

November 9, 2012

Mr. D.V. Prasad
Joint Secretary
Department of Industrial Policy & Promotion
Ministry for Commerce and Industry

Via email: dv.prasad@nic.in
Cc: chandni.raina@nic.in;
sk.lal@nic.in

Re: AIPLA Comments on Draft National Intellectual Property Right Strategy of India

Dear Mr. Prasad:

The American Intellectual Property Law Association (“AIPLA”) is pleased to have the opportunity to present its views with respect to the draft National Intellectual Property Right (“IPR”) Strategy (“Strategy”) prepared by the Sectoral Innovation Council on IPR.

AIPLA is a U.S.-based national bar association whose approximately 14,000 members are primarily lawyers in private and corporate practice, government service, and the academic community. AIPLA represents a diverse spectrum of individuals, companies, and institutions involved directly and indirectly in the practice of patent, trademark, copyright, unfair competition, and trade secret law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property, including users of the Indian intellectual property system. Although we are a U.S.-based bar association, our members have significant interests in intellectual property worldwide including, of course, in India.

AIPLA is generally in strong support of the goals and approaches outlined in the Strategy. India is one of the largest growing economies in the world, and the Strategy has rightly recognized the critical nature of intellectual property in promoting economic growth and national well-being. While we recognize that India continues to face many economic challenges, we are impressed and gratified that the Indian government sees intellectual property as a means of promoting solutions to those challenges, rather than – as some have argued – a system that detracts from India’s ability to meet them.

The Strategy is quite comprehensive. AIPLA has significant experience with the efficient functioning of intellectual property systems, both in the United States and throughout the world. We would be happy to provide whatever advice and expertise may be needed to help India implement the new Strategy in an ongoing process that all major economies of the world, including the United States, are engaged in.

While the Strategy is too comprehensive for us to point out all aspects with which we agree, AIPLA would like to particularly note the following aspects of the Strategy that we strongly support:

- “[T]he rate of technical change and of economic growth depends on efficient diffusion of innovation.” Strategy at paragraph 23. Diffusion of innovation, as the Strategy recognizes, involves both incentives to create the technology, means to protect it adequately, and the opportunity to market or license the technology, which includes adequate enforcement opportunities.
- “The objective of the IPR Strategy is to transform India into an innovative economy...” Strategy at paragraph 26. From our experience in the United States, AIPLA believes that the goal of creating an innovative economy is not only practical, but would benefit all aspects of the economy. We also believe that effective IP protection is a key element of establishing an innovative economy.
- The four pronged approach set out in paragraph 27, which includes **promoting respect for IP, creation of new IP regimes, strengthening protection, and facilitating commercialization**, will clearly foster the long-term development of the Indian economy and overall well-being.
- The goal to “**establish an IP culture**” through education and incentives for micro, small and medium enterprises (MSMEs), paragraph 29, is something that the United States has recognized as critical. For example, the U.S. Patent and Trademark Office (“USPTO”) has established reduced small-entity fees, and has recently adopted micro-entity fees that will go into place shortly.
- **Recognition of the importance of databases of patent and non-patent literature**, paragraph 29(iii), reflects both the importance and the modern availability of technological literature that can (i) stimulate and direct research and innovation, as well as (ii) facilitate patent protection for inventions in an efficient and quality-driven way.
- **The importance of the research that is undertaken by academia and public research laboratories**, as noted in paragraph 30, cannot be overstated. While it is true that many studies have shown that most innovation in growing economies takes place in universities and government-funded research institutions, it is also true that innovation in countries such as the United States also takes place in a significant way in those institutions. The U.S. Bayh-Dole process, for example, recognizes the importance of incentives to bring that critical research to market through efficient use of the patent system.
- “**Key leverage technologies such as information technology, biotechnology and materials science**” are recognized, paragraph 30(iii), as deserving of due importance. These are areas of innovation that a modern economy depends on, and we support the emphasis that the Strategy puts on these as far-seeing and constructive.

- **The educational focus** advocated by the Strategy, paragraph 30(v), is critical to success of the IP system. AIPLA puts many of its own resources into educational programs, and we recognize the importance of promoting respect and understanding of IP at the grade school, university and vocational level as well.
- The Strategy mentions “**strategic relationships even with overseas players.**” One of those players could in fact be AIPLA, which is very active internationally, including operating the U.S. national chapter of the International Association for Protection of Intellectual Property (AIPPI). We have a very strong global component, with over 15 global committees directed toward IP practice, policy, and representation in global fora. AIPLA notes, however, that a strong Indian IP practitioner association is an area which may need attention, and we would be willing to provide support for the development of a strong IP-practice-oriented presence within India. We have found that strong and active user groups have greatly contributed to the efficient functioning of the USPTO, and we also provide advice to our legislature and courts which aids in their work in furthering effective IP protection in the United States.
- The “**efficiency and strength of institutions that grant/protect IPR,**” paragraph 35, is a primary factor in a strong and effective national IP system. We recognize the challenges that face national patent offices, including the problem of application backlog as mentioned in paragraph 36. AIPLA has worked closely with the USPTO to find ways to reduce the backlog of patent applications and increase the efficiency of national examination of applications, as well as improving coordination of information sharing among national and regional patent offices on related applications, for example, sharing of search results and mutual access to informational databases.
- The various elements set out in paragraph 36 are an impressive recognition of the **key factors for improving examination of applications.** Digitization of records and electronic filing, searchable databases which are complete and shared, discounts for micro- and small-entities, and especially **quality of examination**, are all crucial to the good functioning of a modern patent office. AIPLA applauds the recognition of these in the Strategy, and looks forward to providing additional comments and guidance on how these can be developed and implemented over time.
- Effective enforcement is perhaps the cornerstone of any IP system. The goal of an “**enabling legal, administrative and judicial framework available for protection**” is challenging, but crucial for the success of any system. Even if strong rights are available and efficiently granted, if they cannot be effectively and timely enforced, the IP system will fail to provide its key benefit, that of stimulating genuine innovation and protecting the investment in development that will drive an economy.

AIPLA could continue to name many of the additional factors covered by the Strategy, such as the importance of commercialization through effective licensing. However, suffice it to say that we applaud the Indian government for putting out such a forward-looking strategy, and we offer our continued input and advice to help implement its demonstrated strong and vital commitment to innovation and a thriving economy.

In addition, AIPLA is pleased to point out the following specific points of consideration.

Encourage disclosure of patentable subject matter

The government should encourage all enterprises to avoid treating their otherwise patentable IP as trade secrets out of a fear of disclosure, in particular by maintaining the broadest definitions of patent subject matter. Disclosure always encourages follow-on innovation. The smooth process of IP enforcement will make this point most effectively, however education on this point will also be important.

Institution of “office actions”

There appears to be no opportunity for an applicant to communicate with the office of the Controller General of Patents Designs and Trademarks while an application is pending. If such communication is allowed, as is the case in the U.S. through “office actions,” it may reduce the cost for applicants by avoiding an appeal to the Intellectual Property Appellate Board (IPAB) and accordingly reduce the number of appeals for the IPAB to manage.

Reduced fees for small enterprises, individuals and industries that need promotion

Reduced fees for MSMEs encourage both the development of innovative technology, and the protection of that technology through IP, as the basis for building small businesses. Besides reduced application/filing fees for small enterprises and individuals, a similar fee reduction for targeted area(s) would be useful.

Education

AIPLA agrees that IP education is an essential element to developing a strong innovative economy. Respect for intellectual property is essential for the success of any IP system. In order to develop respect and knowledge about the importance of IP, and how to utilize IP in business and research, intellectual property protection should be an integral part of the educational curriculum in all professional programs, including MBA programs as well as entrepreneurship courses/trainings.

Advisory Opinion Opportunities

Many agencies in the U.S. government provide advisory letters to stakeholders to address issues of interest before those stakeholders take action. This can be particularly helpful when new laws and regulations have been enacted. AIPLA suggests that, in a similar way, the India could provide advisory opinion opportunities for different types of IPR as a pilot project, such as advisory opinion panels. Through the use of these opportunities, rights holders can present a case for non-binding determination, to assess its relative strengths and weaknesses. The benefits include allowing rights holders to learn the more recent aspects of the IPR protection scheme in India without the time and expense of litigation, and before initiating licensing talks. This type of procedure can be particularly valuable for entrepreneurs and heads of small to mid-sized enterprises.

Administrative Courts

Administrative proceedings specifically for the resolution of IP disputes would help speed up the process and thereby make more people likely to use such a process. The Judges need not have specific technical backgrounds. In the same regard, administrative procedures that would make it easier for firms to challenge a patent's validity are also vitally important.

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AIPLA is honored to have the opportunity to present these comments to the National Innovation Council of India. We would be pleased to respond to any additional questions or requests for clarification that you may have. We look forward to engaging in an on-going dialogue concerning these important issues, which affect and can potentially benefit everyone.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey Lewis". The signature is written in a cursive, flowing style.

Jeffrey I.D. Lewis
President
American Intellectual Property Law Association