ASSOCIATION OF CORPORATE COUNSEL

Outsourcing to India: A Practical Guide to IP Protections, Enforcement Mechanisms and Export-Import Issues
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Presented by ACC Intellectual Property Committee and Kilpatrick Stockton

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(Alex Montagu): Yes, good morning. Welcome to our ACC Conference and Webcast on Outsourcing to India. This is (Alex Montagu). I'm the General Council of (Lipper). I'm also the Chair of the ACC's IP Committee this year.

I have with me today here in New York a very distinguished guest, and I have the honor of introducing Dr. (Ganacia), who is the Deputy Council General of India to the U.S. I also have presenting with me today (Jim Steinberg) who is a partner of (KilPatrick's Doctin) and a member of the corporate department specializing in outsourcing transactions.

Dr. (Ganacia) has had a long and distinguished career in the diplomatic field and I thought that I would share with you something that really struck me about his resume, which is that he negotiated successfully with the hijackers of the Indian Airlines' plane in (Kantahar) Afghanistan in 1999 to save the lives of 200 passengers.

He – I'm delighted that he's with us today. It was very difficult because he has some ministers coming from India this week for some conferences and speeches, and so it's really an honor to have him with us to give us his insight into outsourcing and IP issues and import export issues in India.

Before I introduce the topics that we're going to talk about today, I'd like to ask (Sandy) to go over a few housekeeping issues about how to answer – ask questions, how to type in your questions. So, (Sandy), if you can do that, please, that would be great.

(Sandy): Sure, (Alex). If you have a question for our speakers today, all you need to do is type your question into the box on the lower left corner of your screen and click on the "send" button, it's that simple. We'd also like to remind you at the conclusion of today's presentation, to fill out the Webcast evaluation form, which you see as number one in the "links" box on the left side of your screen. Thank you.

(Alex), you can go ahead.

(Alex Montagu): OK. I just want to make sure that everyone can hear me well. If you can't, I can see that one or two people can't hear me. If there's a problem, can you just type in? Cannot hear me. OK, I'm going to try something else.

(Sandy): Yes, (Alex), we're going to take care of that problem right now. You can go right ahead with your presentation.

(Alex Montagu): OK, thank you.

Today on our Webcast, we are going to cover export import issues implicated in outsourcing deals between the U.S. and India, commercial disputes that arise out of these transactions, ownership of intellectual property and data protection and security in India. Now one of the reasons that I've put commercial disputes in there and you'll see us talking about that before we get to the ownership of intellectual property and data protection, is that we will – a lot of times people have difficulty with enforcement. You'll see from the presentation today that India has very similar laws to the UK and U.S. on protection of intellectual property. Where the problems and issues arise are the differences in enforcement, so that is why we've put that up there.

Now before we launch into the (substance) of the presentation, I would like to start with a hypothetical situation that I'd like you to all to keep in mind as we run through – as we run through the presentation. The hypothetical is actually a situation that I had – I personally faced here in outsourcing transaction.

We had retained an outsourcing company to build a wealth management module for us. What I did in that situation is that before we retained the company, in addition to the due diligence that we did on them, we – I made them sign a confidentiality and non-disclosure agreement that had a clause in it that stated that all inventions made using our company's intellectual property and confidential information, or confidential information I should say, would belong to our company. And that they would take all steps that we would request in order to (secturate) any necessary assignment or transfers for the (recordal) of the intellectual property in our name.

The venue for the enforcement of that document was an open venue, meaning that it wasn't exclusive, but it was – it stated that the New York Court have jurisdiction and that both ((inaudible)) consented to the jurisdiction of the New York Courts. But it wasn't an exclusively New York venue, because we wanted the confidentiality agreement to be enforceable everywhere that we would need it to be enforceable.

Subsequent to that, we went ahead and retained the outsourcer and to build the wealth management module, and in doing that, we really had to disclose to the outsourcer what a wealth management module is, which is basically a service and a system that allows investors to select stocks, and bonds, and mutual funds. Having done that, we – they built that wealth management module for us. The problem arose when we realized about six months later that they built a very similar, if not identical, wealth management module for themselves that they were marketing and selling in India. So, that is the hypothetical.

Now the agreement that they signed us with a full fledge consulting agreement that very clearly gave the intellectual property rights, all intellectual property rights in the deliverables,

which was basically the entire system that they built, to our company. The language was very clear in that. So, not only did we have MDA, we have the actual agreement. So, that was the situation, that was the hypothetical, and I encourage you to think about those (flats) as we run through our presentation today.

So, the first topic of our presentation is export import issues and outsourcing deals to India. And I'm going to turn it over to James, who can run through that from the U.S. perspective.

James (Steinberg): Good morning, everyone, and thank you for participating.

As I look at export import issues, I'm going to take an expansive look and not just look at U.S. law in terms of whether or not an export license is required, but also step back and say what contractual obligations or hurdles have to be overcome in order to take work offshore to India or frankly, any other country.

And so for the most part, I'm going to be looking at this transaction as if it were an IT outsourcing, but the same would apply to a business process outsourcing, a transformational outsourcing or knowledge process outsourcing. And so what we're going to do now is assume you've made the decision to outsource, you've selected your vendor, you're in the process of negotiating.

One of the items that can always be a hang up in terms of actually hitting your goal for timelines for transition of the services from the customer to the vendor is the issue of consent and export licenses. So the first thing that ought to be taken care of while you're in the middle of your negotiations, is to begin the catalog of intellectual property that you're going to need to make available to the outsourcer.

And for the most part, I'm going to focus on software today. Software will come in two varieties, the homegrown variety, which you've created yourself, and the third party software, which you've licensed in. In the context of third party software, my experience is that licenses have become better and better and that over time, most of them now contemplate in some way that an outsourcing transaction is possible or the contractors will need the right to work with software. But still, many software licenses will have a variety of prohibitions that make it difficult to outsource both domestically and offshore.

And so as you go through the licenses, some of the key places in the agreement that you may find hang ups and you may actually find inconsistencies in your agreement itself, are the scope of the license itself. Who can use it and where can the product be used? The confidentiality provision, the non-assignment provision are all places where you may find issues. And then last is the fee schedule in the sense that the use of the software by additional people or people in other locations may require you to pay additional fees to the software licensor.

In addition to checking for consent, we're going to have to check with the U.S. government for purposes of export licenses. And lastly, is your drafting your agreement. You can allocate the responsibility for seeking the various consents, paying for any fees for consent and also principal responsibility for obtaining export licenses from one party to another.

In addition, as you go through your agreement and write your consent letters to your vendors, one other critical factor to consider is not just the principal location where the services are being provided, but in addition, where disaster recovery and business continuity services can be provided.

(Alex Montagu): Jim, can you hold on just one second. I understand that there's a problem with the audio.

(Sandy): You can go right ahead. We're working on the audio. You can go right head with your – with your presentation.

James (Steinberg): OK.

The principal U.S. laws that govern export of software and other technology are the ITAR, export administration regulations and OFAC. And in addition to what OFAC describes on the slide, OFAC would also put controls in place relating to payment to certain individuals. And, (Alex), would you like the Vice Counsel to share a few words about any Indian restrictions?

(Alex Montagu): Yes, please. Vice Counsel, are there any Indian restrictions on the import or export of software services or other types of involved in outsourcing transactions?

Male: You know, outsourcing in India, if you're talking about the services, they are not coming by a ship, they are not coming by air, they are not coming by road. They are coming through the Internet, and this is an idea, this is a service which crosses the border, and there are no borders on the Internet. So, there can be no restrictions on movement of software from one end of the world to the other as long as the user has a license to do so.

And, the government of India would not restrict them from using it until and unless he's not breaking any Indian (policy) law. Thank you.

(Alex Montagu): So basically, there isn't – you're not required by Indian law to obtain any special licenses for import or export?

Male: Yes.

(Alex Montagu): The only problem would be when you mentioned that, you know, the piracy and the license, you mean that if someone is infringing on someone else's intellectual property privately then that could be an issue.

Male: Then the government would have to intervene. We do not ((inaudible)) (privacy) so any unlicensed user of a software, if he decides to use it illegally, then the Government of India comes ((inaudible)) to do so according to Indian law.

(Alex Montagu): OK. But as far as ((inaudible)) transaction is concerned, there are no licenses that are required.

Male: There are no licenses that are required.

(Alex Montagu): Thank you. That's great. OK.

So it looks, Jim, like the only issues we have is with the U.S.

James (Steinberg): So what I will do is run quickly through the U.S. law. For people who have practice in this area or have had to look at the issue of export licenses, what you'll find are there are the laws and there are the regs, and unlike just about every other aspect of law that I've ever looked at, there really is not a lot of background information, second hand information or ((inaudible)) that describe the process.

But essentially a couple of things are required. The export of software technologies and commodities is covered by the export administration reg. But in reality, only a small percentage of actual exports require a license.

As you begin the process of determining whether a license is required, it's important to note that publicly available software and technology is not covered. So, for instance, something like a Microsoft Word would not be covered, but other software which is available but less available than a Microsoft Word, for instance, SAP software, might be subject to the regime. And the question you then ask is, after something is covered, is whether something is being exported. This is one of the trickiest questions that practitioners face and there's not much guidance in this area. But the export can occur in two ways, a direct transfer, you take the code and download it to a Web site, you ship a CD with the code. And also what's known as a "deemed" export, which can occur by a person in another country being able to actually look through the system over the Internet and actually touch the code itself as opposed to view of images or, if a foreign national is here in the United States and is actually given access to the code.

After you've decided whether an item is being exported, then you have to try and look at the item itself and look at the export control classification number system and identify the reasons for the control for the specific ECCN. Certain items that don't fall within a specific number fall within the general catch all EAR99. I'm going to try and go swiftly through some of these so we make sure that we get to the other items.

As you keep working through the process, you'll eventually come to a chart, which I apologize for the size, but on the left hand margin you'll see a list of countries from one page and across the top, you'll see, you know, broad list of various categories. And as you flip through, you can see for instance, if you have really good eyesight, that India is about three-quarters of the way down and you'll see "X's" for a variety of different types of licenses where India might or might not require an export license based on the technology.

And I think one other item to discover – I skipped ahead a couple of slides – is to also the question of to whom the item is being exported. And certain individuals and organizations are absolutely prohibited from receiving U.S. exports and as the exporter, you have to check the following list on the BIS Web site.

I think the principle thing to keep in mind from drafting your agreement is which party is going to be responsible for this undertaking under the agreement? Is it the customer or is it the vendor? The vendor often has excellent relations with a number of the major software companies and can help smooth the process along even if they don't take principle

responsibility. And the agreement needs to control the further export or re-export of the technology so that if you are to give the – if the customer has principle responsibility for making sure that outsourcer can use the technology in India, that the outsourcer then agrees in the contract not to further re-export the software to any other country.

We're going to switch gears now and talk a little bit about commercial dispute, and I think before (Alex) takes over, I think the one thing that I would add in this area is that do your diligence on your vendor. Understand who the vendor is, what their qualifications are. In the beginning of the outsourcing boom, there were really just one tier of vendors that you could look to and that people could find to do the work. As the Internet and the outsourcing boom has continued, there are multiple tiers of vendors now from the first tier vendors like the (Whip rows) and Infosys's of the world to companies that you've probably never heard of. And as you go through the list, you've got to do greater and greater diligence not just on their skills and capabilities, but also their reputation.

In general, there's not been a significant amount of litigation or public disputes under outsourcing agreements, even though when you do surveys, the number of customers that are generally dissatisfied with their vendor, either in terms of performance or pricing or some other level tends to be high, there tends not to be much litigation. In the United States, there's really been one high profile case in the last two years, which is a case that Sprint has filed against IBM. But for the most part, it's important to draft these provisions and think about them, but given the nature of their relationship and the fact that both parties are heavily reliant on each other, there tends not to actually be a point in time when the parties actually come to blows.

(Alex).

(Alex Montagu): Yes, thank you. And, Jim, just – that's a very good point and it was something that Mr. (Ganacia) and I were discussing right before this in terms of how to avoid the dispute, how to select the right person. So we will get to that right after I mention a few things about the governing law and, you know, this alternative dispute resolution mechanisms.

The governing law in any agreement should be selected in view of the (mind) – where the dispute is going to be resolved, because generally you don't want the law that's going to govern the dispute, which is usually the law that sets (right) in the contract, to become an (evidentiary) issue. You don't want adjudicated – to have to bring in an expert to tell them what the governing law says on the (substantive) issue in dispute.

So, for example, if you pick India as your governing law, but your dispute is being resolved in New York, Indian law will become an (evidentiary) issue. And that would mean much more – it's much more complicated and it will mean much more expenses and delay, so that's something to bear in mind.

Can we move to the next slide, please?

If you look at – can we move to the next slide? Move this along.

Male: I'll do it.

(Alex Montagu): Sorry. If you look in the middle here, the middle bullet point, the Indian courts are severely backlogged. In 2005, (lower) courts had over 25 million pending cases and the higher cases had over three million cases. So this really may not be the most effective way to do it.

More important than that, and if you remember one thing from this Webcast today it should be this, that the U.S. is not a party to any international convention on enforcement of foreign judgments. What does that mean? It means that a judgment that has been issued by any court in the United States is not enforceable in an Indian court. OK.

So as a practical matter, if you're doing a cross border transaction, an outsourcing transaction between the U.S. and India or between the UK and (anywhere), the best thing to do, think about international arbitration. We will talk about mediation in just a second with the vice counsel and other alternative dispute resolution mechanisms, but as far as (drafting) is concerned, what you do with the contract, you know, I seriously recommend that you think about inserting an arbitration clause, an international arbitration clause in the contract. Next slide.

India has in 1996 really amended its laws so that an arbitration award that is rendered in another country will have the (force) of a court judgment in India. That is very important. That means if you have an arbitration preceding in New York or in London and those arbitrators make an award, that award has the force of a court judgment of a decree in India. Now it can be challenged in India under some very narrow grounds, but under the New York Convention to which India is a party and the U.S. is a party and most – there are a lot of countries that are (parties) under the 1996 Arbitration Act, that court decision – I'm sorry – the arbitration work is going to have a very powerful impact in India. Not just that, it can be enforceable in any New York Convention country. So, the U.S., the UK, Switzerland, et cetera, et cetera, so anywhere where the outsourcer or the client has assets, that arbitration award can be enforced.

That stands in (star) contrast with a judgment of a court, which is not enforceable in these other countries. So that shows what the advantage of having a properly drafted arbitration clause is to the dispute including IP disputes. And if you want your IP to be properly protected, this alone may provide a good answer.

As far, let me just have a look at this, as far as drafting the arbitration clause is concerned, I have a little advice on that. I acted as an arbitrator for the ICC before, and the ((inaudible)) problems that we saw at the ICC was what they call "pathological arbitration clauses." Meaning, arbitration clauses that are poorly drafted and that therefore, lead to court disputes. OK, you don't want that. That is one sure way of getting involved in a nasty court battle is if you have a poorly drafted arbitration clause. There's some sample model clauses. You know, the ICC has one ((inaudible)) has one, you know, and this is not basically a (talk) on, you know, drafting arbitration clauses. But, I'm just saying that is a very critical thing. That is where most of the mistakes come in. Get a properly drafted arbitration clause in the outsourcing agreement. That can go a long way to protecting your IP and your confidential information.

Now having said that, what I'd like to talk about is in the event of a dispute with an outsourcer and this is a question for Mr. (Ganacia), what avenues other than litigation or formal arbitration, if any, are available in India to help a foreign company solve a problem and protect its confidential information and IP if there's a serious dispute with the outsourcer in India?

(Ganacia): The first rule of the game should be to make sure that disputes do not arise, and if you have the right arbitration clause, which is worked out carefully between the two parties, and you take as many drafts as you want either from the International Chamber of Commerce or from ((inaudible)) make sure that you understand the meaning of each word and the meaning of each sentence and read between the lines, and above the lines, and below the lines. That will give us a sound footing to make sure that the disputes do not arise.

The second point, India is an ((inaudible)) economy. It's been in existence for 5,000 years and we have even invented ((inaudible)) unfortunately we are not ((inaudible)). And we have systems which are in position which are cultural in India. So most of the companies, the vast majority of the Indian companies are still family-oriented. It's a different question now that in the (services) sector, particularly in the knowledge process outsourcing and business process outsourcing, the companies are not family-oriented. The companies are new generation companies. These are young entrepreneurs. Some of them might be more bright than necessary. Some of them may also not understand the intricacies. And the ((inaudible)) outlook of the (father's) generation is not dead, but that is compensated by frankness and candor of the younger generation, many of whom are trained in the United States and the UK, so they understand your language, they understand your culture much better than their parents did who went only by the trust.

Coming to the question that is being answered, what are the other avenues of ((inaudible)) dispute settlement? Number one, the ((inaudible)) information technology in India has an ((inaudible)) (cell) inside it, and this IP ((inaudible)) (cell) is right now in the business of disseminating the information on IP ((inaudible)) India, dissemination – disseminating the information relating to organizing seminars, Web sites, everything. Plus, the same thing is repeated in each state government. Every state government has a (cell), which is supposed to assist all companies which get into such problem.

And the third, the national associations, we have a National Association of Software Services Companies, which is called (NASCOM) which is literally an entirely ((inaudible)) industry but it doesn't get a penny from the Government of India or anybody else. They manage it on their own. These are companies that everybody knows, ((inaudible)) everybody's a member of this, including the small ones. They can even help you benchmark your company when you sign the agreement. They can tell you this is where this company will figure it (in our list) of companies, so you can make an assessment of your agreement and the ((inaudible)) right then and there when you sign the agreement.

And the other alternative that you have is that the National ((inaudible)) Associations of India, like (Freaky), for instance, they have an initiative which is only for this settlements or disputes that arise between Indian companies and foreign companies in the area of the (IP), specifically for the (IP). They have a special secretary, they have a (data rank), and they have information on cases that have come up elsewhere in the world and how they will resolve it. All these things will help.

And the final analysis, as I say, (trust) is what matters, and you have to protect that as much as the (IP) itself. So if you are trustworthy and you understand the language that you have both written, and then you are in a much safer and better …

(Alex Montagu): That's very helpful. Let me ask a question about these institutions that you mentioned. In the event that a dispute does arise, and let's look at the hypothetical situation that I brought up at the beginning where we had a situation with an outsourcer that created its own wealth management module. And let's say we don't want them to sell that in India. If I go to let's say the software, what was the name of the software?

Male: NASCOT

(Alex Montagu): The NASCOT, that's right, that you mentioned, if I go there, would they bring both parties to the table? Do they act as mediators really to bring both parties to the table and say, OK, you know, let's see if we can resolve this?

And the second part of the question is, do the Indian companies care about their reputation before these (boards) – before (NASCON)? So are they likely to come to the table and listen to what their representatives of (NASCON) and the other agencies say?

(Ganacia): Firstly, I must confess that (NASCON) is not a judicious body. It is an association of the industry. The business of (NASCON) is to spread awareness of its members all over the world, spread awareness about their capacities, spread awareness about their specialties everything that goes with the industry. But as a principle, (they're) know precisely their reputation of most of these companies because they have been together in that institution for so many years. And they do have a say, for instance, this ((inaudible)) (NASCON) is an respected individual, and the president of (NASCON) today is the former of CEO of Cognizant Technology Solutions. It's one of the most (actively) growing companies. And they are – and he runs the company here in New Jersey call Cognizant Inc. And these are people who are sitting at the ((inaudible)) of this company, who are highly respected individuals not only within the institution but even by the Government of India. So when they say something, it is likely to be respected. And, of course, the judicial system is very much there as the last resort. I would say, we don't go to the court of law unless you can settle it out of court before going into law.

The only thing that I can say at this point in time is (NASCON) is not a judicial body. It can assist you (formally) in trying to bring together two parties and trying to explain to them how similar cases will result elsewhere and what kind of solutions ((inaudible)). And here it is, adapted to Indian conditions and trying to bring a solution.

(Alex Montagu): That's very helpful. I wonder if you can speak a little about the differences and outlook since you've been in the states for, is it three years now, (NASCON) ((inaudible))?

It seems to me that in the U.S. and to a large extent, in the UK and other countries, dispute resolution through litigation has become commonplace. In other words, it's very, you know, it doesn't seem to be a last resort. People will litigate very quickly. From our discussions and from what you're telling me today, things are different in India. You can get to the same result maybe, but people are used to doing things a little bit more on trust and bit more on

let's get down to resolve this and let's turn to respected members of the industry to get their – get their view and then people listen to that.

Can you comment on the differences that you've noticed between India and the U.S. on this issue?

(Ganacia): Well, I think let me put it this way, I have had the privilege of looking at the outsourcing industry from (Brussels) in the European Union 10 years ago, and from here now also from India. The difference that I see is that in the European, the tendency is not to (patent), because I find that the large companies are medium and small companies and they've made their product other than they don't register their patent. Because they say that if you register it, 20 years down the line you have to give it up. But you can keep it to yourselves forever if you don't register it. That was the impression that was given to me in the European Union because they were all small companies and they wanted to protect themselves. They didn't want to – they didn't want to go globally.

But in the United States, the size which matters; it's the global operations of companies ((inaudible)). They have to protect themselves. They looked at it more carefully. And in India, it is somewhere in between. You know, differences for keeping it to himself if it is his product as long as he can. But when he realizes that somebody else is going to develop it further and the applications will expand and increase his chances of growing bigger and better, then you tends to share it with that person. ((inaudible)) joint ventures that have come about in the outsourcing sectors between India and the United States have come from multinational companies. They ((inaudible)) constantly tells me that they learn from every customer they work for. They pick and choose their customers and learn from them to help them, to serve them. That makes the ((inaudible)) go deeper, and that is the reason why Indian customers are growing with their Fortune 500 companies into China because ((inaudible)) in their operations. This (trust) is something which will help us (write), too. It's not that we cannot say that the judicial system is not required ((inaudible)). There will be cases which cannot be ((inaudible)) and they have to go to the judiciary. And mind you that the judiciary itself is new in this area, because they have never seen this kind of a problem before.

It's alright if someone commits a murder, they know what ((inaudible)) in the court. But they do not know what kind of retribution should be given to it – infringement in the outsourcing IP ((inaudible)) sector. These are new concepts which we are all learning, and even the International Convention, which is ((inaudible)) in about 103 companies ((inaudible)) members – I think the United States is also a member of it. It will take a little time and it'll keep growing and it keeps expanding. And people like you would have to help the governments of the world become stronger and ((inaudible)) better attune to address issues.

(Alex Montagu): OK. Well thank you – thank you very much. That's really very helpful, and I think that what we can take away from that, all of us today, is that really we have to really change ((inaudible)) as lawyers and as business people a way from thinking that, you know, (mitigation) is going to provide us – the solution is going to provide us with a way of, you know, protecting our (RPR) and doing business. No, there are other ways of doing it and, you know, India is an unavoidable, and for those who say, well, you know, if I can't (mitigate), if I can't protect a (litigation) and injunctions then I'm not going to go there.

You know, you may be able to do that for a couple of years, you may not be able to do that forever.

And what we're hearing today is that there are other ways maybe of getting protection that may be better than (litigation); maybe more cost effective. You just have to find out how to do it. You have to, you know – you know, do your due diligence as Jim was saying earlier. You know, go to these government agencies and find out what information they have about the various outsources before you sign the agreement with them. It's a very important part of the due diligence.

And having done that, if they dispute, a dispute should arise, then the first resort would be to try to go through this mediation process through one of these agencies, which looks like, you know, they might be very helpful in getting this done. And finally, of course, is to make sure that you have the arbitration clause – arbitration clause drafted there.

OK, so move on from here to actually the (substance) of protection of IPR in India and I'm going to hand it back to Jim to take it.

(Jim Steinberg): Thank you, (Alex).

One of the most difficult arguments and debates in an outsourcing agreement between the customers and the vendors, who's going to own the variety of intellectual property that's created during the length of the agreement. And for today's discussion, we're really going to focus principally on copyrights and patents. And mostly thinking about the two as it relates to software and documentation that gets created during the relationship.

One of the ways that we've seen in terms of trying to help the two parties frame the debate, is to try to categorize the various types of IP that are involved. And, you know, there's a list on slide 16 of a variety of the different types of IP that can be used to try and help break down the arguments about who's going to own what based on whether it pre-existed agreement, whether it's third-party code that the two either of the parties have licensed in. Vendor work product really means what the vendor creates during the course of the arrangement and it can cover brand new Greenfield work as well as derivatives of any of the above interfaces which happen to fall within probably the vendor work product, something the vendor has a clear interest in reusing over and over and often has little use or utility to the customer after the agreement is over, and then various improvements and enhancements to the above.

Let's say you've struck your deal with your outsourcer. You've got a general agreement, and now you're going to try and figure out how you want to protect your rights, and make sure that the agreement reflects the general agreement that the two parties have got. I'm going to skip ahead and go to a couple of issues relating to Indian law in this regard, and people can ask questions about the variety – the previous slides if they're interested.

Over time the Copyright Act in India has been amended numerous times and in 1999 amendments were made to bring it up to standards with the World Trade Organizations (trips). I general, what you're going to find from negotiating a contract and building protections into your agreement, is that the copyright laws in India are not terribly different from what we have in the United States. That the protections will protect, you know, the

types of items that we would expect copyright protection to protect, and certainly with most traditional outsourcing arrangements, the types of, excuse me, work product that would be subject to copyright.

The one key distinction between Indian law and the U.S. law is that in India, a copyright assignment is enforceable only if it's signed in writing. And that unless the contract specifically provides otherwise, there's a term of default of five years in a territory only of India and lastly, if the rights under the assignment are not used in the first year, the assignment lapses. All of this can be overcome by a well drafted provision in the outsourcing agreement that assigns the code to the customer assuming the customer is going to own it, and provides for perpetual ownership worldwide usage rights and essentially provides that usage has occurred already.

And as you work with your vendor, one of the things that you would want to do is make sure that the vendor has agreements in place with permitted subcontractors and employees to make sure that intellectual property rights that you've negotiated have (flown) down through the vendors organization so that you achieve what you're looking to achieve.

Patents are one of the areas where if you read the materials that are out there, most people view that patent protection has actually improved much more dramatically than copyright protection in India. Over the last 10 to 15 years historically has been significantly weaker in India than in the United States, and the variety of laws had different patent terms for different types of items, and there are long procedural delays. But in the last several years, things have improved dramatically.

In 1994, India strengthened its protections for foreign and domestic patent holders and join GATT which is now the WTO. There are still though a couple of loopholes that people should be cognizant of. You'll see on slide 22 that India has gone back and forth over the last three or four years regarding patents on computer programs. And that, you know, the language essentially says, India does not recognize patents on computer programs per se. This is not actually as different as the U.S. law as it looks at first ((inaudible)). While I am not a patent lawyer, the patent lawyers here assure me that this is somewhat similar to the law in many other jurisdictions.

But to obtain a patent on a computer program, it has to do more than manipulate data. It has to have some sort of technical effect. And so while the language here says that patents are not available per se, it's not quite accurate.

The Indian law regarding patent filing is one place where the U.S. and Indian law run into an issue. Indian law requires that for any innovations originating in India or involving in India resident inventor, applications for the patents must be filed in India first. However, the parties may week a preliminary grant for a foreign filing license allowing for a primary filing in another jurisdiction. And the law is quite unclear as to what the penalty is for failing to comply with this requirement.

In the U.S., and this is where the we run into an issue, United States law requires a primary filing in the U.S. with the six-month delay prior to any foreign filing. And so again, we have the conflict between the laws of the two countries.

As a practical matter where we have come out although I think reasonable people can definitely differ is thinking through this is in invention made solely in India will not be covered by the U.S. requirement that it be filed in the U.S. first. And so that's an easy case; simply file first in India. But we have inventions made partly in the U.S. and partly in India, and we have both laws implicated. We've got a messy situation with no clear guidance.

In the U.S. the laws were essentially designed initially with the goal of protecting the disclosure of military or classified secrets. And so I'm going to assume for purposes of the conversation this morning, that for the most part, the types of technology that we're dealing with, and the software, and other intellectual property that's created are for non-military applications. And the real question then becomes, where is patent protection more important? Which market is the market that I'm really concerned about as I try to decide which law I want to comply with?

And the real risk we would say is the risk of loss of enforceability although there is a – in the U.S., there is actually the threat of criminal sanctions for not complying although we are not aware of any actual criminal sanctions being imposed.

And so what we would say at this point is that whether the Indian market is more important or whether the U.S. market is more important, pick the one that's more important and go with that. And for most customers who are predominantly U.S.-based in the world we're living in now in terms of outsourcing to India, then the rule we say is file in the United States.

A couple other things about patents, I'm going to try and go through quickly so we can leave some time to answer some questions, but the Indian patent laws are different from the U.S. laws in a couple different cases. And it doesn't require a legal requirement that you change your agreement, but as a practical level, one of the things that you will want to do is educate your outsourcing supplier, your vendor, so that they understand U.S. law in a couple different cases.

One, is as it relates to the duty to disclose and to continue to disclose to the U.S. PTO, and so, both education of the client and preferably provisions in the agreement that require the vendor to continue to disclose. And second, the interference issues, India is the first to file system whereas the U.S. remains a first to invent system. And so keeping documentation available to demonstrate and prove when something was invented is important, and again, it's not the norm in India and it's something that needs to be included in the agreement to try and make sure that you have the rights that you'd like.

I think before I skip to data protection, all things said and done as it relates to intellectual property both copyright and patent, there are a couple of practical steps that you can take to protect yourself above and beyond relying on the protection of the Indian laws and U.S. laws that are more practical that ((inaudible)). How do I deal with these issues or how do I make sure that not just my copyrights and patents, but also my trade secrets, my confidential information and maybe most importantly, customer data is protected when I've transferred it halfway around the world to people that I've met a few times.

And so, at a practical level, a couple of things are critical. One, is make sure whether you're going to India or somewhere else that you have native speakers of the language on your staff

and that you have them onsite periodically at the vendor's premises so that you can keep an eye on what's going on and understand what's going on.

Second, is have regular spot inspections of the vendor. Make sure you have the right in the agreement to audit, to audit periodically and to do spot inspections so that you can show up and see what's going on not just, you know, when a visit is arranged well in advance but on general everyday basis.

The third is you can create prohibitions on portable memory devices, create segregated environments where your work will be performed, prevent wireless access to the vendor systems by its employees when they're offsite. A lengthy security standards document is usually critical both for allowing the vendor access to your systems here if they're going to be able to dial in or have some sort of remote access to your system, as well as a lengthy security document that governs the procedures the vendor has to file follow to protect your information. This can cover both physical security of the premises, physical security of the area of your work as well as more technical security.

Another thing that more focused on the agreement is item by item, specify the type of intellectual property that the vendor has the right to use that you own while performing the services and focus on what they can use with what they can do with that IP on a type by type basis. Last but not least, limit use of subcontracts by the vendor and go for a strict liability provision as it relates to the standard of care so that you can avoid any type of burden of proof.

I think we'll skip briefly to data protection and take a couple of questions. Data protection has also improved dramatically in India although at this point, there is no nationwide legislation governing data protection similar to what you would see in the EU. And one – in the last three to four years, there have been a number of high profile cases relating to theft of corporate data or publication of corporate data. HSBC had an issue in the last few years, and then a UK company essentially did a sting operation, the UK Television Four with credit cards.

And so in response, the industry itself has reacted and has created something called the National Skills Registry in January of 2006 which is an effort to build a way of tracking the employment history of the employees in the IT and DPU arena. As of the end of 2006, 100,000 workers were registered and the goal was to have 500,000 registered by the end of 2007.

There are laws in India that are civil and criminal laws that are designed to protect customer data and other confidential data, but enforcement in the Indian court system is difficult given the incredible backlog that they have. And so at the end of the day, the best things that can be done are to impose rigid protocols and standards to protect yourself in the agreement as well as doing diligence on the vendor before you select a vendor.

At this point, I think the three speakers are ready to answer some questions.

(Alex Montagu): There is one question, Jim, I think for you, which is, can you comment on encryption as far as software export is concerned?

(Jim Steinberg): Let's see, I'm scaling down looking for that, (Alex). Yes, the encryption software remains subject to a variety of prohibitions on export. There are a number of countries, you know, where they are simply off limits where you cannot export encryption technology above and beyond the 128 bit encryption. And they're – similar to the chart that is on the table, there's a similar chart that addresses the encryption technology in details and on a case-by-case basis.

And I also think I did see a comment that somebody had asked for the Web site address and while I don't have it handy, if there's a way to provide it to those who participate in it, I will make that available so that everyone can see where that table came from.

(Alex Montagu): OK – great. I believe there was another question addressed to Mr. (Ganacia), which I think was answered already. It had to do with what kind of licenses are required to file a patent in India, and I think, Jim, you answered that question. So, we can move on from there. I believe there's another question coming in. Just give me a second to read it.

It's a long question. Any thoughts or comments on companies with European operations, which is subject to European privacy directives and how to ensure compliance with it when outsourcing to India?

Well, the European Privacy Directive applies – it has been in one way or another been reduced to legislation in the member countries of the European Union. And generally, if you're doing business only in India and the U.S., you don't technically have to comply with it. It's doing business multi-nationally so that for example, the data that you collect from individuals, that would be subject to the privacy would be on servers or software that is in the EU, then you technically have to comply with that statute – for the statute of the applicable European jurisdiction where your servers are located.

So I would say that if you're multi-national and if you're, you know, if you have business in Europe, you should comply with it. Otherwise, if you're just U.S. and India, that is not an applicable directive to your company.

Jim, do you have any other views on that?

(Jim Steinberg): No. I'm just looking at some of the other questions, (Alex), and also the fact that we're passed our 1:00 p.m.

(Alex Montagu): Yes, we are passed 1:00 p.m., and so unfortunately at this point, we have to finish our call.

I want to thank Dr. (Ganacia) and Jim for their great presentation today, and, you know, I think that there's an evaluation that (Sandy) talked about. If you could maybe, you know, fill that out. And that terminates our Webcast for today. Thank you.

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