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Article

National IPR Policy - What is the IPR Think Tank thinking?

By **Dr. Gaurav Gupta**

The Department of Industrial Policy and Promotion (DIPP) formed a six member committee on 22nd October, 2014 to formulate National IPR Policy. The committee, referred to as the “IPR Think Tank”, is headed by Justice Prabha Sridevan, former judge at Madras High Court and Chairperson of Intellectual Property Appellate Board (IPAB). The draft National IPR Policy was released by the IPR Think Tank within 2 months of its formation.

The draft policy shows government’s intent and aspiration to stimulate domestic IP creation and innovation in India. Specifically, the IPR Think Tank has outlined a vision to make India a country where: (1) creativity and innovation are encouraged for the benefit of society; (2) advancement in science and technology, arts and culture, traditional knowledge and biodiversity resources are promoted by IPR; and (3) knowledge that is owned is shared. The IPR Think Tank has called for establishing an IPR system that would promote innovation and creativity in a knowledge economy; accelerate economic growth, employment and entrepreneurship; enhance socio-cultural development; protect public health, food security, and environment. The IPR Think Tank has enunciated a seven-point objective with several action points under each objective as discussed below.

IP Awareness and Promotion

Increasing the awareness of the benefits of

IP assets, the conversion of knowledge into IP assets, and the respect for others’ IPR are considered as fundamental requirements for a robust IPR regime. The draft policy proposes to:

- (i) Initiate a national level campaign of “Creative India; Innovative India”, and link it with other existing national campaigns, such as “Make in India”, “Digital India”, “Skill India”, “Smart Cities”.
- (ii) Reach out to small scale businesses, corporate entities, farmers, artists, designers, and scientists, and propagate benefits of IP assets by way of audio / video materials, print media, and social media.
- (iii) Involve eminent personalities as ambassadors, create moving exhibits, run awareness programs in multiple languages and in pictorial format to benefit those who cannot read.
- (iv) Announce an IPR day, establish creativity museum, and give monetary incentives.
- (v) Initiate IPR courses in schools and colleges, along with online and long distance learning programs.

Creation of IP

In order to promote the domestic creation of IP and to increase the number of IP filings, the following action points are proposed in the

draft policy:

- (i) Provide essential resources to creators and innovators to enable them to create IP.
- (ii) Make IP creation a key performance metric at various institutions.
- (iii) Guide innovators to research on areas that are of national interest, and create industry-academia interface to facilitate IPR driven research and innovation.
- (iv) Introduce utility model to benefit in protection of 'small inventions'.
- (v) Address the cost issue by giving a fee waiver to first-time filers, provide tax benefits for IP creation and filing.

Legal and Legislative Framework

The IPR Think Tank has acknowledged that the laws in India need to be revised in view of global developments and national interests with respect to social-economic needs. To this end, the draft policy seeks to:

- (i) Review of existing IP laws to remove anomalies and inconsistencies, if any.
- (ii) Introduce laws for utility models and trade secrets.
- (iii) Take necessary steps to clarify, simplify, and streamline the processes related to administration and enforcement of IP rights, and make the processes transparent and time bound.

IP Administration and Management

The IPR Think Tank has called for improvements in the IP administration and management. The draft policy proposes to:

- (i) Upgrade the IP offices, and grant adequate

autonomy to the IP offices considering rapid growth, higher responsibilities, and the increased workload.

- (ii) Build adequate manpower to handle future workload and reduce the backlog.
- (iii) Expand the IT infrastructure to keep up with the demands of e-filings and other administrative processes.
- (iv) Collaborate with IP offices of other countries for building capacity, providing training and accessing databases.
- (v) Adopt best practices with respect to procedural aspects, modernize to implement e-services, provide access to records both online and offline in efficient manner, implement quality standards, remove disparity among different branches at different locations, provide helpdesk and training materials.

Commercialization of IP

The draft policy emphasizes commercialization of IP for the benefit of IP owners. The draft policy also seeks to provide adequate help to economically weak IP innovators. The draft policy calls for:

- (i) Establishing an IP Promotion and Development Council (IPDC) and IP Promotion and Development Units (IPDU) in different regions to assist all classes of IP owners in commercializing their IP assets.
- (ii) Enabling R&D organizations, industry, academia, and funding agencies to

collaborate for IP generation and commercialization.

- (iii) Providing financial support, facilitating investments in IP driven industries, and helping IP owners, particularly, the small-scale ones to test and launch their IP in market.

Enforcement and Adjudication

The draft policy recognizes that IP assets are meaningless without the effective enforcement of IP rights, while at the same time preventing misuse of IP rights. The draft policy acknowledges the gaps in sensitizing and training enforcement officers, adjudicating IP disputes in effective and timely manner, and educating public to curb piracy and counterfeiting. The draft policy proposes to:

- (i) Create awareness programmes to educate public, especially, the youth and students, on negatives of counterfeiting and piracy.
- (ii) Strengthen enforcement mechanisms by establishing a centralized multi-agency task force for coordination between various departments and agencies, inclusion of IP crimes under special laws, and provide adequate training and infrastructure to IP officers for detection of infringement.
- (iii) Designate a special patent bench in the High Courts of major cities, designate a district level IP Court, and create benches of IPAB in cities where IP offices are located.

Human capital development

The draft policy recommends increasing the number of IP professionals, experts, and leaders in the areas of policy making, administration, and enforcement, in order to extract full potential of IP. The draft policy suggests:

- (i) Introducing IP courses in schools, colleges, and training institutions to build skills from grass-root level, and providing training to academicians.
- (ii) Developing long-distance learning and online courses on IP.
- (iii) Establishing collaboration between Indian institutes and foreign institutes to run exchange programs on IP.
- (iv) Collaborating with organizations like WIPO, WTO, for teaching, training, and conducting research on IP.

Closing remarks

The draft National IPR Policy intends to provide a conducive environment to build India as an IP progressive nation. The draft policy, while praising India's existing IP framework, acknowledges the following needs: (1) spreading awareness of IP creation and protection; (2) improving judicial infrastructure and IP enforcement; (3) commercializing IP; and (4) developing human resources. While the draft policy is a step in the right direction, the challenge lies in implementing its objectives within a realistic timeframe. As such, the full impact of the IPR Think Tank initiative remains to be seen.

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Ratio Decidendi

Trademark – Infringement action against the assignor of trademark during pendency of assignment, permissible

Bombay High Court has held that pendency of assignee's application for registration as subsequent proprietor cannot disentitle her any injunctive relief against the assignor. The court in this regard noted that the assignment by the original owner (plaintiff here) in favour of the defendant, by which the defendant claimed to have become a proprietor of the subject trademarks and obtained a registration in his name, was surrounded by mysterious circumstances and hence a deed of re-assignment was executed. The defendant argued that while the plaintiff is not yet a registered proprietor of the subject trademarks, the defendant continues to be on the register as proprietor of the marks and the plaintiff cannot maintain an action for infringement against the defendant. The court however held that if the assignment is valid, there is no reason why application for injunctive relief cannot be urged even against the assignor himself.

The court was of the view that it was bound to take a prima facie view of the validity of the assignment and granted interim injunction in the case involving infringement action by plaintiff claiming to be assignee, pending registration of application, even if the infringer is the assignor of the said trademark. [*Usha Kiran Jogani v. Vijay Kumar Jain* - Notice of Motion (L) No. 2231 of 2014 in Suit No.17 of 2015, decided on 9-2-2015, Bombay High Court]

Digital reproduction can be subject to private copying levy irrespective of actual use

Answering a reference from the Danish court the CJEU held that Information Society directive does not preclude national legislation, which provides that fair compensation to be paid to right holders, from levying the same in respect of multifunctional media such as mobile telephone memory cards, irrespective of whether the main function of such media is to make such copies and it is sufficient that the device enables the operator to make copies. COPYDAN, a body responsible for administration of copyright contended that the company selling mobile phones was liable to pay private copying levy in respect of memory cards imported by it. The respondent-company argued that it sold the memory card to both individuals and business customers and that it could not monitor whether in fact copies authorised /unauthorised were made using the device supplied by it. Also the object of the levy was to provide fair compensation and even if copying did take place it would not be above minimal and would not prejudice the right holders.

However, the court opined that given the practical difficulties of identifying private users, those who have digital reproduction equipment and those making it available can be held liable for compensation. The fact the reproduction function is ancillary to a device, causing lesser prejudice, may be relevant to decide amount of

compensation. It also stated that reproductions of protected works by or with the aid of a device which belongs to a third party could be subject to the private copying levy. In answer to the question whether different types of devices, for example telephone memory cards which are detachable and internal memories of MP3 players should be subject to the same levy, the court held that the national legislation could provide for different levies provided the same was justifiable. [*Copydan Bandkopi v. Nokia Danmark A/S*, C-463/12, CJEU decision dated 5-3-2015]

Use of trademark for spare parts whether covered by general heading

Agreeing with the contention of the applicant that the OHIM should have examined use of the registered trademark LAMBRETTA (among others for Class 12: ‘Vehicles; apparatus for locomotion by land, air or water’) in relation to sales of spare parts, the CJEU annulled the decision cancelling the registration. The OHIM argued that it was entitled to interpret the application for registration as covering only the heading of Class 12 taken in its literal meaning. As regards the argument that,

in terms of the practice of the OHIM at the time the mark was applied for, the applicant could not have had any expectation as to the broader scope of protection the court held that the principle of legal certainty demanded that the view be taken that, by using the general indications listed in a class heading, the proprietor of a Community trade mark, intended to cover all the goods or services included in the alphabetical list in that class. Thus even though, ‘spare parts for scooters’ do not actually appear in the alphabetical list of goods in Class 12, the OHIM was required to examine the evidence adduced as regards sale of spare parts instead of rejecting the same. [*Scooters India Limited v. OHIM*, T-51/12, CJEU decision dated 30-9-2014]

IPAB Members – Madras High Court rules on constitutionality of qualification criteria

Please refer to the special edition of IPR Amicus released on 16-3-2015, analysing the judgement of the High Court of Madras on constitutionality of the qualification criteria of the members being appointed to the Intellectual Property Appellate Board (IPAB).

News Nuggets

Copyright and the human right to protection of authorship

The UN Special Rapporteur in the field of cultural rights has submitted a report on ‘Copyright policy and the right to science and culture’. The report states that copyright laws and international treaties in the present form are insufficient to protect the human

right to protection of authorship. The report calls for a rethink on the accepted ideas that protecting economic interests of IP creators and moral rights adequately preserve and encourage creativity. It argues that unlike copyrights, the human right to protection of authorship is non-transferable, grounded on the concept of human dignity, and may be

claimed only by the human creator and even when an author sells their copyright interest to a corporate publisher or distributor, the right to protection of authorship remains with the human author(s).

From the perspective of human rights, the report observes that corporate rightholders might have better bargaining power and it is important that artists retain right to reclaim copyright interests they have transferred after a set number of years. On exceptions and limitations the report states that they often support creators' material interests by offering opportunities for statutory licensing income or the possibility of relying in part on the work of other artistes in a new work or performance. It calls for exempting religious services, school performances, public festivals and other not-for-profit usages from securing licences to perform musical or dramatic works. Another area of concern raised in the report is recognising and protecting the rights of indigenous people. The report also advocates looking into the special needs of disadvantaged people by bringing uniform legislation in different countries to ensure access and addressing the vastly unequal distribution of published literary works across languages.

Achieving a fanciful distinction

Every seller, perhaps, fancies being distinctive and successful and the applicant in *re Frankish Enterprises Ltd* (decided in 27-2-2015) certainly got the combination right. The TTAB reversed the refusal to register a mark consisting of a truck cab body in the design of a fanciful, prehistoric animal with the word JURASSIC ATTACK. The registration was sought for entertainment services in nature of monster truck exhibition service. An internet search had revealed over 100 monster trucks. But, the mark in question achieved the distinction of being unique and not comparable with any other. Thus, it could function as service mark and was readily identifiable with the truck exhibition services of the applicant. The truck's body was suggestive of a prehistoric animal without looking like a particular animal. Interestingly, IP protection was not sought for the design, as a toy or model truck, or any other product. The TTAB reiterated that while trade dress in the nature of product design can never be inherently distinctive, product packaging trade dress and trade dress for services can be inherently distinctive.

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