

## **Statement for the BASCAP Roundtable**

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From the point of view of business the dynamics of the free market system is such that its endemic versatility allows it to adjust to adverse circumstances in a proactive and resilient manner which is the hallmark of its sustenance and continued growth.

The aforesaid is in essence a fundamental element in terms of survival for any free enterprise. This dynamism in varying forms has not only just persevered much adversity over the years but has in fact demonstrated its ability to further enhance its own and mankind's achievements and developments exponentially. The crisis in Intellectual Property Rights that is perceived in terms of it threatening the essence of free market development should not be construed as something that the system will not automatically remedy or overcome by virtue of its incredible dynamism.

The issue of Intellectual Property Rights has to be viewed by conviction and not by compulsion. The conviction being that Intellectual Property and its protection is an essential cornerstone for free market development. The compulsion being that non-compliance would lead to trade reprisals. It is clear that in ongoing multilateral and bilateral negotiations, Intellectual Property Rights has become a major issue for redressal and its protection is already a foregone conclusion amongst governments. It only remains to be seen as to how capable each government is in obtaining compliance. In its purest sense the degree of compliance is reflective of the level of sophistication and development in any particular country of its civil society, free market elements and institutions. No doubt, conflicts in ownership or origin of intellectual properties may occur but these may be exceptions for which remedies and institutions already exist.

In varying degree violations of Intellectual Property Rights are prevalent in all countries. It remains an irritant which may sometimes have to be relegated to being an occupational hazard as long as it remains in the non-organized sector or what is also sometimes known as the cottage industry. The problem however gets magnified when Intellectual Property Rights violations become institutionalized into vast industries supported by large capital input. This violating industry is not shrinking and remedies need to be sought. Whether it be industrial patents and processes, trademarks or copyrights the question of whether they need to be protected is not the issue. It is a question of how much commitment there is to protect them. This commitment can only be provided by those who are appropriate stakeholders not just in terms of those from whom the Intellectual Property Rights originate but also from those who seek to reproduce, distribute and market the IPR based products in territories all over the world.

Stakeholders come in many forms. They can be governments who benefit from taxes, they can be labor that benefit from wages and then there are of course consumers but by far the largest stakeholder would be the entrepreneur who seeks to benefit from the sale of legitimate products. The protection of the downstream entrepreneur is as essential as that of the ownership of Intellectual Property Rights. For it is the entrepreneur or the licensee or the distributor or the franchisee or the agent who ultimately has to devote resources towards the sale of legitimate products and the creation of its market. When the downstream entrepreneur's stakeholding remains in flux in terms of Intellectual Property Rights the same will ultimately creep up to the eventual owner of the Intellectual Property Rights.

This is a natural phenomenon and the reason has much to do with the vast proliferation of basic industrial production technology. Therefore capacities are created overnight and production is sustained not always on products or processes of self design but by adoption or violation of Intellectual Property Rights. This constrains the original right holder to either further upgrade to stay ahead or to take measures to thwart violations. The latter may be achieved by way of trade negotiations/ reprisals or by simple application of legal action and due process. There are however some other remedies that may be considered.

The loss in market share and growth is inevitable of any original product or process owing to Intellectual Property Rights violations. However it is at this point that the dynamism of the free market system surfaces with more rapid mutation and innovation. In an ironic way human instincts are so ably harnessed by the free market system that its sense of self preservation in the face of Intellectual Property Rights violation motivates ever-rapid innovation to further improve not only the product or the process but also society. If mere criminals were able to bring down the free market system then it would not be a system worth considering at all.

The aforesaid is not in any way a justification for Intellectual Property Rights violation but rather that it should first be put into context and then it requires to fundamentally examine the prevailing business models for licensing, distribution and franchising of IPR in which those that distribute and sell should also have their rights in terms of their own commitments secured so that appropriate stakeholder groups be consistently prevalent to protect those very rights in every territory. There has been a shift in the business models of the 1950s and the 1960s from joint ventures to short term licensing. This has prevented the downstream entrepreneurs from making lasting commitments to protect as their own the products they are responsible to distribute. The examination and reconfiguring of business models will not alone solve the problem but it will definitely be a step in the right direction and will serve to address it to a considerable degree.