



Remfry & Sagor

IP Report



THEN WHY RANK 66

India's R&D spend is a mere .85% of its GDP. Top innovators spend between 2.5% - 3% of their GDP on R&D. Lesser the input, lower the per capita innovation output.

The World Bank ranks our performance 130 out of 190 countries when it comes to the ease of doing business - thwarted commerce translates to less IP entering the market.

Less than impressive pupil enrolment figures, poor teacher pupil ratios and limited access to quality education at higher levels means India's vast talent pool (it is the second most populous nation) is under-utilised on account of inadequate skill sets.

BETTER DAYS AHEAD

2010-20 has been declared India's 'Decade of Innovation'. Noticeable improvements to the innovation climate include amendments to IP laws and overhaul of IP Offices' infrastructure with a strong emphasis on digitisation and enhanced efficiency. Also, heavy investments are being made to boost technological capabilities (the Digital India campaign) and encourage manufacturing (the Make in India campaign) and start-up (the Start-Up India campaign) activities in India.

In 2016, Bengaluru - a city in southern India - was reported as the 5th most preferred location (behind Silicon Valley, London, Paris and Singapore) for housing innovation centres. Microsoft, Boeing, Dell, Twitter, Samsung, 3M and GE are but a few prominent examples of companies that have set up large R&D centres here. Many other R&D hubs are emerging - Pune and the National Capital Region are prominent amongst them.

Pockets of world class excellence can be located in India's top graduate and post graduate schools. In terms of graduates in science and engineering, the Global Innovation Index ranks India at No. 4. For export of services in the sector of Information and Communication Technologies, India is ranked No. 1. Compared with 2015, India's rankings in human capital and research moved up 40 spots in 2016. There is a push to expand these trends and in this, India's culture of frugal innovation is another favourable factor.

INDIAN CONTRIBUTION TO GLOBAL INNOVATION

Going by awarded patents, many global corporations show strong contributions from Indian inventors (see table below).

Company	Total patents granted (Jan 1, 2011 - March 31, 2016)	Patents with at least one Indian Inventor (total)	Patents with at least one Indian Inventor (%)
GE	29,001	1,966	6.8
IBM	45,527	1,894	4.1
Intel	16,542	284	1.7
Amazon	3,631	62	1.7
Google	12,116	192	1.5
Microsoft	24,696	365	1.4
Qualcomm	32,218	421	1.3
Samsung	95,298	441	0.46
Apple	14,007	31	0.22

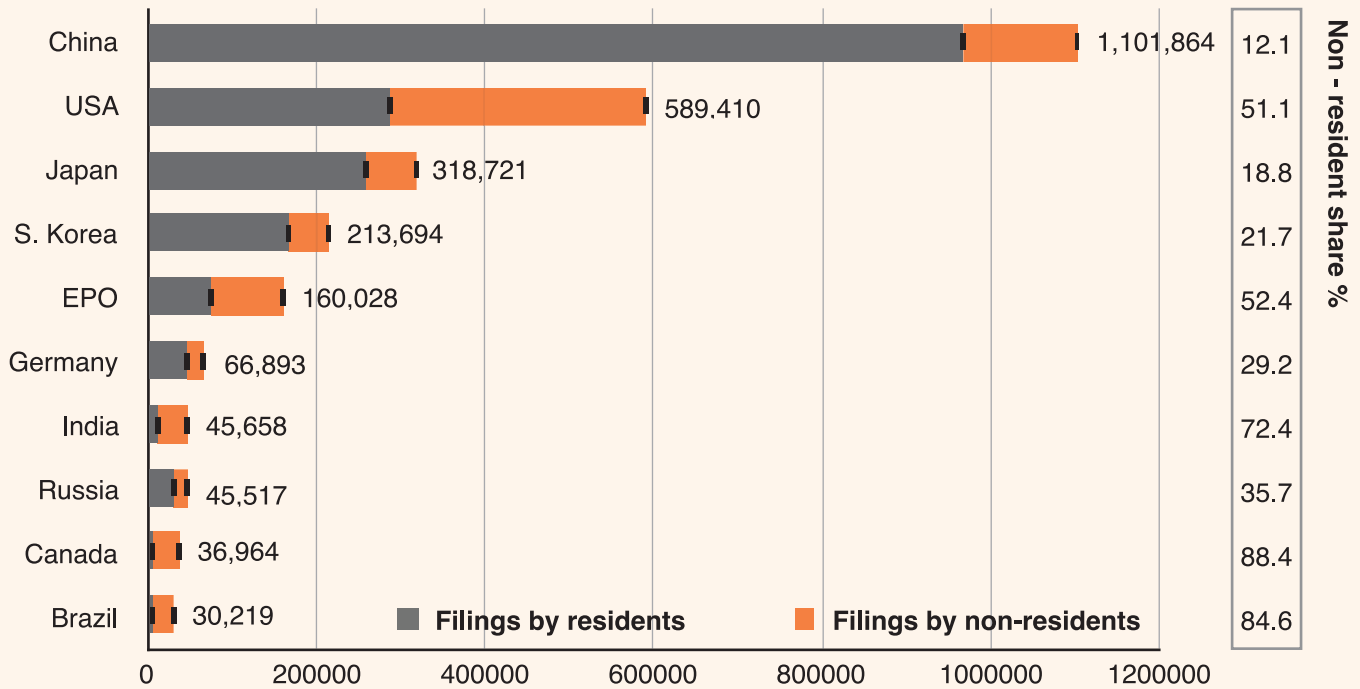
Data Source: Patent Inspiration, <http://www.patentinspiration.com/>

WHAT INDIA'S IP FILINGS REVEAL

Patents

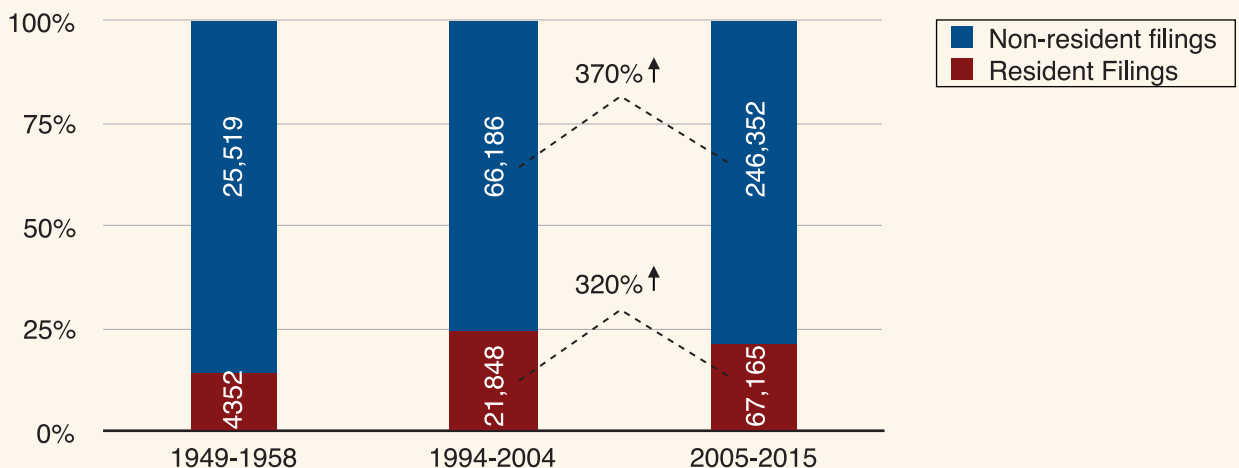
India is 7th in the world in terms of patent applications filed annually. 45,658 applications were filed in 2015, an increase of 6.5% over the previous year. In numbers, China received more than a million patent applications the same year, however, India is ahead of all other BRICS countries.

Patent applications made at the top 10 offices, 2015



Source: WIPO Statistics Database, October 2016

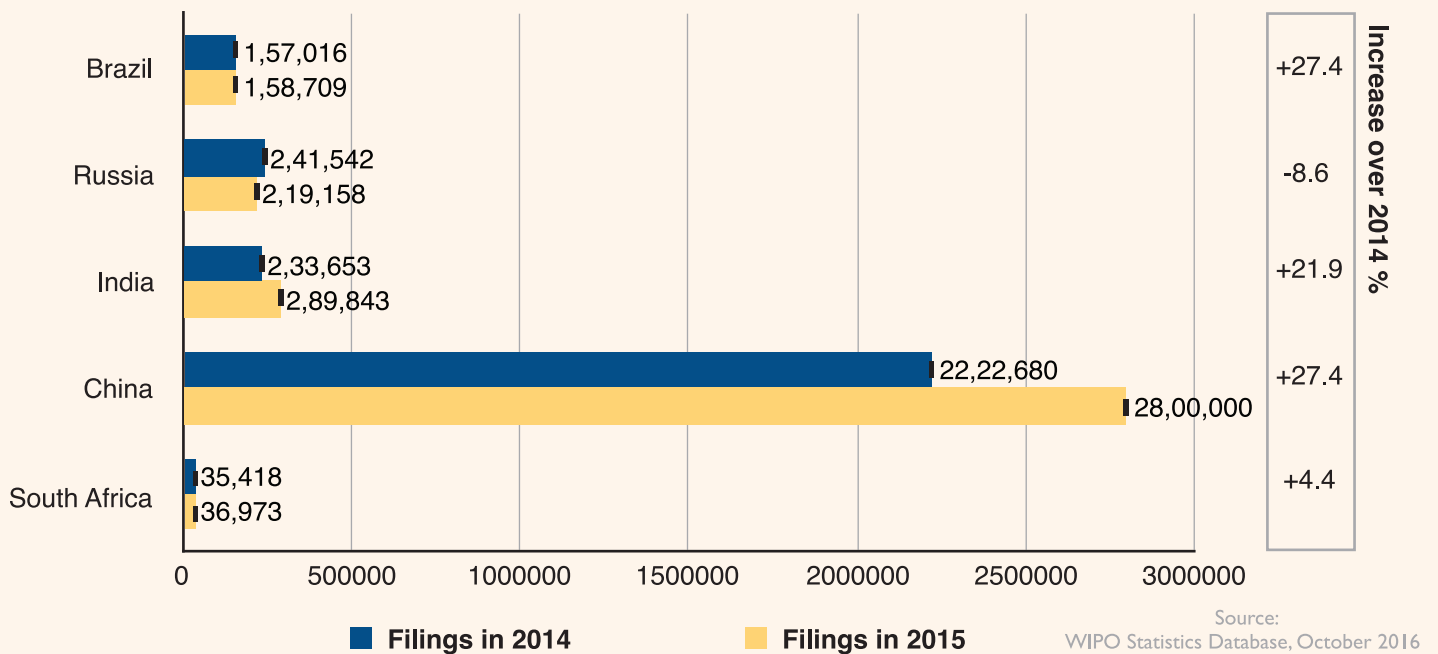
As the graph above reveals, Indian residents only accounted for 27.6% of the total applications filed at the Indian Patent Office. In the context of our innovation capabilities, this share ought to be larger. Yet the rate of innovation in India has not been static. India signed the WTO/ TRIPS Agreement in 1994 and wide ranging amendments to patent law took effect in the 10 year transition period that ended on January 1, 2005. Upon comparing figures (see graph below) from the decade of transition (1994-2004) to the one that followed (2005-15), if the number of foreign applications increased 370%, Indian applications grew 320%.



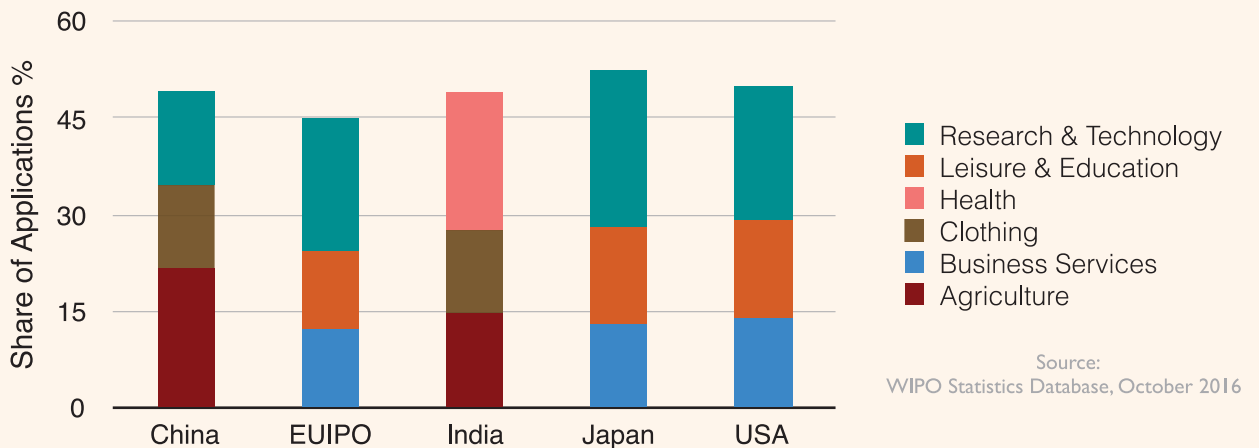
Trade Marks

In 2015, India rose to 5th position in terms of trade mark filings, up from rank 7 the previous year. 289,843 applications were filed constituting 3.4% of the total trade mark applications filed worldwide. Further, while Japan posted the largest increase in trade mark filing activity (+43%), followed by Italy (+32.6%) and China (+27.4%), India came in at number 4 with a 21.9% increase over 2014. The graph below represents India's filing statistics relative to other BRICS nations.

TM applications made in BRICS countries in 2014 and 2015

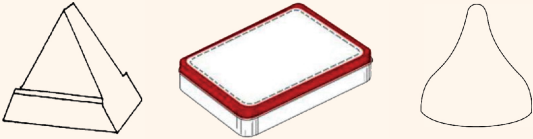


Using the Nice Classification, trade mark applications can be attributed to 10 industry sectors. The figure shows the top three industry sectors in which applicants filed for trademark protection at each of the five offices reporting the highest trademark filing activity in 2015. Research & technology attracted the highest volumes of trademark applications at four of these five offices. Agriculture was among the top three sectors in China and India.



Test Your IP Skills

Take this quiz and see if you have a flair for intellectual property

1. Whose words are these: "I knew that a country without a patent office and good patent laws was just a crab, and couldn't travel any way but sideways or backwards."
2. Before it was renamed Amazon.com, what was the name of Jeff Bezos' online retailing company at incorporation?
3. Which was the first country held in violation of the TRIPS Agreement in a trademark case?
4. Which was the first country held in violation of the copyright provisions of the TRIPS Agreement?
5. Which was the first country held in violation of the patent provisions of the TRIPS Agreement?
6. Name the following protected shapes:

7. Who said, "The patent system added the fuel of interest to the fire of genius."
8. What comic strip character's father was a patent lawyer?
9. Which iconic Silicon Valley company garners a 'mistaken' reference in the multiple Academy Award winning movie Forrest Gump?
10. Which celebrated brand is German watchmaker Hans Wilsdorf credited with creating?
11. Below are names originally adopted by brands that are famous today. Guess the current name/brand:
 - a. Marathon
 - b. BackRub
 - c. Blue Ribbon Sports
 - d. Brad's Drink
 - e. Computing – Tabulating – Recording Company
 - f. Jerry's Guide to the World Wide Web
 - g. Anderson Consulting
 - h. Cosmair
12. Which 2010 Hollywood movie is about an IP ownership dispute?
13. Which famous inventor played a pivotal role in cracking Nazi codes during World War 2?
14. In which country did the board games Ludo and Snakes & Ladders originate?

Answers:
1. Mark Twain 2. Cadabra Inc. 3. USA 4. USA 5. India 6. Toblerone, Altoids, Hersheys 7. Abraham Lincoln 8. Calvin from Calvin & Hobbes 9. Apple 10. Rolex 11. a. Snickers b. Google c. Nike d. Pepsi e. IBM f. Yahoo 12. The Social Network 13. Alan Turing 14. India 15. Accenture h. L'oreal

Temporary Injunctions in Patent Disputes

A REPORT

Patent litigation in India is witnessing a lot of activity. Since most disputes are complex, they are generally time consuming and cost intensive. That the Indian courts are not known to give out timely judgments does not help matters any. Nor does the lack of a culture of enhanced and punitive damages. A peculiar weapon has begun to come to the aid of many a litigant in these circumstances - that of a temporary injunction.

In the face of misuse, the Indian Patents Act entitles a patentee to file a suit for infringement of patent. This entails the remedies of permanent injunction and either damages or account of profits. However, while a main suit is pending, interim relief can be sought by filing an application for temporary injunction. And recent trends indicate that courts in India are not averse to granting temporary relief in patent suits.

This article analyses the 'temporary injunction' landscape in India (in the context of patent disputes) and also looks at what related statistics reveal. Reading it should prove instructive for patent owners who are or will be considering courtroom battles for enforcing their patent rights in India.

Legislative Basis

Order 39, Rules 1 and 2 of the Indian Code of Civil Procedure 1908 (CPC) are the operative provisions for anyone looking to obtain a temporary injunction. Procedurally, post filing a suit for infringement, to prevent a defendant from carrying on with the (mis)use of a plaintiff's patent during the pendency of the trial, the plaintiff may file an application seeking temporary injunction. Thereafter, the court issues notice to the defendant who must file a reply to the temporary injunction application. The court decides the grant of injunction after it hears arguments by both parties. However, an *ex-parte* temporary injunction may also be granted if a plaintiff is able to establish that the circumstances of the case require issuance of a temporary injunction without sending prior notice to the defendant. Such *ex-parte* injunctions constitute the quickest remedy available to a plaintiff for they are generally granted on the very day an application for temporary injunction comes before the court for hearing.

The Three-Factor Test

1. Prima facie case

In this regard, a plaintiff must prove two things. One, his patent is valid and two, that it has been infringed *prima facie* by the defendant. Under current Indian jurisprudence, a patent does not carry a presumption of validity - a sore point for patent owners. Therefore, it is sufficient if a defendant raises doubts about the validity of the patent in question. In turn the plaintiff must tender suitable proof to demonstrate the patent in dispute is capable of withstanding an attack on its validity. This may be done by showing that the patent has withstood the test of time and is in force in other jurisdictions. Further, demonstrating infringement may involve the plaintiff purchasing products, obtaining sample analysis, seeking an expert opinion, preparing claim charts etc.

2. Balance of convenience in favour of applicant

The plaintiff must establish that great inconvenience would be caused to him if the injunction is not granted. In this context, courts often look to assess the financial capability of a defendant in that whether or not the defendant would be able to compensate the plaintiff if the trial concludes in favour of the latter. Another fact may be the remaining life of the patent at issue - in *Telemecanique Controls Vs Schneider Electric, 94 (2001) DLT 865, (Delhi High Court, 2001)* the patent at issue was due to expire in three years and this factor worked in favour of the plaintiff.

3. Irreparable harm

If the court is of the opinion that a plaintiff will be adequately compensated in money terms (damages or account of profits) at the end of the legal proceedings, it may deny a temporary injunction on the ground that the plaintiff is unlikely to suffer a loss that is irreparable. The plaintiff, in turn, may cite factors such as loss of reputation, inadequate assets of the defendant, etc. to argue that the injuries being caused cannot be compensated in money terms.

Other Factors

1. Public interest

Public interest is never off the table when it comes to patent disputes in India. For instance, in *Roche v. Cipla, 148 (2008) DLT 598 (Delhi High Court, 2008)*, noting the price difference between the innovator drug and allegedly infringing drug, the court ruled that public interest was a relevant factor whilst deciding the grant of a temporary injunction. In this case, the court ruled that irreparable injury would be caused if patients were denied access to the cheaper (defendant's) drug and thus, refused the request for temporary injunction.

2. Conduct of parties

In *Franz Xaver v. New Yash Engineers, 62 (1996) DLT 291 (Delhi High Court, 1996)*, the plaintiff had registered its patents in India in 1984 but had not used them in the country. The Delhi High Court ruled that in such a circumstance the plaintiff was not entitled to block the defendant (via a temporary injunction) from selling its allegedly infringing product during the pendency of the suit. In a somewhat similar decision, in *Sandeep Jaidka v. Mukesh Mittal, 211(2014)DLT401 (Delhi High Court, 2014)*, the court found that the balance of convenience lay in favour of the defendant because it had been commercialising the patented invention whereas the plaintiff had not been doing so. Courts are also likely to refuse a temporary injunction in cases where an undertaking is furnished by a defendant saying that were it to lose the case, it would compensate the plaintiff adequately.

3. Injunctions involving Standard Essential Patents (SEPs)

No discussion on patent infringement is complete without a look at SEP battles in India. Unquestionably, India is one of the primary telecom markets in the world and since 2012 battle lines have been drawn between handset manufacturers, with Ericsson commencing infringement actions on the grounds of infringement of its SEPs, and other parties' inability to arrive at a fair, reasonable and non-discriminatory (FRAND) licenses as required by Standard Setting Organizations (SSOs). FRAND obligations have thus become important talking points in the IP community and their interplay with Indian Competition laws is also being fervently pursued before the competition tribunal in India. However, from a temporary injunction perspective, the frequent grant of *ex-parte* injunctions in favour of the SEP holder (or lifting the injunctions subject to a royalty deposits by defendants at royalty rates determined by the court) has emerged as a clear and notable trend. Thus, SEP holders may have an easier task in establishing the Three-Factor test set out above.

Why Are Injunctions Useful

In India, where courtroom battles are often mired in excessive delays, temporary injunctions are particularly useful in patent infringement cases because proceedings are concluded in a relatively short span of time. For instance, *ex-parte* injunctions are granted on the same day while *inter-parte* injunctions are decided within 6-9 months as against a period of 4+ years for obtaining a decree in the main infringement suit. Further, since patent terms are limited and damages are not significant, temporary injunctions provide a useful tool to stop infringers while ensuring business losses do not mount. And all this can be achieved at only a fraction of the total cost that a whole trial entails. Finally, succeeding at the temporary injunctive phase of a patent lawsuit sends an important message and can bring the defendant into a more temperate mood to resolve the matter.

Trends In The Grant of Temporary Injunctions

We conducted a search on the Darts-IP database for the years 1879-2016 to understand the temporary injunction landscape in India. The data retrieved paints an interesting picture – see the charts that follow.

CHART I

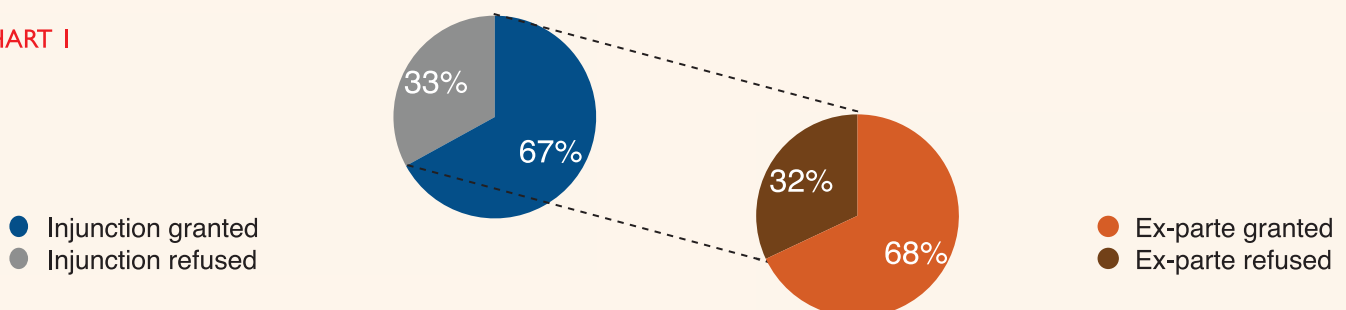


Chart 1 represents the total number of temporary injunction applications that were heard in this period by the courts of first instance and illustrates that courts in India have not shied from providing injunctive relief to patent owners. A majority, 67%, of all patentees proved successful in obtaining a temporary injunction. Of these, 68% secured *ex-parte* injunctions – suggesting a 45% success rate in obtaining *ex-parte* injunctions.

CHART 2

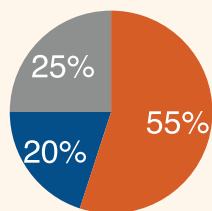
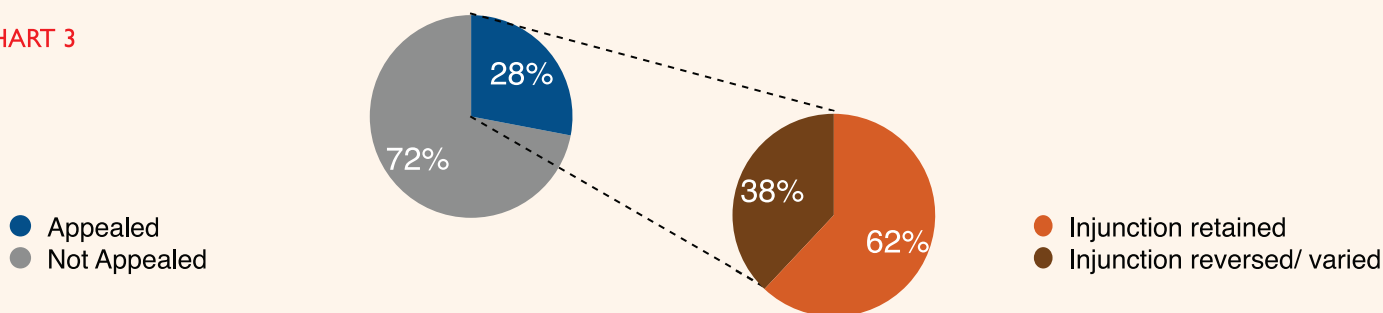


Chart 2 reflects the distribution of injunctions across three broad technology domains. Unsurprisingly, owing to the importance of patents in product development and sale, chemical/pharma patent owners are the most assertive with 55% of total temporary injunctions belonging to them.

● chemical/pharma ● electrical ● mechanical

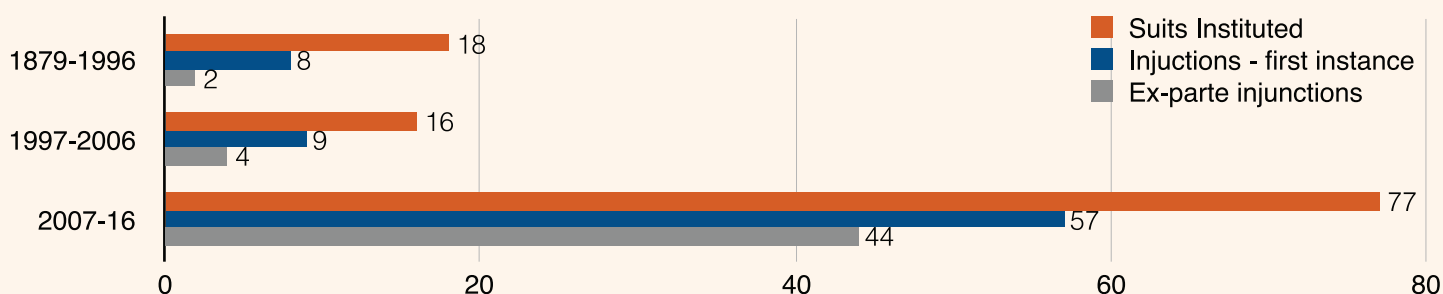
Furthermore, while temporary injunction orders are appealable, Chart 3 reveals that only 28% of such orders have been appealed. Of these, injunctions were retained in 62% of the cases, showing hesitancy on part of appellate courts in overturning lower courts' orders. Reading both statistics together, there is only an 11% chance of overturning a temporary injunction order - succeeding on appeal is thus an uphill task.

CHART 3



Finally, Chart 4 reveals how the Indian patent regime has evolved in terms of temporary injunctions. From humble beginnings, temporary injunctions have over time become necessary to patentees to stave off infringers. During the nine years between 1997-2006 nearly as many temporary injunctions were issued as were issued in the preceding 117 year period (1879-1996). Further, substantial amendments to the Indian Patents Act in 2005 have led to increasing numbers of patent owners asserting their rights in court; concomitantly, more than three times the number of temporary injunctions were granted in the last 10 years as compared to what was granted in 127 years before that!

CHART 4



The foregoing shows that contrary to popular perception in some sections of the IP community, Indian courts are active when it comes to securing patentee interests. Statistics bring out that it is beneficial to apply for temporary injunctions and we advise this should be done as early as possible in an infringement suit. Also, plaintiffs must be thorough in preparing material to support their case and satisfy the court on each parameter of the three factor test. To conclude, it is prudent for a patent owner to draw up strategy with local counsel to prevail in a temporary injunction proceeding. For further queries, do write to us at: remfry-sagar@remfry.com.

About the Firm

Established in 1827, Remfry & Sagar is celebrating 190 years of its founding this year. Having been at the forefront of IP protection and development for nearly two centuries, our depth of experience is hard to match and ability for fresh thinking in changing scenarios self-evident. A dynamic team of 80 lawyers and 125 professional staff offers services across the spectrum of intellectual property law. A group of corporate law experts also advise on wide ranging commercial matters. More than 8000 clients in over 70 countries are testimony to our leading capabilities.

Clientele drawn from diverse industries and extensive involvement in global IP fora including INTA, ECTA, AIPLA, AIPPI, APAA, FICPI, ITMA, LES and PTMG lend us a broad world view and deep insight into the demands of modern business. Our expertise in service is particularly strong in the Indian subcontinent, however, the Firm's long history has fostered close associations across geographies facilitating easy fulfilment of a client's global IP needs. Notably, our efforts towards crafting seamless IP solutions do not conclude with our clients; we engage continually with policy makers to contribute towards a larger change in India's IP milieu.

The Firm's core values endure over two centuries: innovation, integrity, efficiency and undisputed quality are Remfry's hallmark.

Practice Areas

PATENTS | DESIGNS | TRADE MARKS | COPYRIGHT | GEOGRAPHICAL INDICATIONS | IP LITIGATION

CORPORATE – COMMERCIAL LAW | UNFAIR COMPETITION & TRADE SECRETS

PIRACY, ANTI-COUNTERFEITING & BORDER CONTROL MEASURES

TECHNOLOGY, MEDIA & TELECOM | INTERNET & SOCIAL MEDIA | DOMAIN NAMES

PLANT VARIETIES & BIO DIVERSITY | ALTERNATIVE DISPUTE RESOLUTION

DRAFTING & PROSECUTION | IP COUNSELLING & RISK MANAGEMENT | IP COMMERCIALISATION

PORTFOLIO MANAGEMENT | IP LICENSING, AUDIT AND DUE DILIGENCE | START-UP COUNSELLING

PUBLISHER'S RIGHTS, PERSONALITY RIGHTS & ARTIST'S RIGHTS

Awards & Recognition

Managing Intellectual Property (MIP) Global Awards

2016: **India - Prosecution IP Firm of the Year**

India Business Law Journal Awards

2014, 2015 & 2016: **Winner, Intellectual Property**

Asia IP Awards

2014 & 2016: **IP Firm of the Year (Trademarks)**

2015: **IP Firm of the Year (Patents)**

Managing Intellectual Property* - 2014, 2015 & 2016: **Tier I Firm - Trademarks & Patents*

Chambers Asia-Pacific* - 2016 & 2017: **Tier I Firm - Intellectual Property*

The Legal 500 Asia Pacific* - 2014, 2015, 2016 & 2017: **Tier I Firm - IP (India)*

WTR 1000* - 2016: **Tier I Firm - Trademarks*

IAM Patent 1000* - 2015 & 2016: **Tier I Firm - Patents*

Asia IP* - 2015 & 2016: **Tier I Firm - Trademarks & Patents*

Asian Legal Business Rankings* - 2014, 2015 & 2016: **Tier I Firm - Trademarks & Patents*

Asialaw Profiles* - 2016 & 2017: **Outstanding for IP*



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