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To

Shri D.V. Prasad

Joint Secretary

Department of Industrial Policy & Promotion

Udyog Bhawan, New Delhi 110011

Sub: Comments on the Draft National IPR Policy

Dear Sir,

This is with reference to the First Draft of the National IPR Policy circulated by your office for comments. We are a non-profit Society registered under the Societies Registration Act. We provide legal representation and other law-related services to protect and advance Free and Open Source Software (FOSS) and protect digital civil liberties of the citizens of India.

We appreciate the steps taken by the Department of Industrial Policy and Promotion in proposing the Draft National Intellectual Property Rights Policy. We would also like to appreciate the efforts of the IPR Think Tank in drafting the National IPR Policy and inviting comments from the public on the same. While the Draft National IPR Policy takes into account various aspects including IP creation, promotion, commercialization, enforcement and adjudication, we encourage the policy makers to consider formulating an Innovation Policy in India that promotes FOSS, creative works licensed for sharing and the Shared Economy, which will further wide-spread knowledge sharing and simultaneously ensure growth and development for all sectors including industry and education.

We hope that this engagement with the public will continue and all stakeholders including start-ups, patient groups, students and universities would be consulted in order to have an innovation policy. Please find enclosed our detailed comments on the draft Policy. We will be happy to meet you in person to discuss this further.

Sincerely yours,

(Mishi Choudhary)
Executive Director

Comments on

Draft National IPR Policy

Introduction

The Department of Industrial Policy and Promotion and the IPR Think Tank have done a commendable job in coming up with the Draft National IPR Policy. However, the policy seems to equate patents to innovation in as much as it talks about encouraging IP awareness, protection and enforcement in order to promote growth, development and innovation. The policy wants us to believe that merely by educating ourselves about the IPR system, we will all become more innovative and presents IPRs as an end in themselves instead of their actual function. In this age when the new sharing economy which works on the principles of collaboration and incremental innovation is driving the world economy from the Android Operating System for Mobiles to Wikipedia, the policy adopts a narrow view of innovation. Numbers of patents issued is not a true measure of the inventiveness of a society.

For example, in the world of software, while there is yet no evidence to support the contention that patenting software encourages innovation, there is ample evidence to show how software patents have had a chilling effect on innovation and reduced R&D spending in the software industry[1]. Recent empirical data also suggests that software patents actually stifle innovation instead of promoting it.[2] Further, the long history of innovation in the sector goes to show that there is no reason to believe that software patents are indispensable for software innovation. Furthermore, costs incurred by companies in enforcing software patents and fighting lawsuits are phenomenal, and the MSME sector in India would be left fighting battles in court rooms rather than investing in technological innovation if at all patents were to be allowed on software in India. The recent dispute between Sony Ericsson and Micromax, where the former accused the latter of infringing several of its standard essential patents, resulting in prolonged legal battles before both the Delhi High Court and the Competition Commission of India, is a typical example of the problem of patents on Indian industry. Here, Micromax – one of the few domestic mobile device manufacturers – is forced to channel a significant amount of time and resources to defend itself against patent lawsuits from a major multi-national corporation, effectively upsetting its own development trajectory.

It is submitted that instead of making IP creation crucial to the development of the Indian market, the Policy should strive towards creating an “Innovation Policy”, which appreciates the ground

1 Patents, Thickets, an the Financing of early stage firms: evidence from the software industry, Iain M. Cockburn, available at http://cid.bcrp.gob.pe/biblio/Papers/NBER/2007/noviembre/w13644.pdf

2 J Bessen and M Meurer (2008), 'Do Patents Perform Like Property?', Academy of Management Perspectives, pp. 8–20

realities and presents a level playing field for Indian companies within India instead of favoring state granted monopolies for foreign players. Such an “innovation policy” will involve strategies such as promotion of Free and Open Source Software (FOSS), and promotion of the sharing economy, which encompasses among others, creative works that are licensed in such a manner as to permit sharing.

At a time when the entire European Union is re-visiting Intellectual Property Rights laws especially in view of the innovation of digital age in order to streamline their laws to safeguard fundamental rights and to make it easier to offer innovative online services in the entire European Union, this policy advocates “strong IP laws” without digging deeper into a nuanced understanding of laws that may not fit the needs of a growing economy such as ours.

The Sharing Economy and Innovation

The sharing economy is a socio economic system built around the sharing of human and physical resources. Sharing economy is fundamentally based on network-enabled sharing of information. It includes the shared creation, production, distribution, trade and consumption of goods and services by different people and organizations. The concept of sharing economy or collaborative consumption has seen great success in all sectors. In September 2014 the UK Government with an aim to make the country a sharing economy, ordered an independent review[3] to look into policy and regulation issues and how to create a climate where the sharing economy can reach its potential in the UK.

In a Survey conducted by Linux Foundation[4] 83 percent of software developers said they benefited personally from collaborative development through exposure to new tools and development practices. More than 77 percent of business managers said collaborative development practices have benefited their organizations through a shorter product development cycle/faster time to market. 63 percent of software developers surveyed said they spend more time now on collaborative software development, compared with five years ago. And 59 percent reported increased participation in collaborative software development in just the last year.

FOSS initiatives by the Government of India such as the 'Spoken-Tutorial Project' by IIT Bombay; the ICT in Education Curriculum by Central Institute of Educational Technology (CIET), NCERT,

3 Source: https://www.gov.uk/government/publications/sharing-economy-review-terms-of-reference/sharing-economy-review-terms-of-reference

4 Source: http://www.linuxfoundation.org/publications/linux-foundation/collaborative-development-trends-report-2014

New Delhi; The NROER(National Repository of Open Educational Resources by CIET are a few of the worth mentioning examples that showcase the benefits of FOSS. While benefits of FOSS are known to us, the new concept of sharing economy is based on " promoting access to" rather than "proprietary ownership of" resources.

For more than a quarter century, beginning with a few stalwart thinkers and exponentially increasing in size and influence, a movement to build computer software by sharing—treating software programming languages like mathematical notation, for the expression of abstract ideas to be studied, improved, and shared again—has revolutionized the production of software around the world. The "free software movement," believes that computer software expresses abstract ideas, and therefore concludes that the ideas themselves will grow best if left most free to be learned and improved by all. It has attracted hundreds of thousands, soon millions of programmers around the world to the making of new and innovative software through the social process that for centuries has been the heart of Western science: "share and share alike."

Free software, often referred to by commercial entities as "open source software," to prevent confusion between the social freedom of its making and the price at which they sell copies, has become the single most influential body of software around the world. The most important innovations in human society during the last decade, the World Wide Web and the Wikipedia, were based on and are now dominated by free software and the idea of free knowledge sharing it represents.

This explosion of technical innovation has occurred for two primary reasons. First, the principle rule of free software, the required sharing of computer program source code, has allowed young people around the world to learn and apply their skills by studying and improving real software doing real jobs in their own and others' daily lives. This process has enabled the incremental improvement of the art by everyone, rather than by the necessarily small number of programmers working for any one firm with proprietary control of source code. Second, by creating a "protected commons" for the free exchange of ideas embodied in program source code, the free software copyright licensing structure has enabled cooperative interactions among competing firms: each firm has been assured of permanent continuing access to the improvements in program code made by all other firms, which were required to make the source code of those improvements freely available to all users. Thus firms were able to increase their levels of investment in cooperative production, and were able to exchange ideas with academic researchers, secure in the knowledge that those investments would not be appropriated by others claiming exclusive rights.

The principle that innovation is made possible by the free exchange of ideas is not recent, and is not limited to software. The history of western science since the 17th century is testament to this truth.

Accession to international treaties

The Draft IPR Policy proposes, as part of *Objective 3* (*Legal and Legislative Framework*), to:

"*Engage actively in the negotiation of international treaties and agreements in consultation with stakeholders; examine accession to some multi-lateral treaties which are in India's interest; and, become signatory to those treaties which India has de facto implemented to enable it to participate in their decision making process;*"

In this regard, it is submitted that accession to multi-lateral and bi-lateral treaties could obligate India to implement severely restrictive provisions in our IP laws. India is already a party to the TRIPS Agreement, which sets certain minimum standards for global IP regulation. As such, any treaties or conventions acceded to over and above the TRIPS Agreement would involve compliance with (TRIPS-plus) provisions that may be more restrictive than those found under the TRIPS Agreement.

In fact, the TRIPS Agreement itself has been oft criticized as being skewed in favor of developed nations, ignoring the starkly different socio-economic conditions prevalent in their developing counterparts.[5] It has also been suggested that the importance of TRIPS in the process of generation and diffusion of knowledge and innovation has been overestimated by both its supporters and detractors.[6]

Accession to treaties that call for even more stringent IP laws will be to the certain detriment of Indian innovation and the larger economy in the long run. In addition, the trade negotiation processes under several treaties – the Trans-Pacific Partnership Agreement (TPP), for instance – have been criticized as lacking transparency, since they exclude multi-stakeholder participation and remain extremely secretive.[7] The TPP in particular has also been criticized on numerous other counts, including that it expands the scope of pharmaceutical patents, creates new drug monopolies, lengthens existing monopolies, undermines the Indian rule against patent 'evergreening', risks facilitating patent abuse, and extends data exclusivity.

Under the circumstances, accession to multi-lateral and bi-lateral treaties as a means to secure the nation's IP environment and promote IP development should be seen with liberal amounts of skepticism. It must be recognized that more often than not, international IP-related treaties offer non-uniform standards across a diverse range of States, with the sole beneficiaries of such treaties

5 Archibugi, D. and Filippetti, A. (2010) 'The Globalization of Intellectual Property Rights: Four Learned Lessons and Four Theses', Journal of Global Policy, 1, 2, 137-149

6 *Id.*

7 https://www.eff.org/issues/tpp, last accessed: 28th January, 2015

being developed nations that already possess high levels of IP protection, and are home to an overwhelming majority of IP rights-holders.

Anti-piracy provisions

Objective 4 (*Enforcement and Adjudication*) of the Draft IPR Policy speaks at length of the harmful impact of piracy on IP rights, and notes that certain states have included digital piracy as an offence in their laws to deal with prevention of dangerous activities. While it is admitted that piracy poses serious threats to IPR, its inclusion by states as an offence under legislations meant to deal with dangerous and anti-social activities calls for further examination.

Said state legislations – commonly known as the Goonda Act – exist in nine Indian states with the primary purpose of containing known habitual offenders by means of preventive detention. These Acts authorize the preventive detention of offenders for varying periods of time, and several states including Kerala, Karnataka, Tamil Nadu and Maharashtra have brought digital pirates within the ambit of their respective Goonda Acts. This effectively means that any person suspected of digital piracy may be preventively detained under the Goonda Act in any of the aforementioned states, where digital piracy is considered an offence under the concerned Act.

Over and above the inherent rights-violations that come with preventive detentions of any kind, the inclusion of digital piracy as an offence under the Goonda Acts is especially problematic as this makes room for wrongful detention of “pirates”, whose suspected acts of piracy may have been justified under the fair-use doctrine. Considering the possibilities for wrongful invocation and the dire consequences that follow, this is far from an optimal way to tackle the menace of digital piracy. Accordingly, the inclusion of digital piracy within Goonda Acts must be reconsidered, and a more sustainable and abuse-proof mechanism envisioned.

Law on Utility Models

Under *Objective 2* (*Creation of IP*), the Draft IP Policy notes the absence of protection for 'utility models' (UM) of IP in India, and observes that this particularly impacts IPR in MSMEs and informal and unorganized sectors. Further, the Draft policy proposes to “*facilitate creation and protection of ‘small inventions’ through a new law on utility models*”.

It is submitted in this regard that the statistics on UMs available from the WIPO database show a decline in reliance on the UM system. In fact, major countries that have UM protection like Germany, Korea and Japan have seen a steady dip in the number of UMs being filed and granted.

The major reasons for this decline include issues of validating the UM in the case of a litigation and the lesser benefit offered by it when compared to a patent. The interests of MSMEs can be better protected by providing them with better financing and marketing solutions and also with better access to R&D institutions.

Moreover, computer programs must not be brought within the ambit of UM in the best interests of local industry and the general public. Studies have found that patents in the area of software are more likely to be litigated and the disincentives outweigh the incentives to organizations.[8] The Free Software model of knowledge sharing which has spurred innovation in the software sector could be a good model to adopt to ensure innovation in other sectors too. An example of such a model of innovation is the Open Source Drug Discovery project of CSIR. MSMEs will benefit more from such knowledge-sharing exercises than from creation of barriers and monopolies.

E-businesses and IP rights

The Digital India initiative seeks to strengthen and expand India's digital infrastructure and transform it into an Electronic System, Design and Manufacturing hub. However, the policy seems to imply that this can be attained by IP creation, protection, enforcement and commercialization. The Policy seeks to encourage IP owners to check piracy and counterfeiting on a voluntary basis. To this extent efforts shall be made to engage with all levels of industry, including e-businesses, in order to create respect for IP rights and devise collaborative strategies and tools. Further it states that digital environment provides opportunities for utilizing IP in e-applications including e-business and start-ups as also challenges its protection and enforcement.

It is important to point out that the current intellectual property legal regime in India clearly reflects the intention of the lawmakers, i.e. protection of national interest and balancing rights of IP owners with their obligations to the society. Further, while software receives due copyright protection under the Copyrights Act 1957, it is not patentable under the Patents Act 1970. It is submitted that the current regime effectively takes into account the interest of all stakeholders and clearly reflects the legislative intent behind excluding computer programs, as evident from parliamentary debates is to prevent monopolies and to protect Indian industry. It is further important to point out that unlike in the case of pharmaceutical industry where patents are known to have encouraged innovation[9], the patenting of computer related inventions is actually known to have had little or no affect in the innovative capabilities of an organization.

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8 James Bessen and Michael J. Meurer, The Private Costs of Patent Litigation, (Boston Univ. School of Law, Working Paper No. 07-08., 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=983736

9 Mansfield, 1986; Levin et al. 1987; Cohen et al., 2001

Research has shown that software patents are more than twice as likely to be litigated as other patents; patents on methods of doing business; which are largely software patents, are nearly *seven* times more likely to be litigated. Further, despite being a relatively new area for patenting, software patents accounted for 38 percent of the total cost of patent litigation to (American) public firms during the late 1990s. This does not appear to be a temporary problem - the probability that a software patent will be litigated has been *increasing* substantially rather than decreasing.[10]

Therefore the Policy should, instead of stressing the need and importance of IP protection and enforcement, stress on the need for an effective innovation policy for including FOSS and the sharing economy. The reason being that in a developing economy like India, where sharing knowledge is extremely crucial to the growth and development, encouraging IP creation in sectors such as software would lead competitors to seek patents in their products. In turn the bigger corporations, who can afford expensive patent lawyers, will gain monopoly in the market leaving the small start-ups at a disadvantage. Therefore, the policy instead of focusing on IP rights for e-business should look at ways the IT industry and the leading educational institutions in the country could collaborate to build better solutions to lead the marketspace.

Irregular grant of software patents and delays in adjudication of patent oppositions

Objective 3 (*Legal and Legislative Framework*) of the Draft Policy emphasizes the need for strong and effective laws with regard to IP rights that balance the interests of rights owners with public interest. In pursuit of this objective, the Draft Policy proposes, among others, to:

- Review existing IP laws, where necessary, to update and improve them or to remove anomalies and inconsistencies, if any;
- *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;*

We believe that instead of a review of existing IP laws, more emphasis should be laid on the practice and procedure followed in the patent offices. In this regard, we wish to point out a discrepancy between the law and practice surrounding software patents in India. Section 3(k) of the Patents Act, 1970 [introduced by the Patents (Amendment) Act, 2002] specifically excludes computer programs and algorithms from patentable subject matter. An amendment was proposed to Section 3(k) by the Patents (Amendment) Bill, 2005, seeking to allow the patenting of software

10 J Bessen & M Meurer, *Patent Failure: How Judges, Bureaucrats and Lawyers Put Innovators at Risk*, 1st ed. (2008), Princeton University Press

with "*technical application to industry or in combination with hardware*". However, this proposed amendment was dropped after deliberations in both Houses of Parliament, as it was considered non-beneficial to Indian professionals and capable of facilitating a monopoly of multi-national corporations.

Despite this specific legal exclusion of software from patentable subject matter in larger public interest, it has been observed that the Indian patent office grants around 100 software patents out of the 1000 applications in the area of software that they receive on an average annually. Moreover, a vast majority of these patents are granted to foreign multi-nationals as opposed to domestic applicants. Even discounting its inherent irregularity under law, this is a dangerous phenomenon that makes writing computer programs a risky proposition, leaving developers vulnerable to patent-infringement lawsuits from large corporations. This in turn could seriously impede the growth of Indian software industry in general, and could be especially problematic to the development of Free and Open Source Software. All of the above call for an immediate review of administrative procedure regarding software patents.

We also wish to also draw attention to the inordinate amount of delay involved in the adjudication of patent oppositions. For instance, SFLC.in had filed a post-grant opposition before the Mumbai Patent Office in October 2010. However, an Opposition Board has yet to be constituted in this matter even though four years have lapsed since filing. Such delays in adjudication have a negative impact on innovation, as they allow the owners of wrongfully granted patents to initiate and pursue legal proceedings against others working around similar subject matters, thereby hindering progress in the field. It is thus recommended that the IP Policy also include suggestions for expediting the adjudication of patent oppositions.