



Steps towards Patenting Innovations for a Sustainable Startup Ecosystem

Amarendra Pattnaik[†] and Parimita Dash

School of Law, KIIT Deemed to be University, Bhubaneswar — 751 012, India

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However good a product may be, sooner or later, competition will catch up and there will be me-too products in the market. The best way to beat this product imitation is through innovation in products and processes. New products catch eyeballs and sell. But innovation is neither easy nor cheap. A huge amount of money has to be invested in R&D for innovation and therefore there is a need to prevent imitation by others. This is particularly relevant for Startups who operate on a tight purse. Such prevention can be done through patents. Once the innovator patents the innovation, he has a legal right over his innovation for twenty years in India and others can't imitate it. This helps the innovators to have a better market for the product and also they get a better return on investment in R&D. In this article, the authors have emphasized how patents are a business necessity for Startups and how in India patent applications are filed and patents are granted.

Keywords: Startups, Patents, Innovations, Patent Infringement, Patent Licensing

Times are changing. While a large number of young people still look for a job after they complete their education, there is a small segment of people who think and act differently. Instead of seeking jobs, they are starting their own ventures and are creating jobs. There are many reasons why these people choose this less traded path. Freedom to work as they wish is one of the main drivers for this kind of change in outlook. There are young people who get into this Startup business immediately after they complete their education. Some of them even incubate the idea when they are on the campus itself. There is another segment who thinks of starting something new after working as an employee for a few years. Not that all of them taste success. Starting something new is not easy and one faces hurdles on multiple fronts in converting the ideas into enterprises. Startup founders face funding problems, manpower problems, marketing problems and a variety of other problems. One of them is product imitation. There are many Startups which work on an idea and develop a product for marketing. The product is novel and can sell. But before the product gets commercial success, me-too products surface in the market. Customers shift to products which are priced lower and, as such, the innovator who brought the product into the market faces difficulty in selling the product which he

innovated with a lot of investment. Patenting is essential to protect the interest of a Startup founders in such a situation. Unfortunately, many youngsters are either not aware of Patenting or are too busy to give due attention to Patenting. In a study, it is found that there is no clear relationship between the growth of Startups and the increase in innovations.¹ One of the reasons of this situation is product imitations.

Startups not only boost the GDP of an economy but also create employment opportunities. They also help in regional development as many of them are based on resources available in a particular region or the needs of a particular region. It also reduces the concentration of wealth in the hands of big corporate houses and industries. There is no entry barrier for Startups. They require limited funding and very few statutory approvals. Therefore, anyone who has a bright idea can attempt to make it a commercial success through a Startup.

Startups also have a contagious effect. Many people get into Startups because they know someone who is a successful Startup founder. Startup India is a great move by the government to give a fillip to the Startup culture in India. In India, a large number of Startups are still being created out of necessity and not to seize an opportunity.² Unemployment is still driving Startups. There are only a small percentage of individuals who, after completing their education are thinking of becoming entrepreneurs and are launching

[†]Corresponding author: Email: apattnaik@kls.ac.in

their Startups. Besides funding, Startups need a good ecosystem to survive and thrive. Support of the government, simple rules and regulations, mentoring etc are some of the essential ingredients of a good Startup ecosystem. A large number of Startups are in the domain of technology and bio-technology.^{3,4} Technology is touching our lives in all its ways and it is also making our lives simple and smooth. Many of the tasks which were hitherto been done by humans are now being done through the use of technology. Similarly, a lot of innovation is happening in the domain of biotechnology to improve human life. Besides the above two focus areas, lot of innovation is happening in the area of traditional knowledge, whether it is about plant based medicines or products or services related to yogic practices.^{5,6}

Challenges Faced by Startups

Startups face multiple challenges and therefore the success rate of Startups is very low.⁷ They start with minimal funding from the promoters and struggle to get funds from the banks or outside investors. Investors are cautious while investing in a Startup as they are unsure of the return from that investment.⁸ Many times, the prospect of a Startup is bleak and therefore the investors shy away. Suppliers don't extend normal terms of transactions as they are not established organizations with good reputation. Therefore suppliers don't give credit to startups. Similarly, customers are very cautious while buying as the product is new and has not proved its credibility in the market. Startups also face difficulty with both the capital investment and working capital. Prospective employees also stay away from such firms as they are unsure if they will get their remuneration on time or not. Large firms and established organizations adopt various methods to wipe out the small players from the market. Therefore, Startups survive in an alien environment.

What is Innovation and Why Patents

Innovation is the creation of something new. It could be a product, a service or a process. It could be a completely new thing that is disruptive and changes the outlook of stakeholders completely. It can also be an incremental improvement over what already exists in the market and meet the needs of the people. Need is the mother of all inventions and therefore most inventions have an underlying unfulfilled need. But in contemporary times, innovators are coming out with products that no one ever thought were needed. And

with a new product available, there is an interest in buying it or getting it.

The standard theory explaining why inventors or their employers file for patents assumes that patentees generate greater-than-average returns on the patented products they sell by preventing others from making, using, and selling those products. This theory postulates that only when there is great incentive, people will innovate and cater to the greater needs of the society. Though the most common motive behind patenting is as mentioned above, there are many other reasons that drive individuals and organizations to patent.⁹ There are a group who go for patenting to earn money through licensing. They don't have the resources, expertise or inclination to make the invention a commercial success. Therefore, they just allow others to use their invention/know-how/patented products and pay a price for it. These non-innovators have manufacturing capacity to produce the products and marketing channels to sell the products. There are also a few who patent products which they sell and also allow others to sell. For example, a company might sell patented items in one geography but allow others to sell it in other geography on payment of a license fee. There are examples where out of dozens of patents, an enterprise commercially gets involved in selling a few products and the rest they allow on a licensing basis. Another motive for patenting is cross-licensing. Many times, a product may have many parts and an organization may not have the patent for all the components that make that item. In that case, that organization may get into cross-licensing negotiations with an organization which can get into cross licensing. The organization gets a license to use the patents of another organization and allows that organization to use some of its patent items. There are also some organizations who patents to prevent future peripheral innovations. A patented product can be improvised and get patented as an innovation. To prevent such a possibility, some organizations innovate and get patents for improvised products that they may not be put on the market for commercial gain. Investors prefer companies who have large number of patents. It not only demonstrates that the company is future-ready to face any competition, but also has enough R&D capability.

A large number of patents also add to the brand image of a company. In the case of Startups, the game of patenting is not that simple. Startups toy with many ideas and come up with multiple product ideas. They may develop prototypes for some and even go for test

marketing. But they don't go for commercial exploitation of each such product. Therefore, many times they don't consider patenting as an important thing to do. Moreover, filing of patents and contesting patent litigation are time-consuming and costly affairs. Therefore, they shy away from such patenting even though there are definite benefits.

On the matter if patent ecosystem contributes to the overall welfare of the society or not, there is no clear answer.¹⁰ Many times, having a patent is a zero-sum game. It means if firm-A has a patent license, firm-B also would like to have a similar license. While such strategic actions add costs to the firm, it may not lead to any special benefit to the customer. Moreover, there is no clear evidence to show that the growth of patents has any relationship with the growth in innovation. It could just be a competitive move among the players in the market to scale up the patents without properly evaluating the utility of those patents to society. Therefore, too many patents and too little innovation may coexist if the patent eco-system in a country is not geared towards the right kind of innovation that contributes to social welfare. Historical data shows no evidence that a country having a good patent regime has higher innovation.¹¹ While the general belief is that patents promote innovation, there are countries where innovation is high even when there is no system of patenting. While innovations are more in the case of developed countries, in developing and underdeveloped countries there is no significant relationship. Startups need both technological and marketing capabilities to thrive in the market.¹² It is found in one research that these two capabilities are complementary. This means a firm good at technology has a greater chance of marketing success.

Legal Dimensions for Startups in India

Countries across the world are striving hard towards achieving an innovation-led economy. A competitive and thriving market backed by innovative and unique ideas is one of the best propositions for a strong economy of a nation and a major contributor to the growth and stability of the world economy. It is often observed that a strong R&D base is directly proportional to a stable economy and helps a nation emerge as a leading economic power on the globe. That precisely is the reason why the developed countries known to be the global players of the world economy focus on investing in the innovation & knowledge based infrastructure and fund such

capacity building measures that promote creation of capital formation based on unique ideation. Over more than a decade, it is very encouraging to witness a new economic order where not only the large businesses invest in research and developmental activities of a nation, but also the small and medium-sized enterprises come forward to contribute significantly in the creation of intellectual capital for the country's economy giving rise to a new economic era boosted by the Startups.

Startups are comparatively new and young enterprises, founded by a single or multiple entrepreneurs in collaboration to design any new product or service and to offer the same to their target audience in the market. The uniqueness of the intellect or the creative thought process behind the innovation that goes in to the creation of these new products/ services are the Unique Selling Points (USPs) of these Startups and they thrive on making a distinctive mark for themselves among other players in the market based on these innovations. So, it has become very important for these Startups to ensure protection of their innovations against any misrepresentation/ copying/counterfeiting by any other market player. The intellectual property rights (IPR) regime has come up as a strong legal framework globally and has emerged as one of the best mechanisms to ensure such protection to the innovations which drive the Startups culture for any given nation.

Whenever there is an investment of human intellect and such investment of intellect gives rise to expressions in any form which can be physically manifested, then the individual creating such physically manifested expressions out of his/her investment of intellect becomes the creator of those expressions and gets the proprietary right to protect the same against any sort of misappropriation. This conception justifies the rationale behind extending intellectual property rights protection to the creations of human minds, which are called as the intellectual properties of the person investing his/her intellect in creating such new and innovative creations. Going by this justification, the innovations behind the Startups are also the expressions of investment of human intellect, making it an apt subject matter of protection under the IPR regime. And hence, patent, a very important intellectual property right under the broader IPR regime, becomes the crucial tool which helps the innovators/incubators/entrepreneurs to protect the expressions of their unique

ideas or thought processes which take the shape of some novel products and processes with new of improvised efficacy which can benefit the public at large and at the same time mint returns for the stakeholders pumping such novel products and processes to the society. Understanding the need and importance of intellectual property rights in general and patent rights in particular for the Startup sector, the Governments of various nations have brought schemes and guidelines in place to help these innovators/incubators/entrepreneurs in the Startup sector to secure their interests more effectively and seamlessly. India is one of the countries at the forefront which has been actively advocating for the need to strengthen the Startup culture in India to bring innovation led development in the country and hence, has come up with various praiseworthy initiatives not only to acknowledge the investment of intellectual capital of the Indian minds but also to reward such innovators effectively by securing patent rights for them over their innovations/creations.

IPR Initiatives for Startups

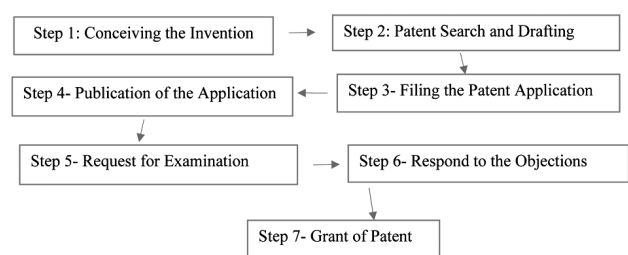
India started its journey of boosting Startup culture by launching the ‘Startup India’ program on 16th November 2016, dedicated to making a clear and robust framework for the management of Startups in India to encourage new ventures and innovations/incubation, which would be pivotal in ensuring sustainable economic development on one hand and creation of job opportunities for the youth of the country on the other. Under this general scheme, the Govt. of India also launched an Intellectual Property Rights (IPR) specific scheme to facilitate IPR filings for Startups under the scheme ‘Startups Intellectual Property Protection (SIPP)’ in 2016. This scheme facilitates IPR filings like patent filing, trademark filing, design filing and processing of these applications by the Startups where the fees for such applications and processing is taken care of by the Office of the Controller General of Patents, Trademarks and Designs under the Department for Promotion of Industry and Internal Trade, Govt. of India to a considerable extent as the applicants don’t have to pay the fees for this filing and processing to the IP facilitators directly and it is routed through the govt. body. With this filing and processing of the applications as the core objective of this scheme, this scheme also has an ancillary focus on creating awareness about the importance of Intellectual Property Protection for innovations/incubation in Startups among the various stakeholders of this sector. From promoting awareness

programs in various colleges, universities, Incubation centres to working towards capacity building measures in this field, this scheme has been instrumental in the significant increase in the no. of IP activities in Startups in the last six years since its inception. Patent applications filed by Startups have increased from 179 in 2016-17 to 1500 in 2022. Similarly, Trade Mark applications filed by Startups have increased from 4 in 2016-17 to 8649 in 2022. From 2016-17 to 2022, 7430 patent applications and 28749 trade mark applications have been filed by Startups.¹³ These figures are a clear indication of the overwhelming response this Govt. Scheme has received from Startups across various domains. In addition to this, the government began offering companies price breaks under the Patent Rules in January 2021. Companies now pay INR 1,000, which is a 50% decrease, to file design applications.

Startups are eligible for this discount on all filing and administrative fees in the design office and an 80% subsidy in filing a patent application where the applicant is a Department for Promotion of Industry and Internal Trade (DPIIT) recognized Startup along with a 50% reduction in Trademark application filing by a DPIIT approved Startup. Another major highlight of this scheme is that, under this scheme, the applicant has an option of expediting its patent filing process by filing a request to Controller General of Patents to issue the First Examination Report (FER) within 105 days of the making of the application which enables the applicant to get a decision of the Controller General of Patents on the patent application within a year of making the request for expediting the matter which is a major breakthrough in terms of the long timelines that a patent application goes through in India.

Patent Grant Procedure in India

In comparison to the registration procedure of other IPRs like trademark/design/geographical indication in India, patent grant procedure is more time-consuming because of the various phases in which a patent application goes through after getting filed at the Office of Controller General of Patents (Fig. 1).



Conception of the Innovation based on the Patentability Criteria

Every Startup that is created around a novel or unique idea is termed as an innovation. It is important to know that conceptualizing this idea behind the innovation which would in turn get the Startup going is the first step towards getting patent protection for the Startup. So one has to take utmost care and caution in conceiving this idea and giving it a physical manifestation. Any innovation in any domain of science, technology and allied fields in India can be patent provided it meets the patentability criteria as laid down under the Patents Act, 1970 in India. Before planning to apply for a patent in India, the applicant must first ensure that the innovation for which the application is to be filed falls within the scope of patent protection and doesn't invite any grounds for prohibition for patenting like the subject matter for patent should not be related to any traditional knowledge, or should not be just a mixture of already known substances, should not be a method of horticulture & agriculture, should not be a therapeutic/ surgical method etc.¹⁴ In addition to that, subject matter of patent also must comply with the following criteria for obtaining a patent:

- (i) Novelty
- (ii) Non-obviousness
- (iii) Industrial Application
- (iv) Utility

Any innovation in order to get granted with a patent in India has to be novel in nature. It must not be an obvious deduction, must have the potential to be manufactured in industry to meet the demands of mass production and it must have utility or efficacy which will be proved to be beneficial for the public at large.

Patent Search and Drafting

Patent search is another very important step as it gives the applicant an idea about the merit of its patent application, as to whether it would get a successful grant, if it would be objected in due course of the procedure etc. Patent search refers to a phenomenon where an applicant searches for patents already granted or in a process similar to his/her own invention or innovation.

Based on the search results, the applicant takes a call on whether to go ahead with filing of the application or to drop the idea of applying a patent which would not have much credibility of getting converted to a successful granted patent. There are many ways in which an applicant can conduct a patent search which

includes basic free patent search option to advanced version of paid patent search engines. One can also avail the professional help available in this regard and can get the desired search results.

Once the applicant is sure of the merit of his application and feels that the innovation for which he/she wishes to file for a patent application is novel and there hasn't been a prior patent on that and it meets other requirement of patentability as per the Patents Act, 1970, the next step is to draft the Patent application, which is equally an important step as the patent application has not be filed in the requisite form furnishing all the details disclosing the specifications of the product or the process.¹⁵

The patent application is a techno-legal document and supreme precision has to be taken in to consideration while drafting the claims of any invention. The applicant again has the option of getting professional help from the Patent Agents who would not only help the applicant to file the application but also to draft it by taking help from experts in the area of the invention. Every patent application must be accompanied by a specification in the requisite format and one can file a provisional specification disclosing the overall details of the invention even when the research on the invention is not fully completed.¹⁶ This is done in order to lock the priority date (first filing date) for the application and one gets 12 months time to file the complete specification from the date of filing of the provisional specification, which discloses every possible details of the innovation.

Filing of the Patent Application

Once the patent has been drafted and well reviewed, the same may be applied at the Office of Controller General of Patents either physically or digitally. Once the patent has been filed at the office, it takes its own amount of time to go through all the steps of the patent grant procedure and that can be a time-consuming procedure, but once the patent application is filed at the Patent Office, one can be free from the fear of his innovation being copied as the applicant would have already secured the priority in connection with his invention. Once the patent is filed, the application is assigned with a patent application no. This number is often showcased by the producers or manufacturers in connection with their goods in order to induce fear among the other players in the market that they should be aware of the fact that the product is in consideration for a patent grant and hence they should stay away from counterfeiting it.

Publication of the Patent Application

The application is released 18 months after the initial submission once the full specification has been submitted with the patent application. However, one can submit an early publishing request in the requisite format to the Controller General of Patents and pay the required costs if one doesn't want to wait until the 18-month period has passed.¹⁷ In most cases, the request for an early publishing results in the patent application being released one month later.¹⁸

Request for Examination

The request for the examination, often termed as RFE of the patent application, needs to be filed by the applicant in order to initiate the examination of the patent application. Upon receiving the request from the applicant, the Controller of Patents hands over the application to an examiner or panel of examiners as the case may depend upon the nature and area of the innovation. The examiner/s would then examine the application, considering the various aspects like the prior art search/patent search and evaluating the merit of the application, examining the application in order to ascertain that the application doesn't invite any prohibitory grounds of patenting as laid down in the Patents Act, 1970 and already discussed in paper and mostly examining the application to check whether the each patentability criteria of novelty, non-obviousness, Industrial application and Utility is met with by the concerned application. Upon satisfaction of the examination, the examining panel files its First Examination Report (FER) with the Controller of Patents for further processing of the application.

Respond to the Objections

Most patent applicants will encounter objections of some description, which will be noted in the first examination report. Together with a patent attorney, applicant should examine, comprehend, and write a written answer to the complaints made in the examination report. In an effort to convince the controller that the creator's creation is in fact worthy of getting a successful patent and complies with all patentability requirements, the inventor and patent agent draft and submit an answer to the examination. If necessary, the option of a live meeting or video conferencing can also be available with the prior approval of the Controller of Patents in this regard.

Grant of Patent

Upon successful satisfaction of the Patent Controller that the concerned application meets all the

requirements of patent grant as per the requirements discussed above, the application may be processed further for a successful grant of patent. And once that patent is successfully granted with a patent grant/registration number assigned to the application for his innovation who would now, in turn, be named as the patent owner, this fact of grant of a patent will be notified in the Patent Journal which is published time to time by the office of the comptroller general of patents for all official record and communications.

Evaluating the Patenting Scenario for Startups in India through Case Studies

This part of the paper would look in to a few case studies to have an assessment of the extent of awareness among the various stakeholders in a Startup ecosystem regarding the need to obtain a patent for their Startups and the scope of legal remedies in case of landing in a patent dispute. There is no doubt that there has been a rise in the Startup culture in India, but whether there has been a proportionate rise in the awareness regarding the need and importance of patenting the innovations of Startups, is a question which has not been answered conclusively but the available data in this regard throws light on how there have been numerous Startups already operating in various parts of the country without securing any patent on that or without even filing any patent for the same. To get a clearer picture, the authors would be discussing a few case studies of Startups, some of which have patented, some of which have applied for patent and even some which have never thought of patenting their innovation Startups.

A Startup named 'Connected' whose seed was planted as early as in 2004, when its founder started the idea of providing high-speed internet facilities and, after a lot of trials and error, the founder was successful in developing product technologies which would solve the low internet penetration issues in the suburbs and rural and finally founded a company naming it as 'Connected' in the year 2012. After being in the market for several years providing its customers satisfactory services, the company finally felt the need for securing its technologies providing high speed internet even in remote areas and hence got itself incubated under the Atal Scheme in the year 2012 and years after that got itself registered under the DPIIT as a Startup to be able to file a patent for its innovation technology and finally filed a patent before the Indian Patent office in the year 2018 and has been

recently granted with a successful Patent. This case reflects clearly on the fact that even after years of being a successful player in the market, the company took a long time to feel the need to patent its Startup.¹⁹

Similarly another Startup incorporated in the year 2017 named 'Saarathi' which is into the manufacturing of riding apparel such as riding jackets, riding gloves etc specially designed for two wheeler riding and is designed with precision to minimise the effects of road accidents on the rider.¹⁹ After a successful stint in the market, the company has finally registered itself with the DPIIT as a Startup, but even 5 years in to being a successful business player operating on a B2B model, the founder of the start up hasn't yet felt the need to obtain a patent for the safety riding products that the company has been successfully manufacturing for years now. In the same line, another entrepreneur came up with an innovative idea for providing an online learning platform for GRE, GATE, MBA etc aspirants along with an integrated app-based technology incorporated a company named 'Well-Placed' in the year 2017 and over a period of 4-5 years, the company has done well for itself in the market by typing up with many popular study centres offering earning modules for such aspirants. Recently, the company has got incubation support from the Atal Innovation Mission and has registered itself as an incubation centre while its registration as a Startup with the DPIIT is still in the pipeline and soon expected to materialize. However, when it comes to the patent status of the company, the company hasn't yet taken any initiative to obtain a patent for itself.²⁰

Two more such instances, one where a company named 'Early Alarms' founded in 2014 with an innovative medical diagnostic technology of early detection of high risk pregnancies, kidney damage etc. and the other named 'Un-reality' founded in the year 2016 and provides customised services on software issues, even though they filed the provisional specification before the Indian Patent Office but never filed the complete specifications of their patent application within the 12 month timeline provided for filing the complete specification leading to the abandoning of their patent applications. Both companies stated on record that lack of funds was the reason for not being able to file the complete specification of their patent application.²¹

The assessment of these case studies of Startups in India paved the way for the Indian Govt. design

specialised schemes to not only create awareness among the various stakeholders of the Startup ecosystem but also to help them file their IPR applications easily without facing much financial brunt and the lessons learnt from these case studies paved the way for the Government.

Patent Dispute Settlement in India

In the light of the above discussions on the need and importance of securing patent protection for Startups, it can be safely concluded that a Startup that has secured a patent protection for itself is definitely better placed in terms of securing its rights against any copying or counterfeiting of its innovations which also termed as Patent Infringement. In legal terminology, patent infringement refers to an action where by an entity makes, sells, manufactures/produces, licenses or any commercial transaction involving a patented innovation without the prior permission of the patent owner. And whenever the patent owner faces such patent infringement, the Startup owner in the capacity of a patent owner has a right to sue the infringer as per the Patents Act, 1970 and is also entitled to claim remedies against such act of patent infringement. The Patents Act, 1970 provides several remedies against an act of patent infringement, including injunctions, damages/compensations, and accounts of profits, etc.²² Injunctions which can be either temporary or permanent are given by the Court of Law as a directive to the infringer to refrain from continuing with the act of infringement. Damages or Compensations is the monetary relief which is granted to the patent owner to mitigate the loss that the owner has sustained owing to the injuring act of the infringer. Similarly the accounts of profits is also a monetary relief provided to the patent owner against an act of patent infringement in which the infringer is made accountable for all the profits that he has made in the name of patent owner, targeting the latter with an act of infringement of the latter's patent.

With all these remedies in place under the India Legal framework, India definitely is better placed to deal with cases of patent infringement and punish the infringers. Therefore, it is high time the Startup owners realise the need and importance of patenting the Startup innovations and bargain with an upper hand against any act of infringement targeted towards their Startups by availing all the above mentioned remedies provided under the Patent Law in India.

Conclusion

Patenting innovations is a business necessity. Not patenting innovations is a business risk. Big businesses understand the importance of innovations and therefore patent them on time. On the other hand, Startups, many of which are based on disruptive ideas, are not sensitive and proactive enough towards patenting innovations. They get too busy in promoting their products and do not give enough attention for patenting their innovations. Startups focus on short term business needs and often ignore patenting which can have fatal future consequences.

It is highlighted that many startups are not prompt enough to obtain patent for their innovative business products and processes. The analytical case study of a few startups, as discussed in the earlier segment of this paper, is indicative of the trend that, startups in India generally take 4-5 years to successfully incubate and promote their business in the market and then consider seeking a patent for their products and processes. In this model of exploiting the business opportunity first and then securing the patent after a time lag poses a very serious risk of dilution of the novelty of the innovation, which is the most important criteria for getting a patent. This happens due to the over exposure of the innovation in the public domain without securing it by an exclusive right, thus not preventing others from imitation and unauthorized exploitation of the innovation. In such a scenario, the innovator remains in perpetual fear of his innovation losing its novelty. Moreover, if the novelty parameter of any innovation gets compromised, the chances of getting a successful patent for such innovation are very low.

In this context, to retain the novelty of any innovative business model, the authors would like to stress upon the reverse model for protecting disruptive/ innovative business models, wherein the focus is on patenting products/processes etc. at its inception stage without waiting for it to get culminated into a market compatible model generating revenue. This early step towards securing their innovative business model through an exclusive intellectual property right like a patent would definitely boost the economic viability of the business because it would allow the creator/ innovators to focus more on its economic exploitation rather than having apprehensions of the innovation getting duplicated by the competitors in the market.

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