

# Management of intellectual property rights in India: An updated review

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## Abstract

The World Trade Organization's agreement on Trade-Related Aspects of Intellectual Property Rights set global minimum standards for the protection of intellectual property, substantially increasing and expanding intellectual property rights, and generated clear gains for the pharmaceutical industry and the developed world. The present review elaborates all aspects of Intellectual Property Rights in detail, along with their protection criteria.

**Key words:** Copyright, geographical indication, industrial design rights, infringement, patents, trade secrets, trademark, utility model.

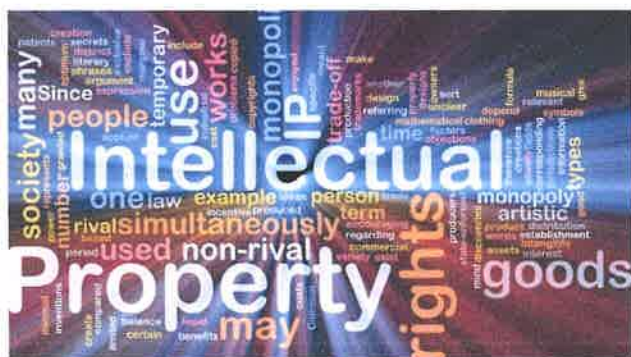
## INTRODUCTION

As was the case with China, India too showed signs of resistance to quick enforcement of International Intellectual Property Right (IPR) protection laws as demanded by the developed countries, particularly the United States of America. China could get away on grounds that it is not a member of the World Trade Organization (WTO), but India was required to comply. Under the terms of the WTO, India is required to implement WTO-standard IPR protection laws by 2005. It must be acknowledged that there has been remarkable progress in IPR protection in the field of software and cinema products. India's general argument was that it did acknowledge, in principle, the case for strict IPR protection, but this can be done only in phases suited by its own ground reality. The reality is that absence of international IPR protection for some decades has spawned employment for millions and, therefore, an

Overnight clampdown on IPR violators would foment social unrest.<sup>[1-3]</sup>

However, under pressure from its own domestic industry and the United States, India strengthened its copyright law in May 1994, placing it at par with international practice. The new law, which entered into force in May, 1995, fully reflects the provisions of the Berne Convention on copyrights, to which India is a party. Based on its improved copyright protection, India's designation as a "priority foreign country" under the United States' Special 301 list was revoked and India was placed on the "priority watch list." Copyright enforcement is also rapidly improving.<sup>[4-5]</sup>

Classification of copyright infringements as "cognizable offenses" expands police search and seizure authority. While the formation of appellate boards under the new legislation should speed prosecution, local attorneys indicate that some technical flaws in the laws, which require administrative approval prior to police action, need to be corrected.<sup>[6-8]</sup> Processes for making drugs are patentable, but the patent term is limited to the shorter of 5 years from the grant of patent or 7 years from the filing date of the patent application. Product patents in other areas are granted for 14 years from the date of filing. However, as a signatory to the Uruguay Round of GATT, including its provisions on Trade-Related Intellectual Property Rights (TRIPS), India must



  
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introduce a comprehensive system of product patents no later than 2005.<sup>[9-11]</sup>

## INTELLECTUAL PROPERTY RIGHT

IPR as a collective term includes the following independent IP rights, which can be collectively used for protecting different aspects of an inventive work for multiple protection:

- Patents
- Copyrights
- Trademarks
- Registered (industrial) design
- Protection of IC layout design
- Geographical indications and
- Protection of undisclosed information<sup>[12]</sup>

## NATURE OF IPR

IPR are largely territorial rights, except copyright, which is global in nature in the sense that it is immediately available in all the members of the Berne Convention. These rights are awarded by the State and are monopoly rights, implying that no one can use these rights without the consent of the right holder. It is important to know that these rights have to be renewed from time to time for keeping them in force, except in case of copyright and trade secrets. IPR have a fixed term, except trademark and geographical indications, which can have an indefinite life provided that these are renewed after a stipulated time specified in the law by paying official fees. Trade secrets also have an infinite life but they do not have to be renewed. IPR can be assigned, gifted, sold and licensed like any other property. Unlike other moveable and immovable properties, these rights can be simultaneously held in many countries at the same time. IPR can be held only by legal entities, i.e. those who have the right to sell and purchase property. In other words, an institution that is not autonomous may not be in a position to own an intellectual property. These rights, especially patents, copyrights, industrial designs, IC layout design and trade secrets, are associated with something new or original and, therefore, what is known in public domain cannot be protected through the rights mentioned above. Improvements and modifications made over known things can be protected. It would, however, be possible to use geographical indications for protecting some agriculture and traditional products.<sup>[13]</sup>

## COMMENTS ON THE SUBMISSION OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS ASSOCIATION (PhRMA)

PhRMA has mentioned that India should adopt a patent

law that offers immediate product patent protection for pharmaceuticals in line with the highest international standards, and offer protection for all products not yet available in the Indian market. It is submitted that this is a demand that goes beyond India's obligations under the TRIPS agreement, as India is availing the full transition period therein. The 10-year transition period available for providing product patents to pharmaceutical products is within WTO rules, and a unilateral examination on the part of USA should not be allowed to overrule this multilateral understanding. Regarding the provision of the mailbox and Exclusive Marketing Rights (EMR) facility, PhRMA is aware that the issue has been taken up in the WTO and that India has committed itself to implementation of the recommendations of the panel/appellate body.<sup>[14-16]</sup>

PhRMA has mentioned that foreign companies experience arbitrary pricing norms of the Bureau of Industrial Costs and Prices, arbitrary local Food and Drug Authority (FDA) decisions, high (42%) import duties and complex import procedures. It is submitted that these have no real basis and that specific cases need to be pointed out. The Bureau of Industrial Costs and Prices (BICP) pricing norms are based on accepted principles of costing, viz. actual cost plus a reasonable return of 14% on net worth and 22% on capital employed. Four percent is added if the production is undertaken from the basic stage. Further, FDA decisions are based on provisions of the Drugs and Cosmetics Act and the rules made thereunder. In fact, the US-FDA has stricter norms than those prevailing in India. With regard to import duties, for pharmaceutical products, they have been brought down from 40% (plus 2%) to 30% (plus 5%) in the 1997-98 budget.<sup>[17-19]</sup>

## PATENTS

A patent is an exclusive right granted by a country to the owner of an invention to make, use, manufacture and market the invention, provided the invention satisfies certain conditions stipulated in the law. Exclusive right implies that no one else can make, use, manufacture or market the invention without the consent of the patent holder. This right is available for a limited period of time. In spite of the ownership of the rights, the use or exploitation of the rights by the owner of the patent may not be possible due to other laws of the country that has awarded the patent. These laws may relate to health, safety, food, security, etc. Further, existing patents in similar areas may also come in the way. A patent in the law is a property right and hence, which can be gifted, inherited, assigned, sold or licensed. As the right is conferred by the state, it can be revoked by the state under very special circumstances even if the patent has been sold or licensed or manufactured or



12. Plants and animals in whole or any part thereof other than microorganisms, but including seeds, varieties and species, and essentially biological processes for production and propagation of plants and animals.
13. A presentation of information.
14. Topography of integrated circuits.<sup>[28]</sup>
15. A mere scheme or rule or method of performing mental act or method of playing games.
16. An invention which, in effect, is traditional knowledge or which is aggregation or duplication of a known component or components.

Computer programs *per se* have not been defined in the Act but would generally tend to mean that a computer program without any utility would not be patentable. Protection of seeds and new plant varieties is covered under a different Act, which provides a protection for a period of 10 years. Similarly, topography of integrated circuits is protected through yet another different Act.<sup>[29]</sup>

#### Term of the patent

The term of the patent will be 20 years from the date of filing for all types of inventions.

#### Mail box provision

TRIPS requires that countries not providing product patents in respect of pharmaceuticals and chemical inventions have to put in a mechanism for accepting product patent applications with effect from 1 January 1995. Such applications will only be examined for grant of patents after suitable amendments in the national patent law have been made. This mechanism of accepting product patent applications is called the "mail box" mechanism. This system has been in force in India and now such applications are being taken up for examination.<sup>[30]</sup>

### EXCLUSIVE MARKETING RIGHTS

TRIPS requires that member countries of the WTO not having a provision in their laws for granting product patents in respect of drugs and agrochemicals must introduce EMR for such products if the following criteria are satisfied:

1. A patent application covering the new drug or agrochemical should have been filed in any of the WTO member countries after 1 January 1995.
2. A patent on the product should have been obtained in any of the member countries (which provides for product patents in drugs and agrochemical) after 1 January 1995.<sup>[31]</sup>
3. Marketing approvals for the product should have been obtained in any of the member countries.
4. A patent application covering the product should have been filed after January 1995 in the country where the EMR is sought.

5. The applicant should apply seeking an EMR by making use of the prescribed form and paying the requisite fee.

EMR is only a right for exclusive marketing of the product and is quite different from a patent right. It is valid up to a maximum period 5 years or until the time the product patent laws come into effect. The necessary amendment to the Patents Act, 1970 came into force on 26 March 1999.<sup>[32]</sup> The provision is applicable with retrospective effect from 1 January 1995. As per the 2005 amendments in the Patents Act, the provision of EMR is no longer required. However, these rights were awarded in India from time to time and there have been some litigations as well where the courts came up with quick decisions.

#### Timing for filing a patent application

Filing of an application for a patent should be completed at the earliest possible date and should not be delayed. An application filed with provisional specification, disclosing the essence of the nature of the invention, helps to register the priority by the applicant. A delay in filing an application may entail some risks, like (i) other inventors might forestall the first inventor by applying for a patent for the said invention and (ii) there may be either an inadvertent publication of the invention by the inventor himself/herself or by others independent of him/her. The publication of an invention in any form by the inventor before filing of a patent application would disqualify the invention from being patentable. Hence, inventors should not disclose their inventions before filing the patent application. The invention should be considered for publication after a patent application has been filed. Thus, it can be seen that there is no contradiction between publishing an inventive work and filing of the patent application in respect of the invention.<sup>[33]</sup>

### COPYRIGHTS

Copyright is a right that is available for creating an original literary or dramatic or musical or artistic work. Cinematographic films, including sound track and video films, and recordings on discs, tapes, perforated roll or other devices are covered by copyrights. Computer programs and software are covered under literary works and are protected in India under copyrights. The Copyright Act, 1957, as amended in 1983, 1984, 1992, 1994 and 1999, governs the copyright protection in India. The total term of protection for literary work is the author's life plus 60 years. For cinematographic films, records, photographs, post-humous publications, anonymous publication, works of government and international agencies, the term is 60 years from the beginning of the calendar year following the year in which



themselves with a level of quality. Certification marks are given for compliance with defined standards. (Example ISO9000.) A trademark provides to the owner of the mark by ensuring the exclusive right to use it to identify goods or services or to authorize others to use it in return for some consideration (payment). Well-known trademark in relation to any goods or services means a mark that has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken as indicating a connection in the course of trade or rendering of services between those goods or services and a person using the mark in relation to the first-mentioned goods or services.<sup>[41]</sup>

Enactment of the Indian Trademarks Act 1999 is a big step forward from the Trade and Merchandise Marks Act 1958 and the Trademark Act 1940. The newly enacted Act has some features not present in the 1958 Act, and these are:

1. Registration of service marks, collective marks and certification trademarks.
2. Increasing the period of registration and renewal from 7 years to 10 years.
3. Allowing filing of a single application for registration in more than one class.
4. Enhanced punishment for offences related to trademarks.
5. Exhaustive definitions for terms frequently used.
6. Simplified procedure for registration of registered users and enlarged scope of permitted use.
7. Constitution of an Appellate Board for speedy disposal of appeals and rectification applications which, at present, lie before the High Court.<sup>[42]</sup>

#### Well-known trademarks and associated trademarks

A well-known trademark in relation to any goods or services means a mark that has become known to the substantial segment of the public that uses such goods or receives such services. Associated trademarks are, in commercial terms, marks that resemble each other and are owned by the same owner, but are applied to the same type of goods or services. For example, a company dealing in readymade garments may use associated marks for shirts, trousers etc., meaning trademarks deemed to be, or required to be, registered as associated trademarks under this Act.

#### Service marks

The Indian Act of 1958 did not have any reference to service marks. Service means service of any description that is made available to potential users, and includes the provision of services in connection with the business of industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of

electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising. Marks used to represent such services are known as service marks.<sup>[43]</sup>

#### Certification trademarks and collective marks

A certification trademark means a guarantee mark that indicates that the goods to which it is applied are of a certain quality or are manufactured in a particular way or come from a certain region or use some specific material or maintain a certain level of accuracy. The goods must originate from a certain region rather than from a particular trader. Certification marks are also applicable to services, and the same parameters will have to be satisfied. Further, these marks are registrable just like any other trademark. Agmark used in India for various food items is a kind of certification mark although it is not registered as a certification mark; the concept of certification mark was not in vogue at the time of introduction of Agmark. A collective mark means a trademark distinguishing from those of others, the goods or services of members of an association of persons (not being a partnership within the meaning of the Indian Partnership Act, 1932), which is the proprietor of the mark.<sup>[44]</sup>

#### Term of a registered trademark

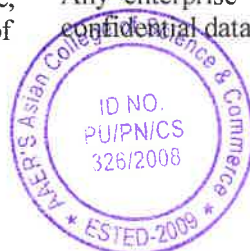
The initial registration of a trademark shall be for a period of 10 years, but may be renewed from time to time for an unlimited period by payment of the renewal fees.

## TRADE SECRETS

Trade secret points toward a formula, pattern, any instrument or design that is kept confidential and through which any business or trade can edge over its rival and can enjoy economic gain. Trade secrets can be anything from a chemical compound, manufacturing process, design or preserving materials or even a list of consumers or clients. It is also known as “confidential information” or “classified information.” To be safeguarded under trade secrets, the matter should be “secret.” Although the definition of trade secret is variable as per the jurisdiction, there are the following elements that are found to be the same:

- Is not known by the public.
- Provides some financial sort of gain to its holder.
- Involves reasonable efforts from the holder side for maintaining secrecy.
- Importance of data or information to him or for his rivals.
- The ease by which information could be learnt or duplicated by others.

Any enterprise or an organization can safeguard its confidential data or information by entering into a non-



disclosure agreement with its employees. Such law of protecting confidential matters offers monopoly in respect of any secret data and information. Trade secrets offer protection for an indefinite time period. Unlike patent, this does not expire.<sup>[45]</sup>

Every company invests its time and resources into discovering information regarding refinement of its various activities and operations. If other companies are to use the same knowledge, then the chance of first company survival and dominance into the industrial arena would be vitiated. When trade secrets are recognized, the inventor of such knowledge is entitled to consider that as part of the intellectual property.<sup>[46]</sup>

### Trade secrets protection

Trade secrets are kept secret and thus not disclosed to the public at large. The owner or creator takes concurrent steps and prevents his knowledge from slipping out of his hands to its rival side. In exchange of getting the chance to be appointed by the holder of trade secrets, a worker will ready to sign a contract not to disclose any material information and data of his employer. Any negligence or violation of the same will mean an imposition of financial penalties. Other business associates or companies with whom the inventor is engaged are often required to sign a similar contract, and any negligence to do so will lead to fines or penalties.

### Trade secrets infringement

Misappropriate use of trade secrets can be called an unfair practice. The Uniform Trade Secrets Act of the USA defines misappropriation as:

- Acquiring trade secrets related to another by a person who has a strong belief or reason that it was acquired by wrongful doings.
- Disclosing or using trade secrets of another person without any implied consent of its owner.

As per the Uniform Trade Secrets Act, “improper means” include “theft, bribery, misrepresentation, breach or inducement of a breach of duty to maintain secrecy, or espionage through electronic or other means.”<sup>[47]</sup>

### Tips for safeguarding trade secrets

- Put a sign or any mark on various computer files and documents related to trade secrets that you are intending to keep confidential.
- Allow the accessibility of trade secrets only to those people who have authentic reason to know the information. The reason should be material and should benefit you in business.
- Make it obligatory for everyone using trade secrets to sign a non-disclosure agreement. It should describe

every minute detail about the trade secret applicability, like how the person will use a trade secret, what will happen if he will pass over this agreement, etc.

- All employees should consider trade secrets as confidential data or information even if they are unaware about the trade secret.
- Always keep your trade secret in a private and restricted zone.

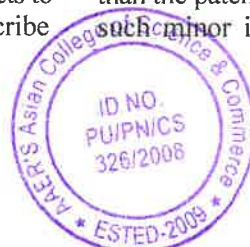
## UTILITY MODEL

The utility model is the IPR for protecting the inventions. It is somehow described as the statutory monopoly that is bestowed upon for the fixed duration of time in exchange to the inventor for the offering of the sufficient teaching of the invention and permitting the other person, possessing the ordinary skills of the relevant art, of performing the invention. The rights granted under the utility model are somewhat identical to those conferred upon by the patent, but are more considerable for using the term “incremental inventions.” Sometimes, words like “petty patent,” “innovation patent,” “minor patent” and “small patent” are used in reference to the utility model. Such models are considered to be more suitable, particularly for the small-scale enterprises, which in turn make the “minor” improvements with the adaption of the existing products. Utility models are more commonly used for the mechanical innovations.

The utility model rights are recognized as the registered rights, which provide the owner “exclusivity” protection in terms of the invention.<sup>[48]</sup>

The utility model working in Indonesia and Finland is termed as “Petty Patent.” Such models are deemed to be more suitable for small- and medium-sized enterprises that make few improvements. These are primarily found to be used for mechanical innovations also.

The origin of utility model goes back to the period of 1891 in Germany, where it was enacted with a motto of filling the gap. During that time, the patent office of Germany provided patents only to those inventions that were new and showed some degree of creativeness. But, it was found that there were a good number of technical solutions that consisted of the industrial creation having some technical or constructive complexity. Such small inventions were not patented, but the German legislature was of the view that they deserved to be protected due to the possession of their high-economic value. Therefore, it was decided to create the set of exclusive rights, other than the patents, which was appropriate for safeguarding such minor inventions. It comes in the form of the



utility model rights. Soon after, many other nations also joined up the club in providing a utility model in their respective territories, like Poland, Japan, Spain, Italy and Portugal. Afterwards, the list has also been extended with the adoption of the utility model by Greece, Finland, Denmark and Austria.

## GEOGRAPHICAL INDICATION (GI)

GI signifies the name or sign used in reference to the products corresponding to the particular geographical area or somewhat related to the origin, like town, region or nation. Thus, GI grants the rights to its holder that acts as the certification mark and shows that the specified product consists of the some qualities and is enjoying a good reputation due to its origin from the specified geographical location.<sup>[49]</sup> The TRIPs agreement has defined the “geographical indications rights” as the exclusionary rights for the indicator that identify the goods originated within the member nation territories, or area or region of that territory, where the reputation or other attributes of the goods is essentially related to the geographic origin of the place. GIs are a part of the intellectual property law and, therefore, like any other law, the regulation and governing conditions of GI also vary from one country to another as high differences have been found in the use of generic terms across the world. Such a case is prominent for food and beverages, which more commonly use the geographic terms.

GIs are aimed toward identifying the source of the product and are considered a valuable business tool. The global trade has made it crucial to harmonize the various approaches and methods that the governments use for registering the GIs in their respective territories.<sup>[50]</sup>

### GI Act in India

In India, the GIs regime is regulated by the Geographical Indications of Goods (Registration and Protection) Act, 1999 and the Geographical Indication of Goods (Regulation and Protection) Rules, 2002.<sup>[51]</sup> However, registering of the GI is not compulsory in the India as the owner of the unregistered GI can also enforce the actions with the help of passing off against the infringer, but it is recommendable to register the GI as the registration certificate acts as the prima facie evidence in the court at the time of arising of any dispute, and no additional evidence is required to prove the validity. Examples of some of the popular GIs are – Basmati Rice, Kanjeeपुरam sarees and Darjeeling tea. In the Indian act, GI is used for identifying goods from a particular geographical location and its origin. It encircles the agriculture goods and natural goods and is extended up to the manufactured goods

also. In order to register the GI, the goods should possess unique characteristics and reputation with other qualities attributed to its geographical origin, e.g. climate, quality of soil, processing methods, etc.<sup>[52-55]</sup>

## INDUSTRIAL DESIGN RIGHTS

Industrial design rights are defined as the part of the intellectual property rights that confers the rights of exclusivity to the visual designs of objects which are generally not popularly utilitarian. It safeguards the appearance, style and design of the industrial object, such as spare parts, textiles and furniture. According to the Industrial Design Society of America, “Industrial Design (ID) is the professional service of creating and developing concepts and specifications that optimize the function, value and appearance of products and systems for the mutual benefit of both user and manufacturer.” As these designs consist of esthetic features, they therefore do not provide any protection to the technical features of the article. The origin of design rights can be traced back in the United Kingdom as “Designing and Printing of Linen Act” (1787).

Designs are used in different products and across various industries like medical, handicrafts, jewelry, electrical appliances, etc. It precludes any trademark or artistic type of work. In India, the first-ever design-related legislation was enacted by the British Government, and was popularly named as the Designs Act, 1911.<sup>[56]</sup>

### Advantages of industrial design rights

Industrial designs help in making any product or item more beautiful and appealing and, therefore, they help in increasing the commercial viability of the product and in increasing its market potentiality. The industrial design registration helps in safeguarding the ornamental or esthetic elements of the article.<sup>[57-60]</sup> Whenever an industrial design is being registered, it gives an exclusionary rights to the owner against unauthorized use, like copying or imitation, by a third party without his consent. This in turns facilitates a fair flow of investment. An effectual system also helps in benefiting the public by encouraging fair and effective competition and trading practices, which, at large, bolster the creativity, and the final result comes in the form of attractive and beautiful products. Safeguarding of industrial designs help in the overall economic development, which promote creativity in the industrial arena.

### The essential requirements for the registration of design

- i. The design should be new or original, not previously published or used in any country before the date of



application for registration. The novelty may reside in the application of a known shape or pattern to a new subject matter. However, if the design for which the application is made does not involve any real mental activity for conception, then registration may not be considered.

- ii. The design should relate to features of shape, configuration, pattern or ornamentation applied or applicable to an article. Thus, designs of industrial plans, layouts and installations are not registrable under the Act.<sup>[61]</sup>
- iii. The design should be applied or applicable to any article by any industrial process. Normally, designs of an artistic nature, such as painting, sculptures and the like, which are not produced in bulk by any industrial process, are excluded from registration under the Act.
- iv. The features of the designs in the finished article should appeal to and are judged solely by the eye. This implies that the design must appear and should be visible on the finished article for which it is meant. Thus, any design in the inside arrangement of a box, money purse or almirah may not be considered for showing such articles in the open state, as those articles are generally put in the market in the closed state.
- v. Any mode or principle of construction or operation or any thing which is, in substance, a mere mechanical device, would not be a registrable design. For instance, a key having its novelty only in the shape of its corrugation or bend at the portion intended to engage with levers inside the lock it is associated with cannot be registered as a design under the Act. However, when any design suggests any mode or principle of construction or mechanical or other action of a mechanism, a suitable disclaimer in respect thereof is required to be inserted on its representation, provided that there are other registrable features in the design.
- vi. The design should not include any trademark or property mark or artistic works.
- vii. It should be significantly distinguishable from known designs or a combination of known designs.<sup>[62]</sup>
- viii. It should not comprise or contain scandalous or obscene matter.

#### Duration of the registration of a design

The total term of a registered design is 15 years. Initially, the right is granted for a period of 10 years, which can be extended by another 5 years by making an application and by paying a fee of Rs. 2000/- to the Controller before the expiry of the initial 10-year period. The proprietor of the design may make the application for

such extension even as soon as the design is registered.<sup>[63]</sup>

#### Strategy for protection

First to file rule is applicable for registrability of design. If two or more applications relating to an identical or a similar design are filed on different dates, the first application will be considered for registration of design. Therefore, the application should be filed as soon as you are ready with the design. After publication in the official gazette on payment of the prescribed fee of Rs. 500/- all registered designs are open for public inspection. Therefore, it is advisable to inspect the register of designs to determine whether the design is new or not. There is yet another important provision for ensuring that the design is different from anything published anywhere in the world. This is quite a strict condition.<sup>[64-65]</sup>

#### CONCLUSION

Intellectual property is a strategic asset for industry and public health. The growth of new global public-private partnerships, such as the malaria vaccine initiative, have shown that the management of an intellectual property system is essential for development of, and subsequent access to, medicines. Work, including that done by WHO Commission on Intellectual Property and innovation, also shows that the creative management of intellectual property is required to help product development and dissemination.

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