

Comments on the National IPR Policy – IPR Think Tank

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1. The opening paragraph of the draft policy which states that “an all-encompassing IP Policy will promote a holistic and conducive ecosystem to catalyze the full potential of intellectual property for India’s economic growth and socio-cultural development” gave the impression that the IP policy will have a holistic approach balancing IP rights with the social interest aiming at the ultimate objective of “socio-cultural development” of the nation.
2. The policy also speaks about the need for the Government taking “a proactive role in leveraging the strength of the IPR regime for effective development of transfer of technology, promoting creative industries stimulating small innovation” etc. The vision of the Draft Policy is, it is stated, to have an India “where IP led growth in creativity and innovation is encouraged for the benefit of all; where knowledge is the main driver of development and knowledge owned is transferred into knowledge shared”.
3. Similarly the declared mission of the Draft Policy is to establish a vibrant and balanced IP system in India to foster innovation, accelerate economic growth and enhance socio-cultural development and protect public health, food security and environment and other areas of socio-cultural importance.
4. Thus an overall impression of the introductory portion of the draft policy is that it aims at a balanced IP regime giving due emphasis to the socio-cultural needs of India’s population and its social, technological and industrial development.
5. However, the objectives listed out in the draft policy do not meet the commitments in the introductory statements. The main thrust of the objectives appears to be promotion of awareness on the significance of IP protection, strengthening of IP laws, strengthening of IP administration, enforcement, adjudication etc., and no attempt has been made to design a balanced IP policy.
6. In spite of stating that the Indian IP laws are “robust” and “balanced”, the IP policy asks for reviewing of the existing laws. This, along with the suggestions to enact laws for

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Utility Models, and trade secrets and to examine accession to or become signatory to multilateral treaties which India has “de facto implemented” (without giving any reasons or making any studies on the desirability of such suggestions) point to the fact that the objectives of the draft policy is absolutely different from what it has claimed in its introductory portion.

7. While recommending creation of awareness program about the economic, social and cultural benefits of IP among industry, R&D entities, small businesses, farmers/plant variety users, traditional knowledge holders, designers and artisans and stimulation of IP and strengthening of IP protection by reconstructing laws, strengthening of IP administration and enforcement, not a word is said about balancing of IP rights with social interests other [than] some laudatory statements. Nothing is mentioned about health, food security, environment etc., in the context of innovation and IP protection in the policy. In other words, of the dual purposes of IP – research incentive and access facilitation – the policy focused on only one, viz., its role as an incentive, that too without much proof of the veracity of that argument.
8. The draft IPR Policy gives a strong message of supporting the Government’s initiative of "Make in India" assuring the industries, substantially large foreign corporations, interested in investing in India that their IP will be well protected and promoted in India through a stable, transparent, efficient and cost effective IP System. The policy never addresses the question if strong IP in itself is sufficient enough to attract FDI. The message is to strengthen IP system in India so that India is a good market for foreign IP holders to exploit their IP and get maximum benefit out of it.
9. Though the draft policy makes it clear that IP is a private property, and states that the primary obligation of protecting IP rights is on the IP owners, the measures suggested in the draft policy envisage large government funding for protecting and promoting foreign IP in India. This is evident from the major objectives mentioned in the policy such as IP awareness, strengthening of existing IP, administrative setup and enforcement mechanism. The detailed measures suggested in the document, quite strangely in a policy document, are clear indications to this. Moreover, the reference to the state legislations in the context of copyright protection shows how the balance in the policy is tilted in favour of IP holders against the society.
10. The Draft IP Policy is built upon the following assumptions which require serious consideration.
 - a. A strong IP legal framework will definitely promote creativity/innovation in India and will ensure the socio-cultural developments of India.

It is quite unfortunate that the draft policy did not bother to make any attempt at all to adduce any evidence to establish this, especially since this is a highly controversial

statement. It did not consider it worth to examine the industrial and technological requirements of India while making such a sweeping statement.

b. India possess a sound creativity/innovation environment and it is the failure to monetize the results of creativity/innovation through IP that is the major challenge

The policy stated thus:

“India has one of the largest pools of scientific and technological talent in the world. In several sectors they have created considerable technological output without commensurate IP generation. This talent pool is spread over R&D institutions, large, medium and small enterprises, universities and technical institutes. It is necessary to come up with targeted programs to encourage them to generate IPRs and utilize them in developing new technologies, products and solutions particularly in areas of national priority”.

(b.1) It is well established that there is no empirical evidence to show that a strong IP framework will foster creativity/innovation. Even in advanced economies like US and EU there are serious concerns expressed on promoting creativity/innovation in a disproportionately strong IP environment. The failure of strong IP system in promoting creativity/innovation in developed countries led to the movements like “open source”, “creative commons” “open source innovation in drug” etc. Hence any measures suggested on the premise that a strong IP system will promote creativity/innovation are questionable.

(b.2) Draft Policy made no efforts to examine the status of creativity/innovation in India. The Knowledge Commission in their study has made efforts in this direction and concluded that India lacks many elements to promote innovation. It is well accepted that innovation based IP is centered around modern science and technology. It is important to recognize the role and relevance of informal creativity/innovation in India to cater to the needs of large population of India who never get a chance to become beneficiaries of modern creativity/innovations.

(b.3) The Draft policy makes no serious efforts to find out the actual need of IP in promoting creativity/innovations in both formal and informal sectors. The lip service paid to the importance of traditional knowledge and need for *sui generis* law for its protection without any details are clear indications. While the draft is more vocal on the details of promotion of modern IP, its comparative silence on the issue of traditional knowledge and the informal creativity/innovations based on it is significant. There is no evidence to show that the modern utility model

and trade secret laws are useful to promote informal innovations. The studies indicate that it will not be useful for traditional communities in promoting their innovations.

- c. India has a “robust, effective and balanced” IP legislative framework to cater to her developmental goals

The policy states thus:

“India’s statutory framework is robust, effective and balanced. It is in consonance with national development priorities while being in conformity with international treaties, conventions and agreements to which India is a party. India’s laws are notable for their far-sightedness and have also anticipated international developments.....The present status of IP systems in India is quite positive. IP consciousness is on the increase amongst the creators and innovators leading to the development of a strong IP culture. India shall continue to strike the right balance between protection of innovation and the larger goal of betterment of society”.

The draft policy asserts that the existing IP laws in India are “robust, effective and balanced”. There is no study available in India to establish this and its relation to the socio-cultural and economic development of India. IP laws in India are more than a century old and are revised substantially after TRIPS Agreement. The limited studies show that absence of patent protection had a significant role in promoting industrial development in Pharma sector and there are no evidences to show that there was innovation or industrial growth in other sectors where patent protection was afforded. The Green Revolution took place in India without any IP protection for the breeders of new varieties of seeds. There is also no evidence to show that Indian industries used the existing IP laws to promote innovation or industrial growth. The limited number of IP made use of by the Indian industries and the very limited litigations are indicative of this. The draft policy admits that the benefits of the new changes in the IP laws in India are being enjoyed by foreign IP holders. This makes it clear that the lack of innovation in India has no significance to IP laws, whether “robust, effective and balanced” or not.

- 11. The Draft Policy is also silent on whether the modern creativity/innovations are going to promote the socio cultural development of the major population of India. Though the draft policy talks about “balanced IP”, there are no attempts to find out the details of the balance required. There is also no attempt to identify the public interest in the IP system that has a strong bearing for the day to day life of the large masses of India. There is also no effort to show how the existing laws have balanced these interests. While the statutory policy of some of the IP laws in India has made attempts to balance

these interests to some extent, the draft policy, which has to implement the statutory policy, is silent in this regard. This silence may even be interpreted as an attempt to carve out an approach contradictory to the existing statutory policy.

12. It is an accepted fact that access to health products, educational materials, information materials, software products, cultural goods produced by the entertainment industry, food security etc., are serious issues in India given the fact that substantial majority of Indian population could not afford these. It is also an accepted fact that the players in the market are not going to find solutions to the needs of the average Indians and there is a need to have strong policy interventions and effective measures from the government to address these issues. WIPO, WHO and WTO have recognized the importance of universal access to public health in IP discussions and have entered into a tripartite agreement to address these issues. Still the draft policy failed to address these important issues. It also chose to ignore the available studies in these areas suggesting appropriate policy options. Assuming that balanced IP promotes public interest, the draft IP policy should have identified the larger public interest of Indian population and suggested concrete measures to integrate this in the IP laws. Though there is a mention about the use of flexibilities in international laws/obligations to promote Indian interests, no serious efforts have been made to identify the same and give proper policy directions for its effective use.

13. In the above context the draft policy needs to be restructured seriously addressing the following aspects/issues:

The role and function of IP to promote creativity/innovation in India

a. What is the current status of creativity/innovation in India?

(i) Formal creativity/innovation using modern science and technology and

(ii) Informal creativity/innovation based on the rich traditional knowledge and culture of India

(iii) What is the current status of Indian creativity/innovation in the global creativity/innovation context?

(iv) Whether the formal creativity/innovations that take place in India address the actual needs of the major sections of India?

(v) Whether “Make in India”, “Digital India”, Skill India” and “Smart Cities” solutions to make Indian creativity/innovation globally competitive is capable of addressing the actual needs of the major sections of India bringing overall socio-economic development?

- b. What is the contribution of existing IP law in promoting creativity/innovation in India?
 - (i) Existing IP laws and its role in promoting creativity/innovation in the formal sector
 - (ii) Existing IP laws and informal creativity/innovation
 - (iii) Who are the major beneficiaries of various IP laws in India?
 - (iv) Whether the existing IP laws in India facilitate affordable access of IP protected products to substantial sections of society?
 - (v) What will be the impact of further strengthening IP laws on the social, economic, industrial and technological development of the nation?
 - (vi) Has stronger IP protection, wherever it has been introduced in response to the TRIPS obligations, had any serious implications so far in relation to FDI and transfer of technology?
- c. What are the gaps in the existing IP laws and the legal system in addressing the developmental needs of the nation?
 - (i) What policy measures are required to promote creativity/innovation in formal and informal sectors using IP so as to ensure access to IP protected products to substantial sections of the Indian society?
 - (ii) What changes in the IP system are required in achieving this?
 - (iii) What alternative models of creativity/innovations need to be promoted in India (like that of OSDD/Open Source) taking into account the special needs of Indian masses?

14. The above examination requires serious research and collection of data and studies. In the last 15 years Government of India has taken many measures to use IP to promote creativity/innovation. Almost all the measures are suggested again in the draft policy without bothering to note that it is repetition. A realistic assessment of the results of programmes initiated is highly warranted to ensure that the measures suggested in the draft policy is going to be meaningful.

15. Any attempt to draft an IP policy for India in a hurried manner without making proper studies on the impact of existing IP laws on the basic needs of the large sections of the Indian population will only help to give a wrong impression on India's ability to carve out a balanced IP policy. The current draft contains many sentences which are unsubstantiated by scholarly research. As per the Annual Report of the Indian Patent Officer for the year 2012-13, of the 43674 patents application filed in India, only 9911 (22.69%) is from Indian inventors. Similarly when India received 28435 PCT applications

from abroad there were only 1042 PCT applications from Indian inventors to other countries. The approach adopted in the policy may only help the foreign domination of IP holders in India, making economic benefits to themselves using the Indian economy as a market. It is disturbing to conclude that the policy suggestions hardly promote socio cultural economic development of large masses of India, which is stated as the aim of the policy. Moreover, it will be set back to many other developing countries that look upon India for effective use of the flexibilities in international treaties for promoting development of the nation.
