and privacy, as more and more digital services

emerge that access citizen data and PII and as India moves towards becoming a data-driven digital economy.

Businesses in India – especially those in the outsourcing industry – are gearing up for the EU General Data Protection Regulation (GDPR) becoming directly applicable as of May 2018 in all EU member states. While such businesses should be performing privacy-impact assessments they also need to start preparing data protection compliance programmes, processes and infrastructure, in order to meet the increased compliance obligations of the GDPR.

Meanwhile in India, the Information Technology Act, 2000, will likely see far reaching amendments or even a complete overhaul to include a robust legal framework for cyber security.

Finally, India should also consider dedicated legislation to provide a holistic data protection and data privacy regime, similar to countries such as Singapore and Japan, to position India as a technology and financial hub.



It will also be interesting to see if the government's 2017-18 budget provides for obtaining swifter and hassle-free regulatory approvals and for making it easier for Indian startups to raise capital. Such measures would contribute to improving India's overall rank in the World Bank's ease of doing business index.

KAPIL CHAUDHARY is corporate counsel, India and South Asian Association for Regional Cooperation region, at Autodesk India.

CHOOSE YOUR BATTLES WISELY

Pankaj Soni, a partner at Remfry & Sagar, provides some smart tips for patent enforcement in 2017.



Pankaj Soni

“How can I enforce my intellectual property (IP) rights in India?” A simple question, the answer to which is complicated because India’s IP regime is sometimes inconsistent in its approach towards what can be protected. It is also plagued with delays. In the face of such challenges, an IP owner may be left contemplating whether or not India as a jurisdiction is worth the investment. If one can enforce IP rights in India, then it will be worth the investment, but having a sound strategy is a must to make sure that the enforcer does not become the victim.

PICK YOUR BATTLES

In the words of Kenny Rogers, “You’ve got to know when to hold ‘em, know when to fold ‘em, know when to walk away, and know when to run”. Litigation is not always the best option and a good attorney will tell you so. The opponent(s) must be carefully considered and a strategy should be developed based on the parties, the product/technology involved and importantly, the desired outcome. I believe an “outcome” differs from, and should not be confused with a “result”. A result is limited in that it is merely the conclusion of the impending battle, but the outcome is the bigger picture where one envisions the conclusion of a conflict in the long term, which may not require litigation at all.

Having said that, Indian entities are not good at coming to the discussion table, so litigation is never off the table. One must strategically decide when to walk away from a discussion and start a courtroom battle. IP owners must also plan carefully how to start a conflict and whether to (i) initiate a licensing discussion, (ii) send a cease-and-desist letter, or (iii) immediately seek temporary injunctive relief. A cookie-cutter approach does not work in any jurisdiction including India.

INJUNCTION: A LEGITIMATE WEAPON

If a company seeks profits from enforcing its rights in India, then its *ab initio* strategy needs to be aligned with the peculiarities of Indian practice. Unlike the US, punitive damages and treble damages are notions that have not found universal acceptance. The better option is to seek injunctive relief, which is inexpensive, efficient and effective. After all, a patentee can, to the chagrin of some commentators, even obtain an ex parte interim

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injunction at a cost less than that of two business class air tickets from the US to India! If not ex parte, then a successful preliminary injunction bid can be achieved in nine to 12 months – not a bad option for a judicial system that is steeped in unfortunate delays. Yes, the injunction can, and will, be appealed, but it sends a message and can bring the defendant into a more temperate mood.

EVERYONE IS A PUBLIC POLICY EXPERT

In India, you ignore public policy at your own peril. Recent decisions indicate that pharmaceutical rights in particular will likely be adjudicated within a public policy framework. Judges, opposing counsel, the media and the IP community often do not shy away from expressing their interpretation of public policy and stressing its applicability. This can lead to

great uncertainty in outcomes. However, IP owners may be reassured by the fact that this trend is not so prevalent in matters outside of pharmaceutical litigation.

SEP AND FRAND ARE KNOWN (DEVILS)

A few years ago one would be hard pressed to have conversations on standard essential patents (SEPs) and fair, reasonable and non-discriminatory (FRAND) licensing obligations. However, since the Ericsson battles commenced in 2012, coupled with the fact that India is one of the primary telecom markets in the world, everyone is talking about SEPs and FRAND, their interplay with Indian competition law and the trend of ex parte injunctions being freely granted (or lifted subject to deposit orders).

The Indian government has also created a body, the Cell for IPR Promotion and Management, to examine the availability of SEPs on FRAND terms. Interested parties should thus carefully study the playing field in India before they set about enforcing telecom patents.

KNOW YOUR LAW FIRM

A lesser known aspect of IP enforcement in India is that law firms are, and should be, hired for their technical and procedural expertise and the depth of their practice. There is a common pool of senior counsel – eminent lawyers who are expert orators and known for their court craft – that work independently and are accessible to every law firm. So work with a firm that matches your style, is willing to strategize with you and gives you the quality of service you desire.

PANKAJ SONI is a partner at Remfry & Sagar. Email: Pankaj.Soni@remfry.com.



The effect of the recent demonetization will be seen in the coming year. The withdrawal of high-value notes is generally expected to have a significant upside in the medium to long term, mainly due to an inevitable move towards a non-cash economy. The expected implementa-

tion of a goods and services tax will also be significant. While compliance requirements will increase for e-commerce and consumer internet companies, which have been the hottest sectors for overseas investors for many years, the chances of scaling up businesses in these sectors is high.

Another development that is going to boost the confidence of overseas investors in the Indian regulatory system is the Insolvency and Bankruptcy Code, 2016, which is being notified and made operational in a phased manner. A vital reform such as the Insolvency and Bankruptcy Code will certainly improve ease of doing business in India and facilitate more investments in the coming years.

It is also expected that the Reserve Bank of India will notify the rules on peer-to-peer or social lending in 2017. This would help to

regulate the fast growing lending marketplace and attract more investments to the sector. Overseas investors have long been concerned by the lack of adequate liquidity from their early stage investments in India. This may be to a certain extent addressed once the proposed changes for high-tech startup and other new business platform norms are notified by the Securities and Exchange Board of India.

Therefore, in the coming year, there are good chances of scaling up businesses, with more liquidity options and improved ease of doing business. This would facilitate more investment opportunities in India.

VINOD KUMAR MENON is general counsel of Accel Partners India.

I am optimistic about the prospects for the Indian pharmaceutical sector in 2017 for numerous reasons. The market has expanded at a compound annual growth rate of 13% annually over the past decade, and is expected to continue growing at 14% for the next five years.

The rural and semi-urban areas account for less than 40% of sales currently. This provides an opportunity for growth in the under-penetrated market. The government is carrying out several regulatory changes that are aimed at making drugs affordable and within reach of large sections of society. While the National Pharmaceutical Pricing Authority is trying to bring more drugs under price control, the government has been trying to regulate how drugs are marketed and how they can be routed through prescription mode. To achieve this, the government introduced the Uniform Code for Pharmaceutical Marketing Practices, under which a recent notification states that doctors should prescribe drugs by their generic name and not their branded name. Implementation of this

may lead to major changes to the industry and also to its marketing strategies.

I also believe that the government is providing better clarity about its intended actions, which will improve the regulatory and legislative environment for the sector in the coming years. Such steps by the government help create a transparent system with tighter compliance measures before a product launch, and also create a level playing field.

I believe that the pharmaceutical sector as a whole will outperform many other sectors in the coming year. In addition, there will be one-off events that have a positive impact on the industry. The recent demonetization is an example of this. We saw that medicines were purchased in bulk to stock up due to the uncertainty of availability of medicines in the near future. There has also been a rise in sales of medicines as pharmacies have been allowed to accept old currency notes.

Lastly, 2017 should see the onset of the goods and services tax (GST). While there will be an increase in the compliance burden and costs, GST will also have a posi-



tive impact on the pharmaceutical sector as it will reduce the multiple levels of taxes that pharma companies currently pay. However, to benefit from GST, companies will need to revisit their strategies and supply chain structure.

VIVEK MITTAL is head of legal for Lupin in India.

WHAT'S ON THE IP AGENDA FOR 2017?

DPS Parmar and Aniruddh Singh of LexOrbis discuss the pros and cons of ongoing sectoral reform.



DPS Parmar



Aniruddh Singh

With the introduction of a comprehensive National Intellectual Property Rights (IPR) policy in May 2016, the government clearly laid down a roadmap for future development in the IP administration in India. The policy, with the motto of "Creative India; Innovative India", will contribute to the advancement of India's IP ecosystem. There were many modifications that took place, from technological advancement to development in infrastructural facilities, and from policy reforms to human capital development. If 2016 was dedicated to certain IP reforms, we may see many policy deliverables in 2017.

The government introduced the Patents (Amendment) Rules 2016, in May last year. The provisions of the rules that found favour with applicants included concessions in the fees for startups and the possibility of a 90% refund in case of withdrawals before a first action report. However, certain provisions, like curtailment of turnaround time from 12 months to six months, received mixed reviews from stakeholders. The purpose behind this move is to accelerate the examination process, but it will be challenging for the applicant to revert back in a shorter time-span.

Similarly, restricting an accelerated examination to only the start-ups and India International Searching Authority (ISA) or International Preliminary Examining Authority (IPEA) applicants, along with a restriction of 1,000 applications per year, gives an impression of a cautious approach from the government to avoid a mad rush, which reflects on the inability of the Indian Patent Office (IPO) to take more work. With the induction of more examiners one can expect this restriction to be lifted soon, paving the way for the establishment of an efficient tool to meet the demands of patent applicants.

The pendency of the over 250,000 IP applications remains a major challenge for

the government. Although some positive initiatives were taken by recruiting 458 patent examiners and 100 trademark examiners, the particular step of contractual basis appointments cannot be considered a permanent solution. It is expected that IP offices should hire permanent technical manpower as much as possible so that in future pendency does not haunt prospective applicants.

Caught in the whirlpool of litigation triggered by public interest litigations (PILs) serv-

The IPAB was non-functional for a year following the departure of its chairman and a technical member last May

ing the social interest, High Court decisions serving the judicial interest, and executive dilemmas in implement court orders, the Intellectual Property Appellate Board (IPAB) was non-functional for a year following the departure of its chairman and a technical member last May. This was a setback to the appellate process as well as the revocation and rectification interests of IP stakeholders. The ministry has provided assurances in parliament that the necessary steps are being taken to fill existing vacancies in the IPAB and modernize and strengthen its infrastructure. The challenge for 2017 will be to make the IPAB fully functional.

In a welcome move, the government has formed a committee to look into anomalies in the computer related inventions (CRI) guidelines issued last year. The committee's

report is with government now and revised guidelines are expected to be published soon. There were certain inconsistencies in the implementation of these guidelines within IP offices and it will be a challenge for the different IPO jurisdictions to complement each other and issue decisions that are consistent with provisions of the Patents Act.

Although government initiatives last year tried to address most of the shortcomings of IP registration and protection in India, certain obstacles prevail in the system, and some of the modifications which were bought with the motive of streamlining the process of IP registration have created confusion among stakeholders.

The Office of the Controller General of Patents, Designs and Trade Marks (CGPDTM) has tried to resolve these ambiguities by way of clarifications and assuring the timely resolution of problems faced by stakeholders in the normal course of practice, but it will be very challenging, even for the government, to act efficiently in such a diverse IP ecosystem. The initiatives of the government will continue to be on the radar of stakeholders for critical review.

The possibility of new opportunities and challenges are likely to arise in 2017, as modifications bought by the government in the name of IP reforms struggle for permanent status. So it is highly recommended that IP owners and stakeholders be sufficiently vigilant while opting for an IP strategy or initiating safety measures for an adequate IP protection.

DPS PARMAR is a senior consultant at LexOrbis, where **ANIRUDDH SINGH** is an associate. Email: manisha@lexorbis.com.

A silent revolution is taking place in India with the growing realization that a courtroom may not be the only place for resolving disputes. Simultaneously the law is waking up to the potential of mediation and I expect this to continue in 2017.



The Consumer Protection Bill, 2015, provides for a panel of mediators. Similarly the Companies Act, 2013, has created the National Company Law Tribunal, which in turn provides for a panel of mediators. The Real Estate (Regulation and Development) Act, 2016, provides for conciliation, which many would argue is similar to mediation.

Given this scenario we need to create the infrastructure for resolution of disputes through mediation. We need skilled people to become mediators and to act as champions and pioneers for mediation. The mediation world needs people with the credibility and reputation of advocates such as Harish Salve and Fali Nariman. They are the giants of the adversarial method of resolving disputes and we need people of the same stature in mediation.

This will require the support of the business community, as only then will the best mediators become available. In addition, I

believe mediation needs to be introduced to private citizens so that people with experience and commitment can be drawn to it. We also need legislation in place to ensure mediated settlements are enforceable, as this will give mediation the clout it needs.

Today businesses in the West use mediation more than arbitration as it is considered more business-friendly. Indian businesses too will increasingly opt for mediation after a failed negotiation (and before arbitration). Lawyers need to learn the art of representing clients involved in mediation.

Can all of this be achieved in 2017? It is time for a concerted effort by the judiciary, the Ministry of Justice and mediators.

LAILA OLLAPALLY is founder of the Bengaluru-based Centre for Advanced Mediation Practice.

Businesses everywhere are grappling with the need to stay abreast of the changes seen in the year gone by. While the UK comes to terms with Brexit and the US gears up for a Trump presidency, in India too we have had our fair share of changes during the year such as the demonetization that happened in November.

Yet, it is not just a case of staying abreast of these unprecedented changes. Businesses need to conduct themselves appropriately if they are to grow and, as in-house counsel working to ensure that companies are always in compliance with the law, the challenge for 2017 will be to stay ahead of the curve.

Gone are the days when lawyers would be called upon to just give their opinion. Today's in-house team needs to work alongside the business as its partner, not just to help and guide it but to hand-hold it and to make sure that it is compliant with the

law. The cost of not doing so is very high, partly due to the speed with which the regulators work. It is in the best interest of the business to remain compliant with and in sync with the law as it faces the challenging regulatory and competitive environment. To be compliant with environmental laws



– both in letter and spirit – will be very important in 2017 for every business, be it in the IT sector, the consumer sector, or the fast-moving consumer goods sector. The cost of mounting a defence to the growing number of public interest litigations that are before the courts is far lower if there is prior compliance.

An added challenge for 2017 will be to tap and nurture talent from among the millennials. I believe losing a valuable talent can knock the wind out of a company's sails. The ability to retain talent is not only vital for the continuing success of a company, but also critical to its bottom-line. ▲

SHUKLA WASSAN is executive director of legal and corporate affairs for South Asia at Hindustan Coca-Cola Beverages.

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