

India

National IP policy talks the talk, but will it ever see the light of day?

A first draft of India's new national IP rights policy goes a long way towards addressing rights holders' concerns, with many sensible suggestions. However, it is worryingly vague about the details of implementation

A think tank formed by the Department of Industrial Policy and Promotion has published the first draft of a national IP rights policy. The document runs to 29 pages and touches on a number of issues that need to be addressed in order to create, promote, commercialise and enforce intellectual property in India. It also makes bold suggestions for cooperation between different government agencies and ministries of government in order to achieve these objectives. However, while the recommendations set out in the draft policy document appear laudable and address genuine concerns, their implementation would require political will at the highest level, not to mention considerable resources.

From the point of view of rights holders, the policy document sets out several micro and macro suggestions that are linked to its seven broad objectives. This article examines some of these under the seven objectives and examines how what effect they are likely to have on trademark practice and intellectual property in India. It also identifies the challenges in implementing the objectives.

IP awareness and promotion

The draft policy document mentions that many "IP holders are unaware of the benefits of IP rights or of their own capabilities to create IP assets". At the same time, "they may be unaware of the value of others' IPR and the need to respect the same". Given this, its suggestions on educating consumers about the benefits of IP rights and fostering a culture of creativity and innovation constitute a proactive approach to the protection and enforcement of intellectual property. It is commonly held that the copying of brands and trade dress by small and medium-sized enterprises is often a result of ignorance or an environment that does not promote respect for the brands of others. Thus, raising the profile of IP rights would help to control, if not completely eliminate, infringement issues faced by rights holders – in particular, the use of well-known brands in respect of similar or different goods and services.

Creation of intellectual property

The draft policy document suggests "providing statutory incentives, like tax benefits linked to IP creation, for the entire value chain from IP creation to commercialization". Again, this appears to be a bold suggestion aimed at linking intellectual property to a direct monetary incentive. However, it is unclear how this would be implemented – it would likely be challenging and require cooperation across several different ministries.

Legal and legislative framework

The suggestion to "review and update IP related rules, procedures, practices and guidelines for clarity, simplification, streamlining, transparency and time bound processes in administration and enforcement of IP rights" is an important one. One of the main reasons for the current backlog of cases before the courts and the trademark offices is the over-emphasis on procedure. A project to streamline these procedural aspects (eg, a white paper on particularly contentious areas or guidelines that could be applied by all five trademark offices in order to ensure consistency in decision making) would be extremely helpful in reducing this backlog and ensuring that similar bottlenecks do not recur. The policy document also needs to address the online issues and IP infringement over the Internet which does not seem to be clear.

IP administration and management,

The draft policy document recognises that: "IPOs now have the twin challenge of making their operations more efficient, streamlined and cost effective while administering national laws and global protection systems with expanding work load and technological complexity on one hand, and enhancing their user-friendliness by developing and providing value added services to the user community on the other." This is an important observation which emphasises how important it is for IP offices to put service at the heart of their operations – an approach that is somewhat lacking right now. While digitisation has resulted in greater transparency, office operations are still caught up in bureaucratic delays and there is a lack of effective mechanisms to resolve mundane procedural issues.

The recommendations to augment manpower and review recruitment, training and retention processes are both laudable, although not new; as is the suggestion that IP offices could be made autonomous bodies, allowing them to manage their own personal and financial issues. However, there is a worrying lack of detail about how these suggestions should be implemented. The

suggestions of timeframes for the grant of legislation registrations, the creation of a service-oriented culture and the adoption of best practices with respect to filing and docketing documents are all good. However, yet again, the issue is implementation. Several projects designed to clear backlogs at the Trademark Office have had a limited impact, given most of the offices are understaffed, with the approach proving unstructured and other functions coming to a standstill. Such drives also place a heavy burden on rights holders, which must often provide documents again and appear personally before the office to conclude their cases. Crucially, it remains to be seen whether the various ministries and agencies that are currently responsible for IP offices in India are willing to grant them the autonomy.

Commercialising intellectual property

The comments under this objective seem to be aimed at public-private partnerships and generally encourage the commercialisation of intellectual property. The policy suggests: “promoting licensing and technology transfer for IP; devising suitable contractual and licensing guidelines to enable commercialization.” One reason for the failure of government-funded institutions to realise the full potential of their intellectual property – including trademarks – is the licensing terms they impose, which are not commercially attractive for licensees. Setting up a council to promote and develop intellectual property would help to create better marketing and commercialisation opportunities.

Enforcement and adjudication

The think tank has noted that piracy and counterfeiting result in losses to rights holders and to the exchequer, besides causing harm to consumers. In order to strengthen enforcement, it suggests: “establishing a centralized ‘Multi-Agency Task Force’ for coordination between the various agencies and providing direction and guidance on strengthening enforcement measures; creating a nationwide database of known IP offenders; coordinating with and sharing of intelligence and best practices at the national and international level; studying the extent of IP violations in various sectors; examining the implications of jurisdictional difficulties among enforcement authorities; and introducing appropriate technology based solutions for curbing digital piracy.” Again, these are ambitious recommendations to implement in a federal structure where none of the enforcement agencies want to give up their authority at either the macro or the micro level.

The suggestions of augmenting the manpower, infrastructure and technological capabilities of the relevant enforcement agencies and of building capacity in order to counter the growth in cybercrime has long been recommended by industry bodies. However, IP crimes are currently seen as a low priority by enforcement agencies due to poor understanding and a lack of resources.

Establishing a patent bench at the high courts of Bombay, Calcutta, Delhi and Madras for the speedy

disposal of patent cases is a good recommendation. However, it would be better to have a bench to deal with all IP cases, including trademark cases.

Further, the suggestion of creating regional benches for the IP Appellate Board in all five regions with IP offices is much needed, as the current backlog is alarming. The existing arrangement of a roving bench which travels to different regions has not been adequate to ensure the speedy disposal of cases.



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Human capital development

The policy document notes that the IP scene in India is dynamic, and that continuous policy research is needed. To this end, it proposes various education initiatives, including the introduction of IP courses/modules in the following major training institutes, which shape the country’s IP policy and play an active role in administering the various laws:

- the judicial academies;
- the National Academy of Administration;
- the police and customs academies;
- the Indian Institute of Foreign Trade;
- the Institute for Foreign Service Training; and
- the forest training institutes.

This is a valid suggestion, the current agenda on the National Judicial academy website showing two training sessions for judges on IP laws during the July 2014 to April 2015 period.

Conclusion

The think tank seems aware that this is an ambitious document, which will present its own set of challenges with regard to implementation. Thus, it has suggested that a high-level body in the government be established or designated to coordinate, guide and oversee the implementation and future development of intellectual property in India. The document suggests monitoring the progress of implementation of the National IP Policy using a set of performance indicators, although it fails to specify what these might be.

Overall, the first draft of the national IP rights policy appears to have strong potential to reinforce the IP laws, with equal emphasis on administrative and procedural mechanisms. However, it remains to be seen how this will translate into real action. **WTR**



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