

INDIAN INTELLECTUAL PROPERTY POLICY

A BASELINE DRAFT BY:

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I. INTRODUCTION

Intellectual property (IP) is of critical importance India, not only from an economic point of view, but also from a social, political, and cultural perspective. While India has a number of intellectual property categories (protected either through statute or common law precepts), it does not have an overarching IP policy as yet. The various intellectual property categories are listed below:

1. Patents
2. Copyright
3. Trademarks/Passing Off
4. Industrial Designs
5. Trade Secrets (protected through common law)
6. Protection of Integrated Circuits
7. Geographical Indications
8. Plant Variety Protection
9. Rights of Publicity (protected through common law)
10. Bio-diversity Protection

All of the different categories above (barring trade secrets and publicity rights) are dealt with through separate statutes. The aim of the IP policy is to identify a set of core common principles underlying these various IP categories.

The policy also sets out a framework for the evolution of future IP norms in India, ensuring that India plays a significant role in the global economy, whilst at the same time protecting her national interest.

It is hoped that this exercise will unearth fundamental philosophies that reflect what is unique about Indian IP and serve as a guiding light to all who seek to understand India's IP environment. In particular, the policy will serve as a valuable restatement of India's foundational principles and enable it to negotiate more effectively with its trading partners.

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However, it bears noting that this policy formulation is not intended to have the force of law, but merely to serve as guiding principles in the administration and enforcement of intellectual property norms.

While India will continue to draw on foreign precedent from jurisdictions that have had a longer and more sophisticated history with intellectual property, it will not blindly adopt their norms. Rather it will seek to adapt them to the local conditions in a bid to promote and protect national interest. Much in line with words of wisdom from the father of the nation, Mahatma Gandhi who once said: "I do not want my house to be walled in on all sides and my windows to be stuffed. I want the cultures of all lands to be blown about my house as freely as possible. But I refuse to be blown off my feet by any.'

India is best characterized as a technologically proficient developing country. Therefore, the rigid categorisations of developed versus developing countries and the attendant IP norms that they are meant to encompass may not strictly apply to India. India will need to evolve new norms that leverages its technological proficiency and yet is conscious of large segments of the population that count as poor and underprivileged for whom access to important IP goods such as pharmaceuticals will be crucial. Section 3(d) of the Patents Act, 1970 is a case in point. While it has created unrest with some trading partners, it creates an effective bright line rule for weeding out the high quality pharmaceutical patents from the low quality ones that do not deserve the 20 year monopoly guaranteed by a patent.

Given that intellectual property legislations have had a long vintage, India will attempt to innovate and explore newer norms to suit the exigencies of a world that is getting increasingly more complex and uncertain. There are no fundamental or established truths in intellectual property. To this extent, alternative IP regimes that foster a higher rate of innovation whilst at the same time ensuring affordable access and a healthy dose of competition will be explored and promoted where feasible.

India's economy is connected with the global economy. While it must be conscious of national interest, it will also take into account its interdependence with the larger world economy and the global innovation imperatives.

India's legal framework on IP, including various judicial pronouncements are to some extent, reflecting of the underlying policy framework and our IP ethos. To this extent, it bears noting that this policy does not seek to replace any existing IP statutes or judicially pronounced norms. Rather it merely reiterates such norms and builds on them to advance national interest in the most optimal way possible.

II. OBJECTIVES

While the introduction already spells out most of the core objectives underlying this articulation of a national IP policy, they bear repetition below:

- 1. Common Core Principles:** To identify core common principles as would aid the protection, administration and enforcement of current intellectual property norms, bearing in mind a fair balance between IP rights and obligations.
- 2. International Agreements:** To identify principles upon which the country can negotiate with foreign trading partners in so far as bilateral/multilateral IP norms are concerned.
- 3. New Norms:** To progressively articulate new norms or amend existing ones based predominantly on data driven evidence, keeping both national interest and the global innovation ecosystem in mind.

III CORE COMMON PRINCIPLES

1. Intellectual Property and Innovation/Creativity

Intellectual property laws are meant to foster innovation and creativity. To this extent, they are not an “end”, but merely a means to an end. As such, they require careful calibration, balancing out the interests of the innovator/creator on the one hand, and the public on the other.

Empirical studies on whether and to what extent intellectual property regimes incentivize innovation continue to remain inconclusive. Therefore, any new norm in intellectual property or any amendment thereto will be adopted only after careful cost benefit analysis. Wherever possible, data driven studies will be conducted.

Further, 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.

Given that intellectual property is merely one of the tools to help incentivize innovation, India will explore alternative innovation incentives that could work more optimally than existing regimes and/or complement them. In particular, it will explore alternative mechanisms to foster funding into diseases that disproportionately affect India and the developing world

(widely referred to as neglected diseases), including prizes and open source/access models (such as the OSDD).

2. Intellectual Property and Commercialisation

IP rights are not meant to be hoarded, but are to be used in a productive way to foster a higher yield of innovative products and services. To this end, innovators and creators who own intellectual property will be encouraged to convert them to useful products and services for society. Where possible, the government will provide support (both monetary and otherwise) to help commercialise intellectual property, particularly for small and medium enterprises, and individual and grassroots innovators. Further, under-privileged and neglected segments of India's informal economy will be provided extensive support, particularly artisans and others who may benefit from participating in India's IP regime and generating wealth for themselves and their communities.

Patent trolls and other similar entities that register intellectual property for the mere purpose of extracting excessive rents without any interest in developing products/services or in legitimately licensing the technologies with a view to fostering their development, will be discouraged. Towards this end, suitable legal measures that strengthen the current framework may be explored.

3. Intellectual Property, FDI and Technology Transfer

India will make all efforts to generate wealth through intellectual property rights. However it will do so in a manner that adequately results in an equitable distribution of such wealth, and with minimal social and other costs.

To the extent that intellectual property norms have a credible nexus with investment, they will be encouraged and strengthened. Here again, data driven studies will be undertaken to assess the nexus between FDI and IP norms and the costs of introducing stronger IP norms.

Norms will be shaped and incentives granted to encourage Technology transfer, particularly in critical areas such as climate change technologies and biologics. The feasibility of a specific legislation to protect trade secrecy (currently protected through judicially pronounced common law norms) will be explored. In view of the government's 'Make in India' policy, such a law

should be framed keeping in mind the necessity of access to tacit knowledge by firms actively engaged in manufacturing in India.

4. Intellectual Property and Enforcement

IP rights will be protected and enforced as best as possible to offer robust protection to IP rights holders. A slew of measures including protection against counterfeits, border control and criminal enforcement will be strengthened keeping in mind the need to protect consumers against deceptive practices. However, such a supportive enforcement framework provided by the government will hew closely to the jurisprudence evolved by courts, and seek to balance the interests of the rights holder in strong and effective enforcement with the rights of the public to guard against IP excesses and avail of various IP defences, as outlined in the next head below.

Enforcement agencies will be provided state of the art training and infrastructural support. However 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.

5. Intellectual Property and Public Interest/User Rights

Intellectual property regimes are not limited to merely granting private rights to innovators and creators. Rather the key objective of these regimes is to encourage public good through such private grants. To this extent, the regimes represent a careful balance between the rights of the innovator on the one hand and the rights of the public to access and build on these innovations/creations, on the other.

As noted by several court decisions and as gleaned from the text of various IP legislations in India, public interest forms a significant part of the IP calculus and will be strengthened as far as possible, particular in relation to critical areas such as access to medicines and education.

In order to aid the larger public good, IP regimes do not merely grant “rights” to IP owners, but also impose “duties” on them. Illustratively, the patent regime mandates that patent owners make available their technology goods in an affordable and accessible manner to the public. Else they will be subject to compulsory licensing. While rights holders will be encouraged to fulfill their part of the social bargain, the government will not hesitate to deploy compulsory licensing, price control and other measures where the rights holders so fail and where the government deems it necessary to check IP excesses and abuse.

Further the various exceptions and limitations in favour of the public, enabling them to access protected content for select purposes will be treated not as bare minimum exceptions to be interpreted narrowly, but as key expositions of valuable public policy concerns articulated through the statute that must be given meaningful construction in order to aid the growth of a valuable public domain.

6. International IP norm-setting

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).

IV SPECIFIC FOCUS AREAS

It is well nigh impossible to traverse the entire length and breadth of Indian IP whilst formulating a national policy. Rather, some core areas of critical concern calling for immediate action are highlighted below.

1. Informal Innovation and Inclusive Intellectual Property

Although 90% of the Indian economy qualifies as “informal”, the current IP regimes do not cater to this sector. Firstly, there is a serious lack of access to IP regimes in so far as India’s poor and informal bottom of the pyramid people are concerned. This needs to be rectified at the earliest and creative solutions need to be found. 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.

The focus will be on ensuring access to IP goods for these communities, and more importantly, to help generate more IP and unleash more innovation and creativity by these communities.

Access to the IP regime becomes critical here. And if the formal regimes are inaccessible for cost and registrability reasons (high patent threshold), we need to find alternative regimes that would work optimally for this sector. Comparative evidence from other jurisdictions suggests that on a cost benefit analysis, there is mixed response regarding the utility of utility models legislation (petty patents) in augmenting informal innovation. In exploring any such model, India must first undertake a robust cost benefit analysis and

ensure that it does not reverse the policy gains achieved through the existing IP laws (viz, the patent law and industrial designs law).

2. Intellectual Property Administration

In order for the IP regime to work well, it is absolutely critical that we have a set of well functioning IP offices that are administered efficiently. Towards this end, the government will make all efforts to recruit the best talent to man these offices and to undertake the task of scrutinizing IP applications and registering them in strict accordance with the statute.

Efforts will be made to identify best practices in relation to the working of IP offices worldwide. Infrastructure, including access to key databases for prior art searches etc would be enhanced. Lastly, IP officials would be given more intensive training from time to time, both in terms of technical expertise as also in terms of legal fundamentals as would enable them to perform their role as quasi judicial officials in a better capacity.

3. IP Linkages and Inter-agency Co-ordination

Each IP category as outlined earlier is protected either through statute or common law is under the administrative supervision of one or more government agencies as outlined below.

1. Patents: Ministry of Commerce
2. Copyright: Ministry of HRD
3. Trademarks/Passing Off: Ministry of Commerce
4. Industrial Designs: Ministry of Commerce
5. Trade Secrets (Breach of Confidence): protected through common law (judge made law)
6. Protection of Integrated Circuits: Ministry of IT
7. Geographical Indications: Ministry of Commerce
8. Plant Variety Protection: Ministry of Agriculture
9. Rights of Publicity: protected through common law
10. Bio-diversity Protection: Ministry of Environment

As can be expected, this poses a co-ordination challenge. The government will take steps to ensure more regulatory coordination between these different agencies so that the norms and strategies evolved are broadly in sync, and that we speak with one voice particularly when it comes to international fora.

Apart from the above, there are agencies that deal incidentally with intellectual property such as the Competition Commission of India, tasked with the power to control IP excesses that have a detrimental impact on competition. The lack of regulatory clarity and certainty regarding the

relationship between IP and competition law poses challenges to businesses and consumers. In this regard, the Competition Commission of India will be encouraged to issue office practice guidelines. Wherever possible, inter-agency coordination and dialogue will be encouraged so that a more coherent jurisprudence develops.

4. Intellectual Property and Tradition

India's traditional knowledge will be safeguarded from misappropriation to the best extent possible. India will continue playing a lead role in current efforts to formulate an international treaty on this count.

India will also attempt to work out domestic policy norms for the safeguarding and protecting of its traditional knowledge, whilst also fostering access to such valuable knowledge, where feasible. The Traditional Knowledge Digital Library (TKDL) will be continually updated and expanded, where possible to aid in its mission in preventing the misappropriation of Indian traditional knowledge. Further, India will also evaluate the prospects of moving from a purely defensive approach in TK/bio-resources to one that also proactively leverages the resources in question to generate more national wealth and benefits for all, particularly the communities that are custodians of traditional knowledge.

5. Data Driven Policy Making

Unfortunately, a number of IP debates and norms turn on rhetoric, emotion and untested assumptions. One needs to move away from such faith based IP towards fact based IP. Future norms for India will be predicated on data driven evidence as far as possible. The government will encourage empirical studies and surveys from a wide variety of stakeholders. Different ministries responsible for specific sectors viz., Ministry of Micro, Small and Medium Enterprises, Ministry of Agriculture, Department of Science and Technology, Department of Biotechnology etc... will be required to generate and share innovation related data and that can inform effective IP policy making.

6. Transparency, Accountability and Efficiency

Intellectual property is a key component of the knowledge economy. Access to valuable scientific and technological information lie at the heart of most IP regimes. Transparency of IP information will therefore be promoted and IP rights holder will be encouraged to submit information as per the dictates of each statute such that the public can benefit. Such information will not only increase the knowledge quotient of society but also enable a more

transparency functioning of India's IP offices and therefore lead to better governance.

7. Recalibrating Current Regimes

Intellectual property norms are not meant to be static, but fluid so that they respond well to the latest scientific and technological advancements and the various equitable/public interest concerns.. The regime therefore requires recalibration from time to time. To this end, periodic assessments of IP norms and whether or not they work well for national interest will be undertaken by the government and its agencies as also by supporting academics and researchers that wish to delve into this. The government will leverage TRIPS flexibilities to the fullest..

As a bare minimum, the government will seek to identify areas that could be reformed with minimal contest from the different stakeholders, such as removing ambiguities and inconstancies from the text of various IP legislations.

8. IP Dispute Resolution

There is no gainsaying the fact that dispute resolution in India is long winded and expensive. Efforts will be made to streamline IP dispute resolution including exploring alternative modes of resolution that are less contentious and swifter. Intensive training programmes for all involved in the dispute resolution ecosystem will be conducted. India's specialist IP dispute resolution body will be strengthened and provided more resources, so as to make for a more efficient and speedier functioning.

9. Education/Romanticisation of IP

In order to mainstream intellectual property debates and policy and engage with a larger set of stakeholders and members of the public, the government will support a series of measures to create more awareness around intellectual property and to help unleash the innovative and creative potential of the nation on a large scale.

In particular, it will explore the feasibility of introducing intellectual property awareness in schools.

The government will think through a slew of measures to help romanticize IP (within the overall innovation and creativity matrix) at the national level. And to attract more people to the fold. In particular, it will explore the possibility

of creating National Hall of IP for leading innovators and creators. It will attempt to institute and encourage the institution of more awards for creative ideas. It will also try and support a TV series on innovation/IP.

10. Specific IP Policies

Given that this is a broad based policy that covers all IP heads, one cannot delve too much into specific IP categories. Such specific policies for each distinct IP head will be carved out in future (patent policy, GI policy, copyright policy etc), broadly in conformity with this larger umbrella IP policy umbrella.

Also, the government will, with the help of various stakeholders, identify areas of specific national interest (eg. pharma, IT, telecommunications, standards, green technology, traditional knowledge, agriculture, handicrafts (GI) etc) and attempt to craft appropriate sector specific IP policies. Given that general intellectual property norms are meant to be technology neutral, such sector specific norms will be formulated only if absolutely essential.

Lastly, the government will ensure that all forms of IP receive national attention and not just pharmaceutical patents, which garner the most attention today.

In particular, it will focus on hitherto neglected IP areas, which are of key importance to India's informal and poorer sections such as plant varieties, GI, TK etc. Attempt will be made to help larger sections of India's population access these IP regimes and then use the regimes and the ensuing registrations to commercialise their wares and create wealth for their communities.

The government will also investigate the need for a specific statute covering trade secrecy (as of today, this IP head is protected through judge made common law). While the tort of unfair competition is a heavily contested one, given that one court has allegedly inducted it into India's jurisprudence, this will also be explored.

11. Public Funded Innovation/IP

Public funded innovation/IP will be a key focus and the government will explore an optimal regime to help capture the IP generated through publicly funded research, whilst at the same time ensuring that research priorities are not skewed as a result of this IP focus and that such IP must serve the public interest. The role of alternative innovation incentives and their substitutability /complementarity with existing IP incentives for this sector will be explored. A bill that sought to provide an enabling framework for such IP did not pass

Parliament as it provided for a punitive and not a facilitative framework, and the government will assess the feasibility of introducing a newer more progressive version of this bill .

12. Broadening Stakeholder Representation

In order to engage more democratically with IP policy making, India will widen stakeholder representation. In particular it will ensure that even informal India (particularly farmers, artisans, GI holders and several others from underrepresented sections) are represented in the IP deliberations.

13. Balanced IP enforcement

Currently, India has unilaterally ratcheted up its IP enforcement standards in many areas well beyond the minimum obligations under the TRIPS Agreement, often at the cost of the civil liberties of defendants. 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.