

Ch 15 India's new Intellectual Property Policy: Exercising sovereignty passively

Introduction

India's Intellectual Property Law and innovation sector is of significance nationally as well as globally. India's intellectual property policy reflects the exercise of both democracy and sovereignty, as these are two sides of a coin. They are interlinked and develop by feeding off each other. This chapter explores the fascinating coming together of strong forces from within and without and melding to produce the effect of passive sovereignty.

External Pressure + Strong judiciary = Passive Sovereignty

These elements of the equation are meant to act as symbols rather than as actual scoped out terms. External pressure signifies unilateral nudging or political commands from States such as the United States, and also refers to institutional pressures such as harmonisation drive of World Intellectual Property Organisation. Strong judiciary signifies both the actual judiciary in action in India as well as the grassroots movements which judge the system by embracing it or puncturing it with their interventions. This chapter claims that the soon-to-be adopted¹ National IPR (Intellectual Property Rights) Policy is an exercise in passive sovereignty, with potential to harm the development of the country.

The context within which the policy is being drawn is discussed in the first section. The pressures and concerns about changes in laws prevailed throughout the drafting period. The process of appointment of the drafting committee (the IPR Think Tank), the consultation and the final draft have raised issues of transparency, conflict of interest, ideological controversies and insipid content. The second part of the chapter compares the Baseline Draft with the Think Tank draft, followed by the last section on assessing the final version of the National IPR Policy. This is done under four themes, namely, Frugal Innovation, Traditional Knowledge, Pharmaceutical Patents and TRIPS-Plus policy.

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This chapter was completed in March 2016. The policy was adopted on the 12th of May 2016. It can be accessed via the Department of Industrial Policy & Promotion website http://dipp.gov.in/English/Schemes/intellectual_property_rights.aspx accessed 25th May 2016.

It is argued that even if some of the concerns have been assuaged in the final draft, the scene has been set in the long term that could bring these concerns back.

Pressures and Concerns about Intellectual Property Laws in India

Intellectual Property Law in India has a long history, having been promulgated during the time of the British Raj. The controversial area of intellectual property law has been patent law. Soon after Independence, these rules were reviewed and a new system put in place in 1970. Further changes came since the liberalisation of the Indian economy in the 90's, culminating with India's accession to the World Trade Organisation in 1995 and the controversial treaty on trade-related intellectual property rights which was implemented into Indian law in 2005. Yet again, the threats to intellectual property law, in particular patent law, come from the pharmaceutical sector which seeks to protect its investment in R & D fiercely. Drug patents have come under constant scrutiny because of their impact on health, and hence a matter of public interest. While legislators have exercised caution in incorporating international standards into Indian IP law, many concerns come from the healthcare sector which worries that there will be a lowering of standards for the efficacy threshold for the grant of a patent under Article 3 (d) of the Patent Act 1970, which will consequently bring more drugs into patent, and thereby making them more expensive for procurement.

Evidence of the brittle nature of patent policy in India is available in the oscillating statements from the commerce ministry. India's chief economic adviser, prior to appointment testified to the US Trade Commission that Article 3 (d) was problematic because defining efficacy can be arbitrary and other policy tools may be available to achieve better control over thresholds of patentability.

So why is the threat to Article 3 (d) so worrying? It is because of a practice that has been commonly referred to as evergreening². Article 3(d) of the Indian Patent Act 1970 is strictly interpreted by the courts, and does not allow incremental changes or modifications to be

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Dwivedi, G., S. Hallihosur and L. Rangan. 2010. 'Evergreening: A deceptive device in patent rights', *Technology in Society*, 32 (4):324–330

considered inventive enough to cross the patenting qualification threshold. In the context of active substances in drugs, which can be patented, Article 3 (d) has made it a significant barrier for 'new uses' of these compounds to be patented separately. If it were allowed, then the compound which is already protected for addressing one problem would be patented over again, thus paving the way for keeping the patent protection alive for longer, and perhaps indefinitely, hence the tag of evergreen. Patents have been applied for, and rejected under Section 3 (d) for example, for tablets that have been converted to syrups, for heat stable version of drugs, for new use of known substance, and these have all been rejected³. Only under rare circumstances would a patent be granted for showing improvements in efficacy. This Indian policy, was pronounced to be compliant with the TRIPS Agreement, and in the Glivec case, the court declared that 'Section 3(d) sets an obviousness standard which member states are free to define in a manner consistent with their national policy'⁴.

Harmonisation of IP law to a certain minimum standard of protection was stipulated under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPS] and signed up to by India. The fear is that the World Intellectual Property Organisation, WIPO is pushing to harmonise IPR beyond the WTO minimum standards⁵, as the pressure comes from the WIPO Quad group (Canada, USA, Japan and European Union). It has been time and again discussed that premature harmonisation of IP law is detrimental to the developmental needs of developing countries.⁶ In fact, it has been argued that intellectual property is not

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Brougher, J.T. 2013. 'Evergreening patents: The Indian Supreme Court rejects patenting of incremental improvements', *Journal of Commercial Biotechnology* 19(3): 54–58, p. 54-55

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ibid p. 57

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Biadgleng, E. T. 2007. *Analysis of the role of south –south cooperation to promote governance on intellectual property, rights and development*, South Centre.

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Harmonisation or differentiation in intellectual property protection? The lessons of history', *Prometheus*, 23 (2) ; Harmonization without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty', *Duke Law Journal*, 57 (1); The changing dynamics of the global intellectual property legal order: Emergence of a 'network agenda'?', *International and Comparative Law Quarterly*, 108 (4); Ncube, B. Caroline. 2016. *Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation*. Abingdon: Routledge.

necessary for innovation and would hinder growth and prosperity⁷.

National IPR Policy

The National Intellectual Property Rights Policy is a report published in 2015. It is the first of its kind in India and has been produced in response to the need for an ‘all encompassing’ IP policy. It is not very clear where the need comes from, for the report also states that there are already robust IP laws and a strong IP jurisprudence⁸ in India. *India has implemented the provisions of the TRIPS Agreement⁹ when it signed up to becoming a member of the World Trade Organisation.* The laws are considered to be balanced and fit for purpose and ‘are notable for their far-sightedness and have also anticipated international developments’¹⁰.

Politically, intellectual property laws in India have been controversial. In a speech in 2015, the Prime Minister Mr. Modi labelled IP laws as underdeveloped. He talked of ‘*bringing our intellectual property rights at par with global parameters*’¹¹. *In response, the United States*

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Boldrin, M. and D. K. Levine, *Against Intellectual Monopoly*,
<http://levine.sscnet.ucla.edu/general/intellectual/againstnew.htm> accessed 14th July 2014

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J Sridevan P. (Retd), P. Singh, N.K. Sabharwal, P. Bhargava, R. Srinivasan, U.P. Pandit, *National IPR Policy (Final Draft)*, New Delhi (2015), p. i-ii

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TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)

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J Sridevan P. (Retd), P. Singh, N.K. Sabharwal, P. Bhargava, R. Srinivasan, U.P. Pandit, *National IPR Policy (Final Draft)*, New Delhi (2015), p. 2

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Mishra, A. R. ‘Need to bring our patent laws on par with global standards: Narendra Modi’ Live Mint E-paper, April 24th, 2015. <http://www.livemint.com/Politics/vW6RzcArtqHi6tUNFyoMqO/Need-to-bring-our-patent-laws-on-par-with-global-standards.html> accessed 24th February 2016

Trade Representative (USTR) ‘encouraged India to expeditiously undertake this initiative’. Such slurs on robust laws has been criticised as pandering to the monopolist models of intellectual property.

Perhaps the clearest indication of the policy purpose is revealed in its aim to create an IP culture. The report commodifies creativity, and casts intellectual creations as intellectual property, right from the start. In one fell swoop, the policy creates intellectual ‘property’ out of intellectual ‘creations’ by stating ‘India’s range of intellectual creations is as diverse as its people, from patents to plant varieties, trademarks to traditional knowledge, copyright to designs and geographical indications.’

It is difficult to reconcile an IP culture with developments in India surrounding frugal innovation¹² and informal economy. Frugal innovation recognises the environment within which inventions and works are created, and is designed to offset novelty and inventive concept with social impact. A lesser amount of novelty or inventiveness is offset by the presence or greater amount of social impact in an invention or a work that is then granted patent or copyright protection. The IP culture that allows this to thrive may not sit well with an IP culture proposed by the new policy. The proposed spread of IP culture could also act counter to existing culture around stewardship or common proprietorship of innovation. One widely prevailing value system in India does support this IP culture. The *Bhagvad Geeta* is purported to state ‘that one should not claim proprietary rights over anything or attach the pronoun “mine” to anything, since the true owner of all things is no one but God, from whom everything originated’¹³. While faith based property theories are under researched, there is also not enough research into the benefits of property models for intellectual creations, and therefore to disregard knowledge in the public domain by stating that ‘it is merely laudable and altruistic’¹⁴ is to blindly put faith in proprietary models for intellectual creations.

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Bound, K. and I. Thornton. 2012. *Our Frugal Future: Lessons from India’s innovation system*, London: National Endowment for Science, Technology and the Arts (NESTA).

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Ganapathi, J. and V. Pullaġ. 2015. ‘Intellectual Property Rights and the Ancient Indian Perspective’, *Space and Culture*, 3(2): 15-24, p.16

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J Sridevan P. (Retd), P. Singh, N.K. Sabharwal, P. Bhargava, R. Srinivasan, U.P. Pandit, *National IPR Policy (Final*

This report is soon to be published as the new National IPR Policy for India in 2016. It consists of two major parts. The first sets out the objectives in seven sections, namely, IP awareness and promotion, Creation of IP, Legal and legislative framework, Commercialisation of IP, Enforcement and adjudication and Human capital development. The second part deals with particular themes, known as special focus areas and there are nine such areas, namely Agriculture and Food, Creative industries, Geographical indications, Information and communication technology and electronics, New and renewable energy, Public health, Science and Technology, Textiles and Traditional Knowledge.

The IPR Think Tank

The National IPR policy was brought to fruition by a six member think tank appointed by the Department of Industrial Policy and Promotion (DIPP) at the Ministry of State for Commerce and Industry (IC). This new Think Tank committee was chaired by a former Chairperson of the Intellectual Property Appellate Board (IPAB), Justice Prabha Sridevan. She gave such momentous decisions as *Yahoo v. Controller and Rediff*, *Tata v Unilever*, and *Financial Times v Times Publishing House* and named one of the top fifty to influence intellectual property law in the world. The members include corporate lawyers, a judge, an academic from a business school, and the chair of an IPR committee at the business and commerce council. Some members are said to feature on the panel because of connections to the Ruling party rather than because of their IP expertise. There are issues of transparency and incompetence surrounding IP adjudication in India. The issues of transparency around the Think Tank only add to these concerns.

The handling of the process by the Ministry is in itself telling of the differences that surround IP policy in India. A committee was first appointed, made up solely of IP academics, which then seems to have been replaced by a fresh committee devoid of IP academics. This turnaround perhaps reflects two strands of thinking within the commerce ministry that is responsible for commissioning the IPR policy report. Critics see that the output from such a

committee ‘marks a shift from the earlier emphasis on policymaking in favour of multinational corporations and a neoliberal vision of ‘development’ Poor communication and poor planning by the Department of Commerce seems to have led to the side-lining of this earlier committee. Having a good mix of academic and other sectors is ideal for the purpose of policy making, especially because Indian IP academia is making waves in the world and is known for its rigour and quality. The lack of transparency around the process ‘smacks of arbitrariness and ad hocism in policymaking both in the choice of experts and in the manner in which it was constituted’, this being the sharp and rightly warranted reponse to a shoddily managed policy making, with possible serious consequences for the economy and India’s leadership in the IP policy making world. Where is the representation on the committee from the 20 odd chairs of IP created by the Indian government asks Rema Rangarajan in her article, that is now only available through other sites, after seemingly been suppressed by the publishers.

The Process

The Think Tank was constituted to draft an IPR policy in 2014. The IPR committee went through a very busy consultation period from Christmas 2014 to end March 2015. In total the committee received 290 written submissions from across a wide spectrum, governments departments, including from representatives of foreign governments to business and industry associations, law firms, academics and research organisations and the general public. In addition, the committee benefitted from oral hearings or ‘in-person meetings’ as it is referred to, 132 delegates from 60 organisations and according to the chairperson, ‘ Stakeholders’ comments were diverse and in some cases diametrically opposite’. Since its submission to the Commerce ministry, it has been on its rounds to other ministries, with a release date in March 2016.

Different policy versions

This section will discuss differences in the policy drafts in December 2014 draft and April 2015 final version. It will then consider the IPR policy draft submitted by the IP academic group, prior to the December 2014 version of the Think Tank.

The most noticeable difference between the draft and final versions of the National IPR Policy submitted by the Think Tank is the presence ‘Special focus areas’ in the final version of April 2015. These areas of the economy have been selected based on the relevance IP holds for them. The effect of the consultations seems to have been for the better as there is a bit more clarity and categorical reiteration of the objectives in the Policy.

There are small additions but significant if one were to observe the trend in the type of additions made to the final version. It seems to appease those who are suspicious of the need for such as policy. Additions such as the ‘promotion of public interest’, international but also ‘South-South cooperation’, implementation and enforcement of IP rights as ‘not adversely affecting India’s developmental objectives’, the recognition that ‘IP will sub-serve the current and future national priorities’, patents for ‘improvements and modifications’, striking ‘the right balance between protection of innovation and the larger goal of betterment of society.

The final version of the draft IP policy proposes introduction of ‘multi-disciplinary’ IP courses/modules in all major training institutes such as Judicial Academies, National Academy of Administration, Police and Customs Academies, IIFT, Institute for Foreign Service Training and Forest Training Institutes. The recognition of multidisciplinary can be beneficial for India’s development needs, however, given the lagging behind of support for social sciences and humanities in India, this multidisciplinary might not be far reaching enough to reach what might be its intended purpose.

In the Legal and Legislative section, the sentence ‘as well as promote further research and development in products and services based on traditional knowledge’ has been replaced with ‘as well as promote their future development’ This shows the subtle shift in how TK needs to be viewed, not as a provider of products and services, but worth protecting for its own ends. This may or may not bring innovation benefits, but innovation is only one side of TK, identity, culture and the commons are the other characteristics of TK that are worth protecting. It would be interesting to see if the shift is a paper tiger or a real one, when the discussions for the proposed *sui generis* system for protection of Traditional Knowledge and Traditional Cultural Expressions gets underway. A stipulation under the revolutionary new

Schedule 7 (Corporate-Social Responsibility) of the Companies Act 2013¹⁵ to include TK preservation is a welcome addition in the final version.

That is, if it doesn't get drowned out by all the other additions to strengthening IPR rights. Making IP teaching compulsory, developing teaching through collaboration with WIPO, WTO and foreign universities, formulation of institutional policies and strategies for IP in government departments, higher education, research and technical institutions, etc.

The establishment of a new ministry or a department of intellectual property is being proposed. The new ministry would 'will be the nodal authority in the Government responsible for bringing cohesion and coordination among various Ministries/Departments on IP matters under their charge' and 'be responsible for laying down priorities for IP development in accordance with the National IPR Policy'.

Now, looking back further at the very first policy document commissioned by the DIPP and wondering if the reason the whole project was restarted from scratch, with no acknowledgment whatsoever of the work done before, although ideas are borrowed from that publication, was because of the values it embedded. The principled and clear approach adopted by the authors stand out in contrast to the Think Tank April 2015 document.

The Baseline Draft	Think Tank Draft
The aim of the IP policy is to identify a set of core common principles underlying these various IP categories.	The Policy aims to foster predictability, clarity and transparency in order to augment research, trade, technology transfer and investment. It will protect concerns such as public health, food security and environment, and encourage generation and diffusion of knowledge by laying a roadmap for holistic, effective and balanced development of the Indian IP system.

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Singh, A. and P. Verma. 2014. 'CSR@ 2%: A New Model of Corporate Social Responsibility in India', *International Journal of Academic Research in Business and Social Sciences* 4 (10) 6990; Sarkar, J. and S. Sarkar. 2015. 'Corporate Social Responsibility in India—An Effort to Bridge the Welfare Gap'

<p>will unearth fundamental philosophies that reflect what is unique about Indian IP</p> <p>India is committed to ensuring TRIPS compliance and will avoid any TRIPS plus measures, purely at the behest of a trading partner. Unfortunately, TRIPS-plus norms have become the order of the day, proliferating rapidly through bilateral/plurilateral and regional free trade and investment agreements. Where possible, India will be guided by the “Principles for Intellectual Property Provisions in Bilateral and Regional Agreements” issued by the Max Planck Institute for Intellectual Property and Competition (MPI).</p> <p>Intellectual property will not be considered in isolation but in relation to other elements of an innovation ecosystem, namely financing, venture capital, education, infrastructure etc. In short, a holistic approach will be adopted so as to situate intellectual property in its proper context, and not as an end in itself.</p> <p>Given that intellectual property is merely one of the tools to help incentivize innovation,</p> <p>IP linkages through authorities that have next to no expertise in IP will be discouraged. Similarly enforcement by authorities that do not have clear statutory mandate to oversee IPR infringement will be discouraged.</p> <p>The rapid proliferation of ex parte injunctions in patent cases is a case in point. The Government will review such trends (after appropriate data collection in this regard) and explore the idea of legislation that would help balance IP enforcement against civil liberties, particularly criminal enforcement.</p>	<p>...this does not fit with the global regime of strongly protected IP.</p> <p>In future negotiations in international forums and with other countries, India shall continue to give precedence to its national development priorities whilst adhering to its international commitments and avoiding TRIPS plus provisions.</p> <p>It (IP Policy) shall weave in the strengths of the Government, research and development organizations, educational institutions, corporate entities including MSMEs and other stakeholders in the creation of an innovation-conducive environment.</p> <p>Increased IP generation will play a significant role in establishing a vibrant innovation ecosystem in India.</p> <p>Engaging with all levels of industry, including e-business, in order to create respect for IP rights and devise collaborative strategies and tools.</p> <p>In recent times, India has witnessed an increase in IP disputes. Patents have a limited term and patent disputes need to be adjudicated expeditiously.</p>
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Technology transfer is firmly embedded in both documents. Recommendations for trade secrets law are common to both policies. Harnessing IP from publicly funded research features in both the Baseline and Think Tank drafts. Education and going a step further by romanticising IP are espoused enthusiastically by both policies!

Assessing the IPR Policy 2016

Frugal Innovation

In assessing its value and intent, it needs to be understood that this is an IP policy for the long term. While it may not have disturbed the current arrangements around compulsory licensing (in the National Manufacturing Policy and Section 84 of India's Patents Act) and Section 3(d) of India's Patents Act (preventing ever-greening of drug patents), it will bring ever increasing pressure to change these provisions, as the ethos of the policy is one of global harmonisation of IP and stronger protection of IP rights, based on weak evidential foundations for such an approach in a developing and populous economy. The foundations it has laid in the conception of the IP system as a fundamental system for economic growth is in itself an important statement. Under the prevailing circumstances in the global arena, this is inevitable and necessary. While the Commons values are what prevailed in pre-WTO India, exclusive property ownership is firmly embedded in the formal economy and will continue to provide the foundations of policies.

The support for the utility patent among government departments is evident from the think tank report and also being picked up by media before the anticipated endorsement of National IPR policy. While utility patents are inconvenient for the IPR system, it is a need felt in informal economies. The world body for the promotion and harmonisation of IP laws, WIPO has been discussing IP in informal economies at the behest of low and middle income countries. India is among the top countries where the informal economy contributes to the Gross National Product (GDP), around 50%. Along with economic growth, there is a rise in informal economy, not a fall. This is an indication that it needs to be recognised and studied. Base of the pyramid (BoP) innovation and the *jugaad* phenomenon have led to groups such as Honey bee network cataloguing over 140,000 grassroots innovation in India. The National IPR policy should pull its weight on this subject, which it currently does not do. In fact,

informal innovation promotion should be the centre piece of the policy. The policy has a role to play in strengthening the growing movement on responsible IPR in the world. The policy needs to lay out and promote development friendly IPR initiatives like it does the utility patents, which is also a development friendly tool. The IPR Policy should join forces with the National Commission on Labour Policy, which recognises informal workers and look at incorporation of innovation clauses into the policy.

It seems the dangerous status quo in IP law and enforcement has been accepted by the Think Tank draft. But accepting status quo is dangerous as IP policy needs to change and needs to change globally. It does not sit well with informal economies and with frugal innovation. The knock on effect that innovation in the field and innovation in Indian IPR law and policy has in the world is also something that needs to be considered in India's IP policy. As the British High Commissioner for India in 2012 wrote in his introduction to a good breaking report commissioned by NESTA 'India's potential as a laboratory for frugal innovations and the knock-on effect this could have not just on Indian or UK societies but on the global community'¹⁶.

What about the two way development of global IP law? 'India should market its distinctive expertise in frugal innovation to the world', says the NESTA report¹⁷. The Think Tank draft should have given precedence to formulating policy that envisions Indian IP policy taking the lead on reforming global innovation policy through this new policy. It is a lost opportunity in creating soft power, at the very least.

How is the grassroots sector represented, promoted and envisioned for the future in IP policy? There are a number of obstacles that need to be removed, what does the IP policy do or say about that? In the Baseline draft, one of the first special focus areas was 'inclusive intellectual property'. Basheer and Pai put 'informal innovation' centre stage as it forms 90%

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Bound, K. and I. Thornton. 2012. *Our Frugal Future: Lessons from India's innovation system*, London: National Endowment for Science, Technology and the Arts (NESTA).

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ibid p.9

of the Indian economy and state that current IPR laws do not cater to this sector. They are of the view, and rightly so, that ‘Data driven studies need to be undertaken to explore innovation and creativity within these informal sectors to locate the role of incentives, build on them and help create local, national and international markets for the creative segments within India’s informal economy’ 18.

Given that such products are not always using frontier technology, there are IP policy issues that arise in this field relating to both speeding up technology transfer and ensuring that efficient markets operate for the use of existing intellectual property via licences where the frugal innovation makes use of old technology’ 19. Otherwise dubbed as Asian innovation²⁰, the technology transfer provisions don’t take cognisance of these developments demonstrating that the ethos of IP policy is different from the grassroots concerns and needs of the Indian populace.

Traditional Knowledge

There is little mention of making the IP system responsive to Traditional Knowledge (TK) in the proposed National IPR Policy. A harmonised IP policy in India should demand that the sequence be the other way round, for TK to adjust to IP. This was exactly the World Bank recommendation in its report on sustainable development and inclusive growth in 2007. It recommended that for TK ‘a policy-oriented intellectual property rights think tank be set up, which will establish India’s leadership on this issue, and reinforce its image as a country taking bold, novel approaches to developing its innovation system, and its burgeoning role as a leading player in the global knowledge economy’.

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Basheer, S. and Y. Pai, *Indian Intellectual Property Policy, A Baseline Draft*, available via Swaraj Paul Barooah, The Draft IP Policy that’s MIA, & more on the Think Tank, 3rd December 2014, <http://spicyip.com/2014/12/the-draft-ip-policy-thats-mia-more-on-the-think-tank.html> accessed 12th January 2016

19 Greenhalgh, C. 2013. ‘Science, Technology, Innovation and IP in India – New Directions and Prospects’, University of Oxford, Department of Economics, Discussion Paper Series, p.9

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Economist, The, (2012) *Schumpeter column: Asian Innovation*, March 24th, 2012

The policy needs to provide leadership in fields that we are leaders of, such as in TK and farmers' rights. The setting up of an appellate body for PBR rights is a welcome move. The emphasis on development of TK and TCE is welcome, but the devil is in the detail. The changes in the final version which seem to signify that TK and TCE would be promoted for their own ends is promising. However we come up against an IP culture, which is also promoted by the National IPR policy, which may not be conducive to the growth and development of TK and TCE for their own ends. How are we envisioning our leadership in these aspects as the future unfolds?

There is nothing on equity in the TK section in the policy²¹. The Indian policy, as it is being discussed as a special theme TK in the report, is a follower, rather than a leader on TK policy. It comes from rehearsed options on TK policy, without addressing it from scratch. The proposal for a new *sui generis* law on IP is a way forward, but how is it going to deal with the sticky issues that we know will arise, from observing the difficulties that WIPO is having putting together a global convention on TK, TCE and genetic resources. There are no indications as to innovation. We need as the NESTA report suggested 'a research programme on the 'science of science and innovation policy' and for it to 'be tailored to distinctive Indian strengths: its focus should be on developing new metrics that capture the breadth of India's innovation (including in design, training, organizational or process innovation etc.) and provide new tools for charting India's progress'²².

Three options were discussed in the World Bank report. Option 1 seems to be favoured by the IPR policy. This is also the most fraught in terms of difficulties, and given the need for movement, might a more graduated process of protection be suited? Option 2 of the report was to institute a blanket license for traditional knowledge IPR. This would reduce

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J Sridevan P. (Retd), P. Singh, N.K. Sabharwal, P. Bhargava, R. Srinivasan, U.P. Pandit, *National IPR Policy (Final Draft)*, New Delhi (2015), p.33-34

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Bound, K. and I. Thornton. 2012. *Our Frugal Future: Lessons from India's innovation system*, London: National Endowment for Science, Technology and the Arts (NESTA).pp. 74- 75

complexity of administration and but will leave enough incentives for its protection and use. But issues around international coordination, enforcement and distribution will remain. However this helps separate the urgent from the less urgent, which is a step better than option 1 which is effectively a committee issue, rather than a grassroots issue, and the positive step forward in the IPR policy would reach the frugal innovators yet.

An important change would be to make patents contingent on the obtaining a TK non-objection certificate. This proposal on prior informed consent and benefit-sharing is languishing in the WTO-TRIPS committee and will be a major step change in recognising TK. There is no mention of this at all in the policy. A revival of this discussion will bring it closer to determining a more globally centralised and harmonised solution to TK appropriation, and more importantly put the onus of decisions on TK in the mainstream patent forums, which have effectively cut-off some dead weight discussion by sectioning the innovation sectors into inventions and TK. Although this makes historical sense, this is causing major issues in the arena of IP policy making and causing IP debates where countries like India have a lot at stake.

There is no mention of Traditional cultural expression (TCE) in the special themes section titled Creative Industries²³. The model being aspired to is not *sui generis* but one of harmonisation with existing IP systems, hence the policy that is oblivious to the contribution of traditional culture to the modern world of entertainment and creative industries. There should be a recognition that traditional arts contribute hugely to the creative industries in India and they need to be fostered using a welfarist model of IP.

Pharmaceutical Intellectual Property rights

India has come to be known as the pharmacy of the developing world. India's generic drug industry supplies medicines to large parts of the developing world and contributes significantly to the health of all. The patent laws in India are compliant with international law

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J Sridevan P. (Retd), P. Singh, N.K. Sabharwal, P. Bhargava, R. Srinivasan, U.P. Pandit, *National IPR Policy (Final Draft)*, New Delhi (2015), p. 24-25

in this area, while also seek to utilise the flexibilities provided by international law in order to suit the development pace of the country. Tensions have been created with this approach as there is dissimilar global harmonisation of patent law, and it has resulted in a more welfarist²⁴ model of intellectual property rights, as opposed to a capitalist model of intellectual property rights.

The new National IPR Policy can be seen as the latest effort by supporters of a capitalist model of intellectual property rights to capture policy space. Thus far, it is the judiciary in India that has been at the forefront of determining IP policy by interpreting the scope of IP law. It will soon have to share the space with its parallel pillar of democracy, the executive, to determine and shape IP policy. The methods adopted by these two pillars of democracy are very different and it remains to be seen what implications. Issues of transparency, plague the executive initiative. The influence of pharmaceutical intellectual property sector on the development of intellectual property law is significant. To the outsider it might seem like the tail wagging the dog, and that is just the case. This sector of innovation holds sway over IP frameworks not just in India but in other countries too.

The role of the Indian judiciary has been praised and recommended in other jurisdictions that are implementing the TRIPS Agreement 2005. The issue of access to medicines is an important debate in the implementation of patent law in India. India's patent laws have radically changed twice within the last hundred years. Following the Ayyangar report which criticised the then patent law for leading to very high drug prices, the then government set about dismantling the patent system that existed from before the Indian Independence. It succeeded. But since the ratification of the TRIPS Agreement by India fears have surfaced that this is the beginning of the reversal of the Ayyangaresque policy on IP, especially in relation to patent law. The judiciary have, within the powers they exercise, taken an independent and unique approach in interpreting provisions of the TRIPS Agreement. A change of course seems to be looming on the horizon if the New IPR policy manages to create a different culture for interpretation of IP norms. Will the policy steer a course towards

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See a discussion of three approaches to IP Social Welfare, Industrial and Global, Pugatch, M. P. 2011. Intellectual Property Policy Making in the 21st Century, *The WIPO Journal: Analysis of Intellectual Property Issues*, 3 (1) 71-81, p.73

a pre-independence IP rights protection regime, which was shunned post-independence. Have we not been there and done that already?

In times of soaring prices and unaffordable healthcare, does the government not have an obligation to investigate, like the Nehru government did via the establishment of the Ayyangar commission? Instead all hands are on the deck for an IP policy that seeks to strengthen patent rights.

A passive compliance oriented policy is not useful in addressing innovation challenges in India. The policy aims to foster predictability in the system. This should raise concerns. TRIPS is being continually interpreted in various jurisdictions and the flexibilities are necessary in order to respond to growing and evolving scenarios. Developed and developing countries perceive TRIPS as complete and unfinished products respectively. In fact, there are more objections to TRIPS after its signature than there were before it came into existence. IP Policy needs to be shaped over time, more discursively, become tried and tested.

TRIPS – Plus Provisions: Mission Creep through passive policy?

India's risks passivity in international negotiations with the new National IPR policy. The reform of global IP, particularly in the context of flexibilities, and in the World Intellectual Property Organisation has only come from actively questioning existing IP regimes and its impact on growth, innovation and development. Whither India's voice when it would be following an IP policy that is compliance oriented rather than being world leading and development oriented? After the failure of the WTO Doha Development Round²⁵, it is going to be harder to find policy space for discussing development issues in IP and trade and this is detrimental for IP policy. But then again, WTO cannot do very much if states do not actually initiate what they want²⁶, hence having robust policies at the State-level becomes

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After Doha: Why the Negotiations Are Doomed and What We Should Do About It',
<http://www.theguardian.com/business/2015/dec/20/doha-is-dead-hopes-for-fairer-global-trade-shouldnt-die-too>

26

Lester, S. 2016. 'Is the Doha Round Over? The WTO's Negotiating Agenda for 2016 and Beyond', *Free Trade*

even more important. With WTO being a victim of its own success²⁷, various regional and bilateral forces are at play in the trade, innovation and liberalisation arena. This is a further need to develop robust indigenous policy.

The section containing Objective 3: Legal and Legislative Framework²⁸ of the IPR think tank report reads like a student textbook discussing IP rationale rather than providing a policy stand. It merely states ‘To have strong and effective laws with regard to IP rights that are consistent with national priorities and international obligations and which balance the interests of rights owners with public interest.’²⁹ The specifics are missing, prioritization and urgency are missing from the policy statement. Granted that the policy is a long term vision, but should build on current situation, and suggest solutions and directions. While it is specific about the past (being TRIPS compliant and using flexibilities) when it comes to the future, even the near future, it loses specificity. There is just mention of more research needed³⁰. Compare this with what could have been had had the original IP think tank had continue. The original IP think tank were going to offer ‘guiding principles while negotiating with international partners for free trade agreements’³¹. In section 3.3 of the new think tank’s IPR policy, the objective is to ‘engage constructively in the negotiation of international treaties and agreements in consultation with stakeholders’³² The former approach provides

*Bulletin*64 (11), p.3

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Institutional Developments in the WTO: Recent Trends and the Challenge Going Forward’, *European Yearbook of International Economic Law*, 6, pp. 375-389, at 382

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J Sridevan P. (Retd), P. Singh, N.K. Sabharwal, P. Bhargava, R. Srinivasan, U.P. Pandit, *National IPR Policy (Final Draft)*, New Delhi (2015), p.9

29

Ibid.

30

Ibid., p.10

31

Dutta, S. *Breach of promise on IPR policy?*, *The Frontline*, Dec 12, 2014

32

a basis rooted in the rule of law and would act as a bulwark against political exigencies that arise as part of negotiations. In the same vein, a commitment to ‘ensuring TRIPS compliance and avoiding any TRIPS-plus measures, purely at the behest of a trading partner’³³ would be a welcome policy objective.

The National IPR policy is parrot-like in its insistence on no TRIPS- plus provision, but might that come about in another guise? Nothing about the policy is reassuring that it would not do so .

Conclusion

India’s intellectual property policy is a passive compliance oriented policy, uninspiring and populated by ‘to-do’ lists, rather than taking a principled policy stand on protecting national interests. The glimpses one gets of policy are nothing new. In the main, it seems like India is starting from a clean slate through this policy, or is the intention to wipe the slate clean? The measures taken to harmonise the Indian Intellectual Property Rights system with that of external international rights systems is adopted unquestioningly, leaving little room for the recognition of stark incompatibilities and incongruence between *sui generis* systems and mainstream IP. If eventually, it is the judiciary that is then going to decide on incompatibilities and incongruences, and are left to perform the balancing act, then what direction can the policy give in this regard? It is a lost opportunity.

J Sridevan P. (Retd), P. Singh, N.K. Sabharwal, P. Bhargava, R. Srinivasan, U.P. Pandit, *National IPR Policy (Final Draft)*, New Delhi (2015), p.10

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Dutta, S. *Breach of promise on IPR policy?*, The Frontline, Dec 12, 2014