India National Intellectual Property Policy

Consultation on Indian National Intellectual Property Policy

The Indian Department of Industrial Policy and Promotion (DIPP) has constituted an IPR Think Tank to draft a National Intellectual Property Policy and to advise DIPP on IPR (intellectual property rights) issues. The Indian Government has been consulting on the National Intellectual Property Policy, and the first official draft was released by DIPP on 25 December 2014.

In its response, policy paper 2/15, the IP Federation first observed that the Think Tank notes that an objective of the Draft IPR Policy should be to "guide and enable all creators and inventors to realize their potential for generating, protecting and utilizing IP which would contribute to wealth creation, employment opportunities and business development." It also aims to "foster predictability, clarity and transparency in the entire IP regime in order to provide a secure and stable climate for stimulating inventions and creations, and augmenting research, trade, technology transfer and investment."

These are important goals not only for the Draft IPR Policy, but also because of what the National IPR Policy, appropriately implemented, can do to support growth in India.

Economic research consistently confirms that developing countries benefit tremendously from respecting IPRs. There is a strong, positive, and well-recognised correlation between foreign direct investment inflows and reliable IP regimes. It is also well established that developing countries gain from high-quality and high-quantity technology transfers associated with foreign direct investment (FDI). Further, R&D expenditures rise at an increasing rate, so that strong IPR protections stimulate effectively greater gains in developing countries than in high-income ones. We note, positively, that the Draft IPR Policy recognises the importance of collaboration with industry to achieve its goals.

The seven main objectives identified in the Draft IPR Policy encompass key elements in providing a "legal framework for strong, effective and balanced protection of IP rights and to impart predictability, transparency and efficiency in the administration and enforcement of IP laws."

If these objectives are met, the Draft IPR Policy will represent a positive and important step toward building the architecture of an IP regime in India that has the potential to support and derive the kind of economic and social benefits described above.

The Think Tank pays tribute to the legislative, institutional and judicial framework for IP in India. Certainly, there are many features of this framework that are strong and our members report favourably on the functioning of the court system for anti-counterfeiting issues, particularly the ability to obtain a preliminary injunction. However, care should be taken not to ignore concerns that exist and may serve to undermine the benefits that improving the framework can bring. These concerns include:

- While the administration of the granting process for patents and trademarks and the judicial system is often efficient, demand on resources can on occasion lead to backlogs with respect to examination and mean determination of disputes is prolonged. The focus on institutional improvements is welcome. These will require commitment of resources and expertise. We appreciate the great efforts that have been undertaken to improve the efficiency of the patent granting process. In our view, this efficiency could be further increased by the introduction of an accelerated system for selected patent

applications. In addition, consideration should be given to streamlining procedures. For example,

- the question of whether there is a need for both pre and post-grant opposition in the patent system;
- the obligation to regularly provide updates on co-pending cases, many of which are readily available to examiners today; and
- exploring work-sharing initiatives with other patent offices, such as the Patent Prosecution Highway (PPH).

- India's trade secret regime is limited to protection against disclosures by those with a close relationship, either through contract or an implied duty of confidence. In this regard, we note with appreciation the references to improving trade secret protection in the Draft IPR Policy. The ability to exchange information freely between partners and customers without risk of further disclosure can help enable deeper collaboration between and across firms, to the benefit of India and beyond. The Draft IPR Policy should further identify elements of trade secret protection that should be codified, such as the availability of both criminal and civil remedies, the ability to preserve evidence and confidentiality of legal proceedings.

- Whether aspects of the law pertaining to the pharmaceutical sector, for example, Section 3(d) Patents Act, the lack of regulatory data protection and compulsory licensing represent an optimal policy balance. In addition, notwithstanding the Think Tank's view that India's laws are fully compatible with her international obligations, we would note that this is by no means universally accepted.

- An apparent preference towards involuntary technology transfer arises throughout the document. For example, the Draft IPR Policy suggests using flexibilities to "judiciously keep IP laws updated and includes a variety of studies including on "exceptions and limitations." Similarly, it references the Technology Acquisition and Development Fund in the National Manufacturing Policy which encourages compulsory licensing. These positions send a negative signal to potential investors and discouraging comprehensive technical exchanges which can accelerate technology development for all those involved.

We commented specifically on the proposal for a new law on utility models. While such a law may be superficially attractive, the Federation has concerns about this. Utility model systems can lead to a proliferation of rights which can increase the risk of litigation, create uncertainty and ultimately inhibit innovation. This is particularly the case if utility models are to be available without examination, and the negative effects of utility models are felt most by small enterprises. We are aware that the introduction of utility models in India was the subject of a consultation in 2011. We would urge that before introducing legislation a further consultation should take place.

Indian Government consultation on draft Patent (Amendment) Rules, 2015

To support the Indian Prime Minister Modi's aims of improving ease of doing business in India, the Indian Patent Office announced on 29 October 2015 a consultation on Amendments to its Patents Act. The Amendments seek to streamline the process of patent applications and processing.

In its response, policy paper 9/15, the IP Federation made the following comments in respect of two specific Rule amendment proposals that if implemented will impose a significant burden to Applicants, whether they be national or foreign.

Rule 24B is a proposal to reduce the term for the compliance term set by the first office action from 12 months to 4 months, with possible extension for an additional 2 months on payment of a fee. We understand that this proposal is made with the intention of leading to a reduction of the current high examination backlog, and a speeding up of the examination process.

This proposal will not solve the issue of the backlog in examination nor lead to earlier grant of an application.

Examination delay and the backlog in examination is the result of delays within the Patent Office itself and not a failure to act on the part of the Applicant.

Reduction of the term to 4 months (6 months with paid extension) will put undue burden on both the agent of record and on the Applicant for no good benefit. There have been numerous Rule changes in the past that have reduced the term set by the first office action issued by the Patent Office, yet there has been NO noticeable reduction in the examination backlog as a result.

We urge that this proposed Rule change is not adopted, nor any further revision that reduces the compliance term.

Rule 24C is a proposal for expedited examination, for those applications that meet set requirements, and on payment of a fee. The proposals contained in proposed Rule 24C are not workable; further we understand that the fee set is excessive, being of the order of $4,000.

While Applicants may look for expedited examination in India, it is unlikely that many Applicants can or will fulfil the stringent requirements proposed.

Even if an Applicant can meet the requirements, the fee imposed imposes a significant financial penalty, particularly as the level of the fee is not in alignment with (or even close to) that set in other jurisdictions that require a fee for expedited examination.

David England, 15 December 2015