

National Intellectual Property Rights Policy

Comments by CUTS International

On December 19, 2014, the Draft National IPR Policy was released by the Department of Industrial Policy & Promotion (DIPP), Government of India. This is a welcome step towards a meaningful statement of their intent and long-term vision in the field of Intellectual Property Rights (IPRs). It has also done well to request stakeholders to offer their comments thereon.

The IPR Policy at a Glance

The draft IPR Policy is a comprehensive document covering, in its sweep, all the facets of the subject. This Policy is meant to carry forward and implement its Vision of *'encouraging creativity and innovation in intellectual property (IP) led growth for the benefit of all'*. To achieve this Vision, the Mission of the Policy is to *'establish a dynamic, vibrant and balanced IP system in India to foster innovation and creativity in a knowledge economy; accelerate economic growth, employment, entrepreneurship; enhance socio-cultural development; and protect public health, food security and environment, among other areas of socio-economic importance.*

To achieve this Mission, the Policy sets out certain objectives which are:

- IP Awareness and Promotion;
- Creation of IP;
- Legal and Legislative Framework;
- Administration and Management;
- Commercialisation of IP;
- Enforcement and Adjudication; and
- Human Capital Development.

After broadly stating the vision for India's IP policy, the draft provides for several objectives, divided in seven categories (Awareness and Promotion, Creation of IP, Legal and legislative framework, IP Administration and Management, Commercialisation, Enforcement and Adjudication, and Human Capital Development). It then goes on to discuss integration of IP with government initiatives, and methods of coordination, implementation, monitoring and evaluation. While it is a 30-page draft and covers several worthwhile issues following are a few notable highlights:

Highlights

- Envisages long-term vision to encourage creativity and innovation in IP-led growth for the benefit of all, on the one hand, and seeks to be practical by capturing an appropriate balance between enforcement and knowledge availability for creation and innovation, on the other
- Provides for policy coordination and integration with other major initiatives of the Government of India, such as *'Make in India'* and *'Digital India'* campaign

- Provides for the establishment of a high-level body in the government to coordinate, guide and oversee implementation and future development of IP in India in accordance with the National Intellectual Property Policy
- The draft Policy contains new initiatives. Following are some of the major initiatives:
 - Formation of a IP Promotion and Development Council (IPPDC) to provide one window services to entrepreneurs
 - Formation of a Technology Acquisition and Development Fund (TADC) for licencing or procuring patented technologies
 - One-time Patent Fee waiver for micro, small and medium enterprises (MSMEs)
 - Industry-Academia interface for promotion of research and innovation
 - Commercialisation of IP regime through '*Mind to Market*' concept
 - Formation of a high-level body in the government to coordinate, guide and oversee implementation of the IP Policy
 - Recommending designation of a specialised Patent Bench in the High Courts of Metros, and promotion of Alternate Dispute Resolution (ADR) mechanism for speedy resolution of IP matters
 - Establishment of a national-level Institute of Excellence to provide thought leadership on IP
 - Development of petty patents or '*utility models*'
 - Development of a *sui generis* system of protection of traditional knowledge
- Emphasises on creating a developing country model on IPRs and makes clear that India's IP policy will focus on IPR as '*a tool*' for innovation specific to India, not an end in itself and therefore need to customise standards required for its stakeholders rather than following standards set by countries whose IPR regime may exist in a different context.
- While the efforts to have Utility models have been on for some time. The draft IP policy actually calls for a new law on utility models for 'petty patents' so as to provide short periods of exclusivity (such as 5-8 years) for innovations which do not otherwise qualify so far as the patentability criteria but are still valuable innovations, especially for MSMEs. Thus, many '*jugaad*' innovations could be protected with these utility model patents.
- The draft policy plans to create specialised patent benches in the High Courts of Bombay, Calcutta, Delhi and Madras. It further seeks to establish regional benches of the Intellectual Property Appellate Board (IPAB) in the five regions where IPOs are located. It is noteworthy that the policy directly or indirectly speaks to two earlier petitions by suggesting increasing the IPAB's autonomy in selection/appointment of technical and judicial members and asking for urgent steps to make the Copyright Board function effectively and efficiently.

Lowlights

The Policy statement is full of good intentions and covers all imaginable aspects of the topic, and if all the suggestions are indeed implemented, India will definitely become an IP powerhouse. Nonetheless, the Policy is attempting at dealing too many aspects and does not focus on some of the key areas which are necessary and sufficient to develop a healthy and equitable IP culture in India. In other words, there is much gap between the intentions and their implementation. Following are some of the major shortcomings:

1. *Ambiguity in Institutional Framework and its Scope*

- Although the policy proposes IPPDC units in all states, smart cities, innovation and industrial clusters so as to provide single window services to start ups, entrepreneurs and manufacturing units, it does not lay out a roadmap with benchmarks and a time limit to achieve this structural and functional network.
 - Secondly, ambiguity persists as to whether the proposed IP Promotion and Development Units so established will be administered by the Government of India or the Government of States, and if they are part of a department of the Government of India, what will be their jurisdiction and scope of work and how will they be different from IP cells that are running under State administrations. How will the effort of the Government of India gel with the Industrial clusters, Smart Cities etc. that are being put up by the States under their own Industry and Urban Development policies?
 - It has been mentioned in the preamble that different IPRs are being governed by different Ministries of the Government of India, and though it is necessary to establish or designate a high level body in the government to coordinate the implementation of the Policy, the actual implementation will be done by the respective Ministries of the Government. This means that the Ministry of Industry will keep on dealing with Patents, Trademarks etc., and Department of Information Technology with Semi-conductor and related products/issues while the Ministry of HRD will keep on dealing with Copyright issues. How will this set up deal with a situation where one IP Office authorises or grants several category of rights like copyright, trademark, semi-conductor designs etc. all in one go as proposed in the policy?
2. In addition to the high-level coordinating body, the Policy envisages creation of an Institute of Excellence, an IPPDC and its branches in each State and even Industrial cluster, a Technology Acquisition and Development Council (TADC) and a 'Multi-Agency Task Force' for enforcement of IP regime. It is well know that the government culture is to work in silos and is thus not clear how these bodies will develop coherence and synergies, and whether they would act independently or will be under one roof.
 3. In view of above, it appears that the policy although aims at integration of work carried out by various Ministries and Department, falls short of a clearly demarcated scope and role of these institutions giving an impression that their role has not been fully thought out.

It is, as stated earlier, also not clear where will the high level body fit in to the scheme of things and under which Ministry or dispensation will it work? There have been a lot of projects that have floundered on account of lack of coordination between departments in the past and the policy does not seek coherence and efficiency in this area either.

Specific Issues and Suggestions

It is important that for any omnibus scheme to deliver and in good time, it is important to break it in to short-term and long-term goals. Tending to all things simultaneously may not work. Hence, it is strongly suggested that the Policy needs to be broken up into goals that can be achieved within the next, say, 2-3 years, and those that will need more time, in order that the financial resources and manpower are optimally channeled and utilised.

Encouraging Innovation and related initiatives: The core of the draft policy is innovation and creation leading to accelerated economic growth, employment and entrepreneurship. The policy lays down the following major steps that need to be undertaken in this context:

- Create public awareness for the IP regime through publicity and public campaigns;
- Carry out a comprehensive IP audit or survey to evaluate strengths and weaknesses, and determine priorities;
- Create an industry-academia interface for encouraging research and ideas;
- Stimulate large corporations to create, protect and utilise IP in India;
- Stimulate IP output of national research laboratories, universities, technology institutions and other researchers by encouraging and facilitating the protection of intellectual property created by them,
- By commercialisation of the IP rights.

These are excellent ideas and need to be nurtured. It is widely known that domestic industry in India is still evolving in terms of research & development (R&D) of its own, consequently relying heavily on importing either technology or readymade goods in knock-down conditions, to be only assembled in the country. It is, therefore, required that the domestic R&D needs to be encouraged to innovate and create and should not be confined to in-house R&D of large multinational corporations.

National research laboratories and universities need to go in for more applied research and one way of encouraging it is to have an active industry-academia interface. It is to be remembered that a lot of inventions have come out of universities through applied research. To ensure that the academia collaborates actively in innovation and invention, it is important that a proper incentive mechanism be created including financial compensation for their efforts by the industry through financed projects/consultancies. The researchers and their organisations, be it national research laboratories or universities, can split the gains to make it a 'win-win' situation. This model of industry-academia cooperation needs to be considered by the government think tank as the way forward.

Going a step further there is a dire need to encourage individuals and MSMEs to also conduct research in order to invent and innovate. The draft policy mentions a one-time waiver of 'patent fee' and introduction of support systems for MSMEs and reduces their transaction costs in other ways. It also mentions help in commercialisation of the inventions of MSMEs and individual inventors/innovators. That is a good beginning and it needs to be further built up. However, it is crucial that MSMEs and individual inventors and innovators are able to access financial support on easy terms and this need to be ensured. Unfortunately, the Technology Acquisition and Development Fund (TADF) has been tasked to only buy/acquire patents. The role of TADF instead could be enlarged to provide easy loans/grants to MSMEs and individual innovators/inventors so that accessing capital is not a hindrance to their efforts.

The role that TADF could play in creating a vibrant and innovative industry, especially the MSMEs, thus becomes crucial as far as the IP Policy is concerned. It is supposed to be used to acquire patents and create a patent pool. However, the policy does not indicate what is to be done with the pool? Will the government commercially exploit the patents or will they pass on the patents to government-run research laboratories? This is vital in terms that governance of patents pool so acquired will indicate the degree of involvement of government in business. Ideally, the government needs to be only a facilitator between the inventor/innovator and the end users.

Further, it is important that the TADF role is not restricted to the Manufacturing Policy but needs to be expanded to include all categories of IP and to the relevant sectors of the economy, especially related to agriculture given that the sector may not be financially strong and need capital on easy terms for a variety of reasons.

However, the policy does not dwell in sectors and so there is no mention of pharmaceutical sector as well which is one of the key sectors that is affected by IPR Policy. This absence appears to be a purposeful in terms that the government is taking an explicit position that IPR policy is more than just about pharmaceuticals. It is noteworthy that the draft notes with appreciation, India's judicial system – the judicial system which big pharmaceutical companies have consistently been complaining about. The draft says, '*Judgments of Indian courts relating to IP disputes have clearly expressed the intent and purpose of our laws.*'

Given the above, it is high time that India's IPR Policy is formulated taking into account country's needs and expertise, potential or otherwise. This would mean increasing focus on several other areas such as Copyright, Traditional Knowledge, Biodiversity, among others, where India's local creators are more active and stand to gain with effective protection in the international arena.

In this context, the draft IP policy is seriously flawed. The policy appears to be industry-centric (large corporations mainly) and patent-centric. The policy does not dwell into IP rights *per se* however, it places less attention to some of the major areas of IPRs that could be beneficial for India, for instance, linkages between Geographical Indications (GIs) and Traditional Knowledge (TK) and the Agriculture Sector in India.

The sector is typically weak economically and politically and also do not have as strong advocacy bodies as the industry which has industry associations to argue their case. IPs like GIs and TK are not in the ownership or control of one individual, or one body, or one organisation. TK especially requires 'defensive protection' to ensure that third parties do not gain illegitimate or unfounded IPRs over them.

Further, it must be remembered that though a large population is involved in the agriculture sector in India, its growth has normally lagged behind industrial growth, and that of the agriculture sector in other countries. Productivity has plateaued in this sector and need for another Green Revolution is argued by experts to push up productivity and diversity.

There has to be, therefore, a robust plan to get the disparate interested groups in the sector of Agriculture, GIs and TK together through guidance, advice and counseling, and help them become economically viable and sustainable. The TADF mandate needs to be further expanded to include reaching out to these types of interested individuals/groups for help or guidance in regards to procedures and creating substantive culture of IP. The draft Policy rightly highlights concerns regarding the general lack of awareness on IP, particularly among MSMEs and the informal sectors and therefore there should be an outreach programme for them.

As far as TK is concerned, it is suggested that the draft policy should consider the model developed and followed in the case of *arogyapaacha* used by the Kani tribals in their traditional medicine. It is one of the pioneering examples of knowledge and benefit sharing on TK. This sort of symbiotic relationship between vulnerable indigenous people and the government initiatives needs to be developed, especially in TK and GIs.

As the draft Policy is not sector-specific, it does not dwell on sector-wise concerns. It would have been good to target some of the key potential areas which could be focussed on by the IP policy. For instance, in the area of Semi-Conductor-IC design technology, could receive enhanced attention and needs to be nurtured by the IP Policy. However, it would call for an approach which is customised for the domestic market. Further, data security and confidentiality is an issue that needs immediate attention. These two elements need to go hand in hand with the development of Semi-conductor design technology as one cannot work without the other. Hence, the IP Policy needs to include it as one of the areas that is developed as part of the Policy. Another, potential area of focus could be along with innovative industry, the IP policy needs to address concerns of creative sectors, such as publishing, film and broadcasting.

While different sectors have different positions but absence of IP courses in various law/engineering/MBA courses etc. and absence of IP certifications directed towards specific industry are major areas where the IP Policy could foster the culture of IP. For example, current IP certifications provide very little value for Indian IT industry as these certifications are generic in nature.

The Policy, as stated above, wants to energise, protect and nurture innovations and inventions, of Indian companies. It also wants to encourage foreign companies with patented technologies to set up their units in India, bringing with them their established technologies, or transferring them to Indian companies.

In addition thereto, it wants Indian companies to export their patented technologies to foreign lands. It is felt that sometimes, encouraging foreign technologies to come to India and set up an establishment may work at cross-purposes with encouraging domestic technologies to develop in the same area. Therefore, the IP Policy needs to clearly carve out a mechanism in case of conflict of interests and the priorities thereof so that a level playing field is provided to both domestic and foreign companies.

IP Interface with Competition Law & Policy: One of the policy objectives suggest undertaking study and research on various important areas, such as IP interface with Competition Law and Policy, interplay between IP and other laws, among others. Enough literature is available on the interplay between IP laws and Competition Law and Policy, but the current IPR policy do not seem to recognise it and encourages further research.

It is well known that balancing of competition with innovation is a daunting task given the apparent tension between the tenets of IP law and Competition policy. While IP law usually aims at providing protection to creators and innovators of intellectual work, by conferring exclusivity upon them; competition policy strikes at the 'exclusivity' which impedes free and fair trade. The developed countries have evolved policies in both IP and competition however, Indian law and policy is still evolving in this regard.

For instance, experts argue compulsory licensing is a potent tool to counteract harmful effects of IPRs on competition, such as abuse of dominance and other anticompetitive practices which is permissible under Trade Related Aspects of Intellectual Property Rights (TRIPs) agreement subject to certain condition. Many countries, especially the developed, have been using compulsory licencing to encourage research and innovation. The applicability of such provisions in India although not precluded under the Indian Patent Act, has been so far used only in case of public interest on grounds of providing reasonable affordable and accessible medicines to public and not focussed on using it for research and innovation purposes in other IPs, besides patent.

Furthermore, many times in developing countries including India, competitive processes are affected by non-accessibility of certain facilities without which an enterprise cannot compete. The doctrine of essential facilities: Fair, Reasonable and Non Discriminatory (FRAND) access, in such cases need to be emphasised and the IP Policy is an instrument that could lay down this more effectively. Recognising the essential facilities doctrine in no uncertain terms will go long way in creating a vibrant IP and competition culture in the country especially in sectors, such as communication, gas pipelines, among others, as both be possibly regarded as essential facilities. In that case, third party access must be allowed, provided it is technically feasible. In this context, India can evolve its own principles with regard to application of essential facilities doctrine without dampening the growth of innovation and enterprise.

In nutshell, the IP Policy needs to clearly lay down that competition and IPRs complement each other in encouraging innovation, efficiency and consumer welfare. Taking such an approach will go long way in emphasising 'competition on merits' and would augur well for dynamic efficiency.

In regards to the India's international obligation, the policy underlines that India will actively engage in the negotiations of international treaties and agreements in consultation with stakeholders and become signatory to those treaties which India has *de facto* implemented it to enable itself to participate in the decision making processes. This seems to indicate India's willingness to prepare domestically for higher standards of IP protection in near future. However, in the process of doing so, the Government of India should engage all stakeholders, such as businesses, civil society organisations and other relevant stakeholders. While stakeholders are being engaged already nevertheless, a continuous demonstration of this process will build confidence in the IP regime of the country.

Conclusion

The draft IP Policy is definitely a positive step towards setting up a vibrant IP regime, encourage innovation and inventiveness, leading to creation of jobs, industrial growth and economic prosperity for the country. But it is, on the whole, like the curate's egg, good and not so good in parts. For any policy to work, it needs to pass the test of clarity, transparency, predictability and stability. The draft Policy states that it will be reviewed fully after three years. This is too short a time to evaluate a policy that is supposed to guide the IP regime for some time. In three years, it will neither be clear, nor stable, nor predictable, which is absolutely necessary. It is too short a time for stakeholders to get used to it. Therefore, it is strongly suggested that while the Policy should provide clear directions on vital areas of IP for next 10 years or so, regular review of the Policy should be undertaken regularly on a rolling basis, every year.

To conclude, IPR is a domain that has seen significant and positive movements in India. The considerations laid out above should enable the think tank to further advance national interests, relating to both the innovation environment and the spread of benefits of technology through robust IP regime in India.