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# VEPACHEDU EDUCATIONAL FOUNDATION

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Issue 141

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### **USE OR LOSE: A SOLUTION TO THE TROLL PROBLEM**

Per the US Constitution, patents are supposed to produce higher and more certain investment returns from innovation, effectively ensuring and magnifying the first-mover advantage and helping to justify sustained investments in research and development. To be the innovator's friend, the patent should protect a marketed and profit producing innovation from the predators.

Regrettably, that is not the case now, because too many frivolous patents are frustrating the competition and impeding further advancements. These frivolous patents owned by non-practicing entities are inherently imprecise vehicles for incentivizing innovation and counterproductive. To prevent this situation, many countries have adopted laws that require a periodic showing of "working" of the patent by the patent owner, for example, India requires submission of a certification, similar to trademark use in the US, called "working requirement." This is an important mechanism by which a patent granting country can compel non-practicing patentees to transfer technology by a compulsory license option or dedicate the technology to the public in that jurisdiction by losing rights to the patents for failure to "work the patent" in that jurisdiction. Many in the US think that it is important to have such laws to make sure that patents are used as they should be, per the Constitutional mandate.

*"The ability to own a discovery and reap rewards from the investment in that unique invention or concept encourages innovation. Why invest, if predators could easily steal the idea and make it their own? The patent system is the innovator's friend. But the current system is not necessarily the friend to the public that wants to see innovations put to use. Industry giants can lock up ideas and sit on patents in*

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*order to discourage competition. We should favor "use it or lose it" rules that ensure that true innovators can't be driven out of an industry because incumbents protect their turf." Rosabeth Moss Kanter<sup>(2)</sup>.*

In addition, clear definition and process of the idea generation and conversion process pays off with higher revenue, market-cap growth and **EBITDA** [earnings **b**efore **i**nterest, **t**axes, **d**epreciation and **a**mortization] as a percentage of revenue. Building critical innovation capabilities in the area of innovation portfolio management, and aligning these capabilities with the innovation strategy and overall corporate strategy pay off with up to 22% higher profit margins. Further, active alignment of innovation strategy with culture pays off as much as 33% higher enterprise value growth and 17% higher profit growth over time<sup>(3)</sup>.

### CHANGING PATENT AND TRADEMARK LANDSCAPE

The cooperation between various countries in protecting intellectual property goes back in history. The Paris Convention, adopted in 1883, applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications and the repression of unfair competition. This international agreement was the first major step taken to help creators ensure that their intellectual works were protected in other countries. The Paris Convention for the Protection of Industrial Property was amended on September 28, 1979<sup>(4)</sup>. The Paris Convention boasting about a current total 176 Contracting Parties<sup>(5)</sup>, is administered by World Intellectual Property Organization (WIPO).

The WIPO Convention, the constituent instrument of the WIPO, was signed at Stockholm on July 14, 1967, entered into force in 1970 and was amended in 1979. WIPO is an intergovernmental organization which in 1974 became one of the specialized agencies of the United Nations system. The origins of WIPO go back to 1883 and 1886 when the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works provided for the establishment of an "International Bureau". The two bureaus were united in 1893 and, by virtue of the WIPO Convention, were replaced by the World Intellectual Property Organization in 1970, which administers 26 treaties, grouped into three categories<sup>(6)</sup>:

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#### (I) IP Protection

- Convention establishing the World Intellectual Property Organization
- Beijing Treaty on Audiovisual Performances
- Berne Convention
- Brussels Convention
- Madrid Agreement (Indications of Source)
- Marrakesh VIP Treaty
- Nairobi Treaty
- Paris Convention
- Patent Law Treaty
- Phonograms Convention
- Rome Convention
- Singapore Treaty on the Law of Trademarks
- Trademark Law Treaty
- Washington Treaty
- WCT
- WPPT

#### (II) Global Protection System

- Budapest Treaty
- Hague Agreement
- Lisbon Agreement
- Madrid Agreement (Marks)
- Madrid Protocol
- PCT

#### (III) Classification

- Locarno Agreement
- Nice Agreement
- Strasbourg Agreement
- Vienna Agreement

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By filing one international patent application under the PCT, applicants can simultaneously seek protection for an invention in 148 countries throughout the world.

**EUROPE (ABOUT 500 MILLION PEOPLE):** The concept of a unitary European patent has been under discussion for over four decades, in Europe. The Regulation (EU) No. 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of Unitary Patent (UP) protection came into force on January 20, 2013. An agreement on a Unified Patent Court (UPC)<sup>(7)</sup> was signed by 25 Member States of the EU on February 19, 2013 at Brussels, not yet in force. The UPC will comprise a Court of First Instance, a Court of Appeal and a Registry. The Court of First Instance will be composed of a central division (with seat in Paris and two sections in London and Munich) and by several local and regional divisions in the Contracting Member States to the Agreement. The Court of Appeal will be located in Luxembourg.

The Agreement on the UPC and its proposed Rules of Procedure provide for a protection of confidentiality of communications between clients and their patent advisors. The aim of the EU Patent Package (UP and UPC Regulations) is to provide a single pan-European patent and a single court for litigation of European patents. Advantages of the UP include cost savings for designating and maintaining patent protection in the 25 participating jurisdictions and expedited decision making regarding validity and infringement claims. Only European Union (EU) states may be party to the Unitary Patent Regulation (“the Regulation”). Many EPC states are not EU states (for example, Switzerland and Norway) and will therefore not be covered by the unitary patent.

Under the current European Patent Convention (EPC) system, a granted European patent can be validated in up to 40 states (38 EPC states and 2 “extension states” Bosnia & Herzegovina and Montenegro). European patents granted by the European Patent Office (EPO), which are subject to a national validation procedure to take effect in the designated states. The process to obtain Unitary Patent is through the EPC patent process. The process of applying for a European (and Unitary) patent, the examination of the patent application by the EPO, and the EPO grant formalities will remain unchanged under the new regime.

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Within one month of European patent grant, the patent owner must file a “Request for Unitary Effect” to obtain a unitary patent. European patents will continue to be granted in English, French or German. English-language patents will require translation into any other language of an EU member state. French or German language patents must be translated into English. Translations will be required until suitably accurate machine translations are available and for a maximum of 12 years from the enforcement of the Regulations. Grant of a unitary patent is to provide uniform protection having equal effect in all participating member states. The EU Patent Package is intended to make the patent system easier to access, less costly and more legally secure. The Unitary Patent Regulation will come into force from the date of ratification of the Unified Patent Court Agreement by 13 contracting member states<sup>(8)</sup>, including the UK, France and Germany, or after the “Brussels I” Regulation (No. 1215/2012) on the jurisdiction of the courts in civil matters in the EU is amended to clarify the jurisdiction of the UPC, whichever is the later.

While this package is being heralded by some as a means to make access to the patent system easier, less costly and more legally secure, by providing uniform patent protection in all participating 25 member states, representing some 500 million people; there are already such unitary systems in place in other parts of the world, such as the Indian Union and China.

In addition, a comprehensive reform to the EU trademark system, including a reduction of renewal fees and expanded rights for trademark owners when tackling counterfeit products in transit, is due to take effect in March and the new directive is to be implemented by January 2019. The comprehensive measure adopted on December 16, 2015 includes Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs)<sup>(9)</sup>.

**INDIA (ABOUT 1.3 BILLION PEOPLE):** The Republic of the Indian Union (India) came into being on August 15, 1947, bringing most of the Indian Continent under one democratic umbrella covering financial, defense, trade and IP. On December 7, 1998, India became a member of the International Union for the Protection of Industrial Property (“Paris Union”), founded by the Paris Convention<sup>(10)</sup>.

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India submitted the instrument of accession to the PCT, the Treaty became effective on December 7, 1998 with respect to India<sup>(11)</sup>.

In 2005, the Indian Union made the required amendments to its IP regime and became fully integrated with the WIPO by becoming TRIPS-compliant. Further, the International Bureau of the World Intellectual Property Organization appointed the Indian Patent Office as an International Searching Authority (ISA) and International Preliminary Examining Authority (IPEA) under the Patent Cooperation Treaty effective from October 15, 2013<sup>(12)</sup>. At present, India covers 29 states serving 1.3 billion people with a single patent and trademark regime.

**CHINA (ABOUT 1.3 BILLION PEOPLE):** Similar to India, the People's Republic of China (China) serves about 1.3 billion people with one IP regime. China submitted its access to PCT, effective from January 1, 1994<sup>(13)</sup>. China also is a member of the Paris Convention<sup>(14)</sup>. In addition, the State Intellectual Property Office of the People's Republic of China has been appointed as an ISA and IPEA under the PCT, effective from March 1, 2015.

**ISA and IPEA:** So far, the International Bureau of WIPO appointed the following Authorities as International Searching and International Preliminary Examining Authorities under the PCT<sup>(15)</sup>:

1. AT	<a href="#">Austrian Patent Office</a>
2. AU	<a href="#">Australian Patent Office</a>
3. BR	<a href="#">National Institute of Industrial Property (Brazil)</a>
4. CA	<a href="#">Canadian Intellectual Property Office</a>
5. CL	<a href="#">National Institute of Industrial Property of Chile</a>
6. CN	<a href="#">State Intellectual Property Office of the People's Republic of China</a>
7. EG	<a href="#">Egyptian Patent Office</a>

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8. EP	<a href="#">European Patent Office (EPO)</a>
9. ES	<a href="#">Spanish Patent and Trademark Office</a>
10. FI	<a href="#">National Board of Patents and Registration of Finland</a>
11. IL	<a href="#">Israel Patent Office</a>
12. IN	<a href="#">Indian Patent Office<sup>(16)</sup></a>
13. JP	<a href="#">Japan Patent Office</a>
14. KR	<a href="#">Korean Intellectual Property Office</a>
15. RU	<a href="#">Federal Service for Intellectual Property, Patents and Trademarks (Russian Federation)</a>
16. SE	<a href="#">Swedish Patent and Registration Office</a>
17. SG	<a href="#">Intellectual Property Office of Singapore</a>
18. US	<a href="#">United States Patent and Trademark Office (USPTO)</a>
19. XN	<a href="#">Nordic Patent Institute</a>

The above ISAs are competent ISAs for international applications filed on or after the date of appointment as ISA. If an international application is filed with the EPO acting as receiving Office, the EPO is the only competent ISA. If an international application is filed with the USPTO acting as receiving Office, there is an option to select a competent ISA. At least one applicant should be a resident or citizen of the United States. Search fee for an Indian applicant choosing Indian Patent Office as ISA, payable within one month from date of filing, is 2500 INR (38 USD) for individuals and 10000 INR (154 USD) for other entities<sup>(17)</sup>.

Certain ISAs have limited their competency for applications filed with the RO/US. Specifically, the European Patent Office (EPO)<sup>(18)</sup> will not act as an ISA/IPEA for applications with one or more claims to

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a business method (see PCT Applicant's Guide, Annexes D(EP), E(EP) and PCT Gazette No. 07/2005, page 4432 and No. 38/2006, page 19070). Further, the Australian Patent Office (IP Australia) has declared that it is not competent for applications with one or more claims drawn to subject matter set forth in Annex A of the Arrangement between IP Australia and the United States Patent and Trademark Office (1337 OG 263)<sup>(19)</sup>. To avoid significant processing delays, applicants filing international applications naming either the EPO or IP Australia as the ISA should take care to ensure that the application does not contain any claims for which the selected ISA is not competent.

Pursuant to an agreement concluded with the International Bureau, the USPTO, as an International Searching Authority, agreed to conduct international searches and prepare international search reports and written opinions of the International Searching Authority, for, in addition to the United States of America, Bahrain, Barbados, Brazil, Chile, Dominican Republic, Egypt, Georgia, Guatemala, India, Israel, Mexico, New Zealand, Oman, Panama, Peru, Philippines, Qatar, Saint Lucia, Saint Vincent and the Grenadines, South Africa, Thailand, and Trinidad and Tobago. The agreement stipulated the English language and specified that the subject matter to be searched is that which is searched or examined in United States national applications<sup>(20)</sup>.

### **TRADEMARK TRILATERAL AND TM5**

The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, the Madrid Protocol<sup>(21)</sup>, is one of two treaties comprising the Madrid System for international registration of trademarks. The protocol is a filing treaty and not a substantive harmonization treaty. It provides a cost-effective and efficient way for trademark holders -- individuals and businesses -- to ensure protection for their marks in multiple countries through the filing of one application with a single office, in one language, with one set of fees, in one currency. Moreover, no local agent is needed to file the application. While an International Registration may be issued, it remains the right of each country or contracting party designated for protection to determine whether or not protection for a mark may be granted.

In 2001, the Japan Patent Office (JPO), the European Union's Office for Harmonization in the Internal Market (OHIM), and the USPTO established a cooperative framework called the Trademark Trilateral. An outgrowth of the Trademark Trilateral is the TM5<sup>(22)</sup> comprising the five largest trademark offices in the world: the USPTO, the JPO, the OHIM, the Korean Intellectual Property Office (KIPO), and the

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Trademark Office of the State Administration for Industry and Commerce of the People's Republic of China (SAIC), in 2011 and 2012. The TM5 framework allows the partner offices to exchange information on trademark-related matters and to undertake cooperative activities aimed at harmonizing or improving their respective trademark protection systems and procedures. The work of the TM5 is structured through cooperative projects designed to improve users' interactions with national trademark offices and the World Intellectual Property Organization (WIPO). These projects include, among others, minimizing bad faith filings, TMview, common status descriptions and ID List, and comparison of examination results and Madrid Protocol procedure.

### TMVIEW

[TMview](#)<sup>(23)</sup> allows users to conduct a single search of multiple databases, including data from OHIM, WIPO, and 43 trademark offices (which includes the USPTO, JPO, and KIPO). The TM5 partners expect that the trademark data from SAIC will be added to the system in 2016. TMview also provides a link to access the trademark prosecution history and all associated documents of an application file, if that information is provided by the national office.

### REFERENCES AND NOTES

<sup>(1)</sup> Dr. Rao Vepachedu is the Managing Director at Cardinal Risk Management and registered patent attorney with extensive experience in the management of intellectual property and extensive experience in research and teaching. He currently works for Cardinal Intellectual Property (CIP), Cardinal Risk Management (CRM), and Cardinal Law Group (CLG). In addition, he is the president of Vepachedu Educational Foundation Inc. ([www.vepachedu.org](http://www.vepachedu.org)), a 501(c)(3) educational foundation. For more information visit: [www.linkedin.com/in/vepachedu](http://www.linkedin.com/in/vepachedu); <http://www.avvo.com/attorneys/60201-il-sreenivasarao-vepachedu-764535.html>, and <http://www.crm-ip.com/vepachedu.html>. Contact: [svepachedu@yahoo.com](mailto:svepachedu@yahoo.com) or [rao.vepachedu@cardinal-ip.com](mailto:rao.vepachedu@cardinal-ip.com); [www.linkedin.com/in/vepachedu](http://www.linkedin.com/in/vepachedu) and <http://www.crm-ip.com/vepachedu.html>;



<http://www.avvo.com/profile/dashboard>.

(2) Rosabeth Moss Kanter (@RosabethKanter) holds the Ernest L. Arbuckle professorship at Harvard Business School, where she specializes in strategy, innovation and leadership for change. <http://www.wsj.com/news/articles/SB10001424127887323582904578487200821421958>

(3) According to Cesare R. Mainardi, chief executive officer of global management consulting firm Booz & Co.

<http://www.wsj.com/news/articles/SB10001424127887323582904578487200821421958>

(4) Paris Convention for the Protection of Industrial Property: <http://www.wipo.int/wipolex/en/details.jsp?id=12633>

(5) Contracting Parties: [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=2](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2)

(6) WIPO-Administered Treaties: <http://www.wipo.int/treaties/en/>

(7) Agreement on a Unified Patent Court: [http://www.wipo.int/wipolex/en/other\\_treaties/details.jsp?group\\_id=21&treaty\\_id=934](http://www.wipo.int/wipolex/en/other_treaties/details.jsp?group_id=21&treaty_id=934)  
[http://documents.epo.org/projects/babylon/eponet.nsf/0/A1080B83447CB9DDC1257B36005AAAB8/\\$File/upc\\_agreement\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/A1080B83447CB9DDC1257B36005AAAB8/$File/upc_agreement_en.pdf)

Unified Patent Court: <https://www.epo.org/law-practice/unitary/patent-court.html>

(8) Ratification Details: <http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2013001>

(9) A comprehensive reform to the EU trademark system: [http://eur-lex.europa.eu/legal-content/EN/NOT/?uri=uriserv:OJ.L\\_.2015.341.01.0021.01.ENG](http://eur-lex.europa.eu/legal-content/EN/NOT/?uri=uriserv:OJ.L_.2015.341.01.0021.01.ENG)

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(10) Paris Notification No. 188: [http://www.wipo.int/treaties/en/notifications/paris/treaty\\_paris\\_188.html](http://www.wipo.int/treaties/en/notifications/paris/treaty_paris_188.html)

(11) PCT Notification No. 129 Patent Cooperation Treaty (PCT) Accession by the Republic of India:

[http://www.wipo.int/treaties/en/notifications/pct/treaty\\_pct\\_129.html](http://www.wipo.int/treaties/en/notifications/pct/treaty_pct_129.html)

WIPO Convention > India: [http://www.wipo.int/treaties/en/remarks.jsp?cnty\\_id=76C](http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=76C)

WIPO-Administered Treaties Contracting Parties > India: [http://www.wipo.int/treaties/en/ShowResults.jsp?country\\_id=80C](http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=80C)

Patent Cooperation Treaty > India: [http://www.wipo.int/treaties/en/remarks.jsp?cnty\\_id=500C](http://www.wipo.int/treaties/en/remarks.jsp?cnty_id=500C)

PCT System: [http://nopr.niscair.res.in/bitstream/123456789/4895/1/JIPR%208\(1\)%2050-57.pdf](http://nopr.niscair.res.in/bitstream/123456789/4895/1/JIPR%208(1)%2050-57.pdf)

(12) ISA/IPEA Agreement – IN/IB: Indian Patent Office as an International Searching Authority and International Preliminary Examining Authority:

[http://www.wipo.int/export/sites/www/pct/en/texts/agreements/ag\\_in.pdf](http://www.wipo.int/export/sites/www/pct/en/texts/agreements/ag_in.pdf)

Filing international applications for patent under the Patent Cooperation Treaty: [http://www.ipindia.nic.in/eLearning/PCT\\_filing\\_26December2014.pdf](http://www.ipindia.nic.in/eLearning/PCT_filing_26December2014.pdf)

FAQ: <http://sac.gov.in/SACSITE/TTIDWebsite/IPR/FAQpatent.pdf>

(13) PCT Notification No. 81, Patent Cooperation Treaty (PCT) Accession by the People's Republic of China:

[http://www.wipo.int/treaties/en/notifications/pct/treaty\\_pct\\_81.html](http://www.wipo.int/treaties/en/notifications/pct/treaty_pct_81.html)

(14) Paris Notification No. 114 Paris Convention for the Protection of Industrial Property, Accession by the People's Republic of China:

[http://www.wipo.int/treaties/en/notifications/paris/treaty\\_paris\\_114.html](http://www.wipo.int/treaties/en/notifications/paris/treaty_paris_114.html)

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(16) Receiving Office, INDIAN PATENT OFFICE: [http://www.wipo.int/pct/guide/en/gdvol1/annexes/annexc/ax\\_c\\_in.pdf](http://www.wipo.int/pct/guide/en/gdvol1/annexes/annexc/ax_c_in.pdf)

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(17) IN/ISA Search Fee: [http://www.ipindia.nic.in/iponew/feeChart\\_29December2015.pdf](http://www.ipindia.nic.in/iponew/feeChart_29December2015.pdf)

(18) EUROPEAN PATENT OFFICE (EPO): [http://www.wipo.int/pct/guide/en/gdvol1/annexes/annexd/ax\\_d\\_ep.pdf](http://www.wipo.int/pct/guide/en/gdvol1/annexes/annexd/ax_d_ep.pdf)

(19) Australia: <http://www.uspto.gov/web/offices/com/sol/og/2008/week52/TOC.htm#ref11>

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(21) Madrid Protocol: <http://www.uspto.gov/trademark/laws-regulations/madrid-protocol>

Madrid Protocol (Total Contracting Parties : 97):

[http://www.wipo.int/treaties/en/ShowResults.jsp?country\\_id=ALL&start\\_year=ANY&end\\_year=ANY&search\\_what=C&treaty\\_id=8](http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=8)

FAQ: <http://www.uspto.gov/trademark/laws-regulations/madrid-protocol/international-applicationsmadrid-protocol-faqs>

(22) TM5: <http://tmfive.org/>

(23) TMview: <https://www.tmdn.org/tmview/welcome>

**Additional Sources:** The information published here is available from the primary sources cited above, and also from secondary sources such as: New York Times (NYT), Washington Post (WP), Mercury News, Bayarea.com, Chicago Tribune, USA Today, Intellihealthnews, Deccan Chronicle (DC), the Hindu, Hindustan Times, Times of India, AP, Reuters, AFP, womenfitness.net, about.com, mondaq.com, etc

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AUM! SWASTI!

Om! Asatoma Sadgamaya, Tamasoma Jyotirgamaya, Mrityorma Amritamgamaya, Om Shantih, Shantih, Shantih! (Aum! Lead the world from wrong path to the right path, from ignorance to knowledge, from mortality to immortality, and peace!)

SWASTI! AUM!

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