

Managing Intellectual Property

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THE WAY FORWARD FOR INDIA'S IP SYSTEM

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Will India's National IPR Policy help to unleash the country's innovation potential? Pankaj Soni examines the policy and what more needs to be done

Did India put the cart before the horse in establishing its TRIPS compliant intellectual property rights regime without first creating a policy which would govern IP in India? Ideally, the numerous changes in law should have been accompanied by a well-defined IP policy; however, this did not receive priority.

Going by recent discussions and debates on the Indian IP climate, particularly those surrounding the [public health/pharmaceuticals minefield](#), the absence of such a policy has become rather glaring.

Every allegation which speaks of either pandering to western capitalism or being hostile to innovator companies (ie overly protective of the generics industry) adds fuel to a fire that was burning in the underbelly long before Western and Indian media made India's IP regime an issue of discussion, and dare I say, bickering. Unfortunately, responses and reactions varied by the individual because there was no single policy that could be relied upon in explaining India's position on IP.

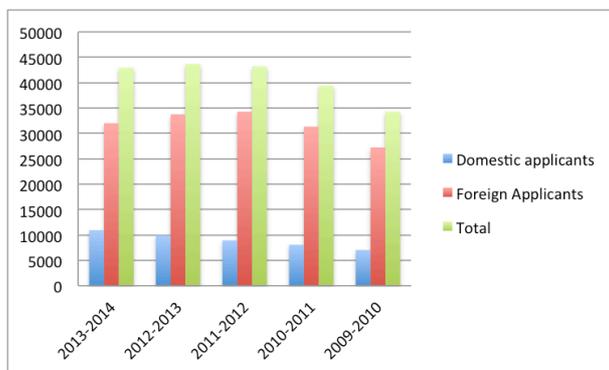
But, that is about to change. In recent months, a [draft National IPR Policy](#) proposed by a six-member IP Think Tank constituted by the government provides hope that India can now project its IP regime in a framework that is unified, defined and documented. Of course, time will tell whether the substance of the policy meets the standard expected of it.

But in the meantime, as Lao Tzu said several centuries ago, "the journey of a thousand miles begins with one step", and India has taken this step.

Understanding the draft Policy

Last December, two months after it was formed, the Think Tank submitted a first draft of the National IPR Policy and, shortly thereafter, the government sought feedback from stakeholders. Few can complain that the Draft Policy is not comprehensive. If at all, it goes a step beyond what was expected. An elaboration of the Vision, Mission and Objectives sections would have been sufficient to lay down the framework of India's IPR Policy, but the draft Policy went further and identified the "set of strategies or measures" or steps to be taken in pursuit of each of the seven objectives.

Towards its mission of establishing a 'dynamic, vibrant and balanced intellectual property system' in India, the Draft Policy begins with an analysis of the existing IP framework. Stating it to be



India patent applications. Source: India Controller General of Patents, Designs and Trademarks

If there is no mention of how India wants to handle data exclusivity or compulsory licensing, does that mean these will be added in future

progressive and robust, the Think Tank declares it as one in which India's national development priorities are well harmonised with her international treaty obligations. Also identified is a strong judiciary attempting to balance the rights of IP owners with the public's rights.

However, IP awareness is recognised as sub-optimal and the draft Policy's first objective is directed towards raising awareness levels through a variety of outreach campaigns involving the electronic and print media, social network platforms, eminent personalities as ambassadors and others.

Next in focus is the strengthening of the innovation ecosystem. Some of the significant proposals include: an IP audit to assess the strength and potential of different economic sectors, introduction of IP creation as a key performance metric for R&D institutes, and filing fee waivers and tax incentives particularly for micro, small and medium enterprises (such concerns account for nearly half of India's manufacturing output).

Another listed objective seeks to close gaps in IP protection by recommending legislation on utility models and trade secrets. The policy also calls for a review and update of all IP rules, procedures and practice guidelines for greater transparency. A parallel suggestion outlines the need to study the interplay of IP statutes with other legislations, such as competition law, and remove ambiguities and inconsistencies, if any.

These are some of the major objectives laid out in the policy.

Identifying problems

The policy paper highlights an interesting statistic. Though patent filings have risen more than 10% over the last 5 years, Indian filers - at 25% - still account for a small share of the pie. This is more a comment on poor commercialisation of IP in India than lack of creativity. The draft Policy addresses this by seeking to facilitate partnerships between stakeholders such as through an 'IP Promotion and Development Council' which would connect innovators, academia, industry and funding agencies via an IP exchange.

Objective 6 seeks to tackle the problem of protracted adjudication- an ugly blemish on India's innovation climate. The draft Policy recommends patent benches in the High Courts of Bombay, Calcutta, Delhi and Madras and if need be, designation of a special IP court at the district level. Furthermore, it recommends permanent benches of the Intellectual Property Appellate Board. At the moment, one bench rotates between different locations.

A nation-wide database of known IP offenders seeks to further improve enforcement. Human capital development, a very important aspect of any IP regime, finds its way as a separate objective. Under here IP courses are sought to be introduced in public institutes such as judicial, police, Customs, administrative and foreign services training institutes. IP teaching is also suggested for schools and colleges. This is a welcome thought for a country that has no dearth of talent and expertise, but lags behind in making sure that the talent blossoms.

What is also interesting is that the government's "Make in India" and "Digital India" initiatives are identified as programmes that should be integrated with the national policy. So on its face, the Draft Policy has made a good effort in laying the groundwork for the opportunities that lie ahead in India's IPR regime. But, as with anything in IP, especially in India, challenges remain.

Challenges for policymakers

It is a worthwhile exercise to mention some of the bigger challenges that lie ahead because every challenge that is well managed leads to an opportunity to make India's IP regime better.

A fundamental lacuna in the Draft Policy is the lack of priority and timelines. Surely, each objective is not of equal importance and moreover cannot be achieved in the same timeframe as the others. Since the policy is being created after having the legislative framework in place, it is necessary to (i) identify the existing gap *vis-à-vis* each objective; (ii) document which will be taken up first; and (iii) specify the timeframe within which goals are likely to be achieved. Without these benchmarks, how are we going to evaluate the success of the policy?

Another issue with draft Policy is that it is perhaps too detailed. First, it is easy to miss the Vision and Mission sections and jump straight to the Objectives, thereby getting lost in the details at the cost of missing the policy that is being laid down. Many stakeholders have responded to the Draft Policy by giving opinions and suggestions on how to achieve a particular objective, with very few if any actually discussing the shortcomings of the Vision or Mission sections.

At the same time, although steps to achieve the objectives have been identified, they are couched in very broad terms and for a document that is otherwise so elaborate, the lack of accompanying details leave us with several questions: Are the missing steps or issues not deemed necessary? For example, if there is no mention of how India wants to handle data exclusivity or compulsory licensing, does that mean these will be added in future iterations of the National IPR Policy, or are they off-the-table from a policy perspective? Some general inferences on these subjects may perhaps be drawn from the overall policy document but this runs contrary to its *raison d'être*.



Pankaj Soni

Further, the Mission section itself raises a unique challenge. Having identified that "protect[ion] of public health" is a key mission, the draft Policy ensures that the affordable medicine/public health/pharmaceuticals discussion remains a hot topic. Thus, the burden remains on policymakers to firstly, define with specificity the relationship between protection of public health and IP and, secondly, appreciate and elaborate on the difference between public health as applicable to IPR and universal healthcare as a health policy of the government. Further, as is the conundrum with any growing economy, the implementation of the *Mission* must strike the right balance between protecting public health and incentivising innovation.

Opportunities abound

Despite the challenges which remain and the disagreements which are bound to occur, there is little dispute that India has taken the necessary first step towards a better understood IP regime. But, what has started with a (belated) bang must not end with a whimper! It is imperative for the Think Tank to accelerate this initiative with the right conviction and not let it languish in the corners of the bureaucracy and government. With this policy initiative, India has the opportunity to put IP in the right context domestically and internationally, and to let it be an example of how India understands and appreciates IP within the socio-economic limitations inherent in the country's diversity. Putting the best foot forward should be the only option on the table.

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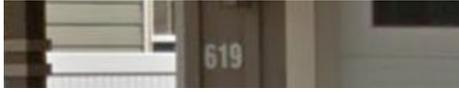
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