THE NATIONAL IP POLICY, 2016-A STUDY

A Dissertation submitted to the National University of Advanced Legal Studies, Kochi in partial fulfillment of the requirements for the award of L.L.M Degree in International Trade Law

THE NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES

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PREFACE

The ability of any nation to retain a competitive edge in the world rests on its ability to innovate as well as create & maintain an environment which aims to nurture, protect & sustain innovation. Innovation drives growth and positive social change particularly so in countries such as India which are reaping and will continue to reap the windfall of a younger demographic in the coming decades. In September 2010, the Government of India "realizing that innovation is the engine for national and global growth, employment, competitiveness and sharing of opportunities in the 21st century", declared 2010-2020 as the 'Decade of Innovation'.

India needs innovation to not only ensure it remains competitive on the world stage but also to deliver to its various sections the benefits of innovation ranging from hardier crop varieties and weather information to advanced Medicare and drugs. In order to reconcile, develop & sustain a national effort at bolstering innovation, and ensuring the protecting of arising Intellectual Property Rights including international IP in India, a unified vision and "mission statement" is required. This unified and harmonized "Policy" road map is even more critical given that the responsibility for the different IPR species rests with different arms of the Government leading to a fragmentized effort which at the end of the day falls short of ensuring robust as well as just laws, regulations aimed at protecting and equally importantly balancing such exclusive rights with the national interest.

In India securing its rightful place among the leading nations of the world, it cannot ignore and must in fact make every effort to fulfill its International obligations as a responsible member of the World Trade Organization and related treaties and compacts.

This policy framework seeks to protect & further IP and recognize the importance of innovation being a prime driver of and benefits of securing India's ascendancy on the global stage. In order to ensure that innovation in India is able to contribute to Indian social and economic development, Intellectual Property Rights must be assessed, recognized and protected as a critical asset in informing and contributing to Indian growth trajectory. Through this work we are trying to analyze the National IP Policy adopted in the year of 2016 and to point out its pros and cons. Also made certain recommendations in the end.

LIST OF ABREVIATIONS

SI NO.	ABBREVIATION	FULL FORM
1.	ASEAN	Association of South East Asian Countries
2.	AYUSH	Ayurveda Yoga Unani Siddha and Homeopathy
3.	BRICS	Brazil Russia India China and South Africa
4.	CBSE	Central Board of Secondary Education
5.	CIPAM	Cell for IPR Promotion and Management
6.	CSIR	Council of Scientific and Industrial Research
7.	DIPP	Department of Industrial Policy and Promotion
8.	EU	European Union
9.	GI	Geographical Indication
10.	IP	Intellectual Property
11.	IPR	Intellectual Property Rights
12.	KIPS	Kids Intellectual Property Series
13.	MNC	Multi National corporation
14.	MPDA	Motion Picture Distributors Association
15.	NCERT	National council of Educational research and training
16.	PAMS	Patent Analysis and Management System
17.	PCDA	Patent Committee on Proposals Related to a WIPO development Agenda
18.	R&D	Research and development
19.	RBI	Reserve Bank of India
20.	RGNIIPM	Rajiv Gandhi National Institute for Intellectual Property Management
21.	RSA	Republic of South Africa

22.	SAARC	South Asian Association for Regional Cooperation
23.	TETRACOM	Technology Transfer in Computing Systems
24.	TKDL	Traditional Knowledge digital Library
25.	TKDS	Traditional knowledge Docketing System
26.	TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
27.	U.S	United States
28.	WCT	WIPO Copyright treaty
29.	WHO	World Health Organisation
30.	WIPO	World Intellectual Property Organisation
31.	WPPT	WIPO Performances and Phonograms Treaty
32.	WTO	World Trade Organisation

TABLE OF CASES

SI No	CASE NAME	CITATION
1.	*Novartis A.G* v. *Union of India*	(2013) 6 SCC 1
2.	*Natco* v. *Bayer Corporation*	Order No. 45/2013, ¶ 40 (Intellectual Property Appellate Board, Chennai), available at http://www.ipab.tn.nic.in/045-2013.htm
3.	*CCH Canadian Ltd. v. Law Society of Upper Canada*	[2004] 1 S.C.R. 339
4.	*BDR Pharmaceuticals Pvt. Ltd. Vs Bristol Myers*	I.A. No.15720/2009 in CS(OS) No.2303/2009

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CHAPTER-1

INTRODUCTION

"Patience is bitter, but its fruit is sweet."

-Aristotle-

This quote proved to be truly working for the 2016 National IPR policy. This much-anticipated policy finally received cabinet approval on May 13, 2016, and all sectors were able to gain a positive response. This all-encompassing policy aims to build a holistic environment conducive to leverage the full potential of intellectual property for the nation's economic, social, and cultural growth. The policy is one of its kind, involving, on the one hand, every conceivable sector from a village industry to an academic and research institution in the process of successful creation and use of IP while, on the other, balancing the public interest. India has a plethora of ruthlessly flowing creative and innovative energy, which will result in a global transformation of its economy if channelized correctly.

It was a surprise when such policy was released by the Ministry of Commerce and Industry's Department of Industrial Policy and Promotion (DIPP). The surprise is that India undertook massive legislative measures only a few years ago to amend patent, copyright, and trademark and design acts and no new measures are on the anvil. In addition, witnessed wide-ranging and contentious debates over issues related to "compulsory licensing" and "evergreening" of patents by foreign drug majors in the last years.

Unfortunately, India remained under pressure from the U.S. pharmaceutical lobby and the U.S. Trade Representative with suggestions for tightening IPR laws and regulations beyond the international obligations of India. In response to concerns raised by NGOs, India's government told critics that it will not resort to external pressure in implementing IPR amendments. Unfortunately, the new IPR text, in particular its reframing of IPR targets, seems to send a different message.

While the efforts made by high-powered committees to formulate the document are commendable, it raises more doubts than it attempts to resolve. This states, for example, that all "information" should be "transformed into IP properties." This implies that national policy should "share the value of IP rights" by using "eminent personalities as ambassadors." Sadly, it betrays an IPR system imbalance that can tip the balance away from access to vital public goods. There is substantial consensus between economists and the scientific community that IPR has little potential to foster progress in and of itself.

In addition, the policy places undue emphasis on publicly funded research institutions such as those under the Scientific & Industrial Research Council (CSIR) to generate more property rights through IPR. India needs a clear vision and guidelines on how to commercialize and cover the work of scientists using public money through IPRs. The policy in its current form fails to take note of the fact that an IPR policy must reasonably balance the concerns of all stakeholders and cannot be seen as an instrument offering absolute protection for products on the market.

The best elements of the paper are found in the third purpose that addresses the constitutional and regulatory system. It reiterates that India should use the flexibilities available in international agreements and reaffirms its adherence to the Doha Declaration on Trade-Related Aspects of the Agreement and Public Safety on Intellectual Property Rights.

It is commendable to have the need to improve IP office management. Yet, the well-intentioned idea loses its significance without adequate cost-benefit analysis. Apart from this, it states this IP disputes should be adjudicated by "private courts, set up at the correct stage." Furthermore, the document fails to mention the fate of the Intellectual Property Appellate Board, now an orphaned infant, set up under outside pressure.

Promoting and creating IP is not an exercise in a few pieces of a puzzle being realigned. It calls for a broader understanding of competing problems. The policy document is correct in its accent and the pride it takes as a artistic hub in India. A policy that positions IP as the main focal point or the key to innovation in a specific way lacks a holistic understanding of the dynamics attached to science / knowledge generation and how IP laws and standards impact them.

At this Juncture, the present research paper dissects the National IP Policy and studies the important features and flaws of the policy. Moreover, it seeks to put forward certain opinions and recommendations so as to create positive environment for innovation and development.

CONTEMPORARY RELEVANCE

Unlike any other creature in this world, humanity is endowed with the power of thought. The human mind is a unique creation that enables one to think and act. In the human mind imagination is the explanation behind all or at least most of the inventions that occur almost every day in various fields. Protection of IPR is very important to the founder or inventor from a personal and business perspective. If no proper security is granted via IPR, then any person, organization, and company will have high chances of misuse of IPR. In India, patent, trademark, copyright and design are most widely recognized IPRs.

Now, for the first time, the Government of India has taken a constructive approach to drawing up a roadmap for the country's IPR and has come out with a strategy to strengthen the country's investment climate and encourage innovation and enhance national competitiveness; India has also proclaimed this decade as the 'Decade of Innovation.'

The study is confined to identifying the positives and negatives of the National IP Policy of India. Also, for the purpose of recommending some desirable changes in National IP Policy the study shall also refer to some of the essential features of the National IP Policy of BRIC Countries.

OBJECTIVES AND PURPOSE OF STUDY

1. TO SCRUTINIZE THE NATIONAL IP POLICY OF INDIA AND EXAMINE THE IMPORTANT FEATURES OF THE POLICY.

2. TO ANALYSE THE SIGNIFICANT PROGRESSIVE STEPS TAKEN IN THE NATIONAL IP POLICY.
3. TO IDENTIFY THE FLAWS OF THE POLICY AND THE IMPACTS OF THE SAME.
4. TO COMPARE AND ANALYZE THE POLICY WITH THAT OF BRICS COUNTRIES POLICY

STATEMENT OF PROBLEM

India has enacted several Acts for the protection of IP via Copyright, Patent, Trademark, GI, Designs etc. But still there exists several loopholes in the IP system and at this juncture a Single policy covering all the Intellectual Property Rights has been drafted by the Central Government. This Dissertation aims to analyse whether the Indian IP regime fulfilled all the loopholes by adopting the IP Policy.

RESAERCH QUESTIONS

1. Whether the Indian IP regime fulfilled all the loopholes by adopting the IP Policy?
2. Whether the policy has made progressive steps for advancing the innovation and creating an environment for IP generation?
3. Whether the policy has any flaws? If any, the impacts of the same?
4. Whether the policy has any resemblance with that of the BRICS Countries policies?

HYPOTHESIS

National IP Policy fails to address several critical issues including piracy and compulsory licensing with respect to IPR regime in India.

RESEARCH METHODOLOGY

I would like to conduct a doctrinal research method on this subject.

SCHEME OF CHAPTERS

Chapter 1: Introduction and Contemporary Relevance. It provides an overview about the study in general and what are the objectives behind it.

Chapter 2: In this Chapter an Evolutionary study of the policy is detailed. It includes the Background, vision, Mission and its Aims of the Policy. This policy which will set out the future roadmap for IPRs in India and as this study is its analysis, thoroughly explained its objectives and features. The progressive steps and structural changes are also mentioned.

Chapter 3: In this chapter an overview of the policy's working is detailed. It includes how does it carried out its objectives, the plans, the bodies associated with that as well as the impacts of implementing those on Pharmaceutical production as well as on Information Technology Industry .Further it also deals with Role of States in protecting and promoting innovation and Multilateral Negotiations. It also points out the flaws and certain drawbacks in the policy.

Chapter 4: In this chapter National IP Policy V. WIPO Development Agenda is explained. It began with a small introduction and a background study regarding WIPO and latter The 45 Recommendations adopted by them are explained. Afterwards a comparison is made between WIPO Development Agenda with that of the IP Strategy in India

Chapter 5: As India is a signatory in the BRICS this chapter deals with the analysis of ip policies in European Union, South Africa, China and to analyze our policy in light of these countries. Also mentioned the things that India could adopt from them.

Chapter 6: This chapter includes conclusion, findings and certain Recommendations

REVIEW OF LITERATURE

1. Josh Lerner, The Empirical Impact of Intellectual Property Rights on Innovation: Puzzles and Clues , INTELLECTUAL ROPERTY RIGHTS AND ECONOMIC GROWTH IN THE LONG -RUN : A DISCOVER MODEL (2009).

The book argues that there is no direct connection between IPR and innovation on the basis of empirical study. The traditional understanding that the grant of IP rights will lead to a hike in innovation has been proved by the author to be a myth.

2. K.M Gopakumar, National IPR Policy: A Reality Check, Deccan Herald, June 5, 2016

This article is a critical analysis of the National IP Policy and it lays down the events that led to the drafting of IP Policy. It goes on to identify the pros and cons of the policy and also gives a review on the same.

3. Sri.vidhyaRaghvan, A Policy without Intellectual Clarity, https://thehindubusinessline.com/opinion/a-policy-without-intellectual-clarity/article8682479.ece (last visted sept. 15 2019)

This article gives an idea about the areas which the National IP Policy has left out and the ambiguity in certain recommendations put forth by the policy. The article considers policy as one drafted in haste without amble deliberations.

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2. "Open Standards Policy", available at http://cis-india.org/news/open-standards-policy (last accessed sept.12, 2019).

3. Joseph E. Stiglitz, Economic Foundations of Intellectual Property Rights, 57 *Duke Law Journal* 1693-1724 (2008) Available at: https://scholarship.law.duke.edu/dlj/vol57/iss6/3
4. https://spicyip.com/2014/12/national-ipr-think-tank-whats-going-on.htm
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CHAPTER- 2

THE NATIONAL IP POLICY,2016 – AN EVOLUTIONARY STUDY

The origin of the State is one of the attempts made for the protection of interests of society. In ancient society, there were mainly two problems of living, namely, food and security.[1] The State was obliged to provide security and food arrangements. Since the beginning, the maintenance of the State was dependent on society (the concept of taxation). And thus, the State protected the life and 'property' of the individuals. The idea of property emerged due to the natural needs of the developing society, as the development of the nation is directly proportional to the development of individuals. Generally, the term property is defined as the objects which are owned or those in which the right of ownership can be expanded. It includes both living and non-living things such as lands, debts, chattels, shares, etc.[2] In the broader sense, it can be coined as those things without which one cannot live. It includes the right to life, good reputation, personal liberties, etc. Thus property can be treated as personal as well as proprietary rights, and every individual is entitled to the same.

Jurists have differed in their opinion regarding the origin of the property. Theories of the property include,[3]

1. Natural law theory,
2. The labor theory/ positive theory,
3. The Metaphysical theory,
4. The historical theory,
5. The psychological theory,

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[1] Suri Ratnapala,jurisprudence(3 ed.2017)

[2] Jonathan Griffiths, *Intellectual property as property, In* CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW 9–182 (Helena Howe ed., 2013).

[3] Stephen R. Munzer, *Frontmatter, in* A THEORY OF PROPERTY i-iv (1990).

6. The sociological theory,
7. The theory which states the property is the creation of the State.

The branch of the proprietary jurisprudence, which deals with the immaterial products of the human intellect, is known as the 'Intellectual Property Rights. In the broader sense, it means the legal property, which results from intellectual activity/ creations of minds. It is divided into two categories: Industrial property and copyright. The principles of proprietary jurisprudence, which are readily applicable to the basic concept of property, about the intellectual property, it becomes tough to apply. The concepts of possession and ownership, while applied to intellectual property, become more complex. Similarly, the other fundamental theories of the proprietary jurisprudence are though made applicable in respect to the intellectual property, but in a modified version.

The history of intellectual property is fascinating and complex. Its past can be traced back to 500 BCE when Sybaris, a Greek state, granted for its citizens to obtain a one year patent for "any new refinement in luxury."[4] Patent, copyright, and trademark laws have become more sophisticated in the ensuing centuries, but the intent remains the same. Countries initiated to protect intellectual property laws to enrich creativity and thus providing the inventor to reap the benefits of their inventiveness. These rights can be traced under Article 27 of the Universal Declaration of Human Rights, which dealt with the right of the owner to benefit and to claim the protection of material and moral interests resulting from authorship of scientific, literary or artistic productions.

The importance of intellectual property was first recognized through the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886). Both treaties were superintended by the World Intellectual Property Organization (WIPO). The significance of the intellectual property in India is well established at all different levels, such as statutory, judicial, and administrative. India had ratified the World Trade Organization (WTO) deal. This agreement, inter-alia, includes an Intellectual Property

[4] Law office of Jeff Williams, intellectual property achieves,2 available at https://txpatentattorney.com/blog/category/intellectual-property/page/2/(last accessed 10Apr 2020)

Rights Trade-Related Aspects Agreement (TRIPS), which entered into force on 1 January 1995[5]. It sets minimum requirements for the protection and enforcement of intellectual property rights in the Member States, which must encourage fair and sufficient protection of intellectual property rights to eliminate distortions and obstacles to foreign trade.[6]

The Indian government, under the Make in India initiative, has recognized the intellectual property as one of the crucial factors in its vision for long-term development. The government is providing incentives for startups in the form of concessions in the application fees up to 80 percent, especially for small and medium enterprises (SMEs).[7] Government policy can be considered as a manifestation of the intentions of the Government in a particular subject matter. It is a set of guidelines for governance in a particular area. It is a common practice in a democracy that when a political party forms a Government, it tends to draft policies in specific arenas of public life. Often such systems will be in line with the political ideology that the party in power follows. The present Union Government have a pro-IP stand. This political lineage has inspired the Government to adopt a policy governing the Intellectual Property regime in the country. Thus the first National IP Policy of India has been adopted and notified by the Central Cabinet under the headship of Shri Narendra Modi on 12th May 2016.[8] It is for the first time that a policy has been drafted by the Government to give guidance to the protection of Intellectual Property in the country. It covers all the Intellectual Properties like Design, Patents, Copyright, Trademark, Geographical Indications, Integrated Circuits, .and Confidential Information. A separate policy on each of the subject matter in IP will hamper the adequate protection of IP in case of innovations that involve the interface of different IP's. Therefore, the policy summons all

[5] Intellectual Property Rights and Biotechnology: An Overview. http://www.biologydiscussion.com/biotechnology/intellectual-property-rights/intellectual-property-rights-and-biotechnology-an-overview/11921(last accessed on 5 Feb 2020)

[6] Essay on the importance of intellectual property. http://www.shareyouressays.com/essays/essay-on-the-importance-of-intellectual-property/89528(last accessed on 5 Feb 2020)

[7] Business Today, India sees huge surge in Intellectual Property rights applications, available at https://www.businesstoday.in/buzztop/buzztop-feature/india-sees-huge-surge-in-intellectual-property-rights-applications/story/280092.html(last accessed 11 Apr 2020)

[8]National IPR Policy, Brief about the policy, available at http://dipp.nic.in/policies-rules-and-acts/policies/national-ipr-policy (last visited Oct. 11, 2019).

the IP into a single framework and aims to protect the innovations through a comprehensive manner by identifying the interactions between different categories of Intellectual Property. The policy is a harbinger to the future journey of IP in the country.

- The Policy is based on the arguendo that more IP means more innovation. It is based on the logic of incentive theory concerning the justification of Intellectual Property Rights. The incentive theory presupposes that if the creator of an innovation is given incentive for his creativity, it will encourage others to come up with innovations. Moreover, the incentive inspires the innovator to disclose the invention to the public. IP laws give the inventor the right to a monopoly over the invention for a limited period. Hence the National IP Policy emphasizes the need for giving monopoly rights over the intellectual property created. Furthermore, the policy seeks to supplement Government projects such as “Make in India,” “Skill India,” “Digital India,” etc. which aims to boost innovation and scientific development in India. The policy recognizes the torrent of innovations that are happening in India and focuses on the need for streaming all of them into a single productive channel. It reiterates that the IPR laws in India align with the TRIPS agreement and gives pressure on the significance of creating a healthy IP environment where innovations are protected. The entire policy is permeated with the idea that awareness needs to be created about the commercial value of IP.

The National IP Policy mainly deals with the need for reforming the existing IP laws and also stresses on reviewing the IP protection given to individual cases. The international approaches have also been considered in the policy so that it can be applied to the Indian scenario with appropriate changes. On the one hand, the policy identifies the IP laws in India as TRIPS compliant, and on the other hand, it seeks to utilize the leverage or flexibility that is allowed by TRIPS. TRIPS only sets a minimum set of standards to be followed by the signatory countries. The maximum limit of IP protection can be decided by the individual countries themselves. Thus the countries are free to determine the level of IP protection within this framework. Since IPR is a monopoly right, there is an inherent chance of it being abused, and the right holder may, at times, abuse the right to gain advantage or dominance over the parallel competitors. This abuse will lead to stagnation in the market, and it leads to anti-competitive market practices. It is for this cause that the TRIPS agreement obliges the State to prevent the

abuse of IP rights.[9] The capitalist market survives on market freedom and competition. Hence the abuse of IP rights is considered to be a severe issue, and the public is affected by such abuse. For instance, if a pharmaceutical company that owns a patent abuses its dominance and restrains other companies from entering the market, the public will be deprived of the choice in consumption, and they have to buy the pharmaceutical products at a price fixed by the dominant party. In light of these circumstances, the policy has recognized the need to balance the IP rights with that of public interest. The policy also puts forth a formula to achieve this balance, i.e., to make use of the flexibility provided by TRIPS. One of the flexibility provided by TRIPS is contained in the Doha Declaration. The Declaration was adopted by the WTO Ministerial Council in the year 2001. It is based on Bentham's idea of utilitarian justice, which aims at maximum happiness for the greatest number.[10] Doha declaration allows the member countries to restrict patent rights to export the pharmaceutical products to an underdeveloped country which faces a health emergency. The patent rights are also subject to restrictions in such importing countries. The National IP Policy reaffirms the commitment of the country towards the Doha Declaration. Thus the intention of the policy to strike a balance between the private IP rights and public interest is crystal clear. The policy further focuses on providing access to medicines at affordable rates through cross partnerships between P.S.Us, private entities, and N.G.Os. It also gives impetus to the alternative models of research, such as open-source research by CSIR.[11] The policy has taken a giant leap by ensuring that the stakeholders are consulted for finalizing the stand that the country ought to take in International consultations concerning IP. It further moots the need for guidelines to help the parties in reaching just and reasonable licensing terms when it comes to standard essential patents. The entire policy is based on the canons described above or principles. The policy is expected to give a direction to the adequate protection of Intellectual Property Rights in India.

9 Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 40, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

[10] V K Ahuja, Law Relating to Intellectual Property Rights, Lexis Nexus (2013)

11 National Intellectual Property Rights Policy, 2.10 available at http://dipp.nic.in/sites/default/files/national-IPR-policy-English.pdf(last visited Oct 20, 2019).

BACKGROUND

India became a signatory to the TRIPS agreement in 1994. Since then, efforts have been taken to make the IP laws of the country TRIPS compliant. India's IP laws, whether it is Patent Act 1970 or Copyright Act 1957, were amended to bring them in lines with the minimum standards that were prescribed by TRIPS. A dramatic shift happened when India legalized product patents in par with obligations under TRIPS. However, the public interest and the interest of the right holder are always balanced to avoid clashes. India views Intellectual Property as a means for development rather than as a commodity. This attitude towards IP is reflected in many areas of the public in which IP plays a significant role viz., pharmaceutical industry, agricultural products, etc. For instance, the big pharmaceutical companies and the US lobby have on and off lashed out against the compulsory licensing regime in India.

The history of compulsory licensing can be traced back to the UK Statute of Monopolies in 1624, which ruled out monopolies associated with Patent, and stated that grants should not be mischievous to the State or hurt trade. The UK recognized compulsory licensing in terms of non-working and stipulated rules to prevent patents from not being worked commercially.[12] TRIPS agreement states that "where the law of a member allows for other use of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government." The Agreement provides for compulsory licenses as part of the overall attempt of the Agreement to strike a balance between encouraging access to new drugs and encouraging the use of existing drugs. Yet, in the TRIPS agreement, the term "compulsory licensing" does not appear. Instead, the phrase "other use without the right holder's authorization" appears in the title of Article 31. Compulsory licensing is only part of this, since "other use" includes use by governments for their purposes. Compulsory licensing and government use of a patent without the authorization of its owner can only be done under several conditions aimed at protecting the legitimate interests of the patent holder.[13]

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[12] Mishra, G. Patents and the Misunderstood Case of compulsory Licensing in India Available at: http:// www.sinapseblog.com/patents-and-the-misunderstood-case-ofcompulsory-licensing-in-india/(last accessed 11 Apr 2020)

[13] Fact sheet: trips and pharmaceutical patents: Obligations and exceptions Available at https://www. wto.org/english/tratop_e/trips_e/factsheet_pharm02_e.htm.(last accessed 11 Apr 2020)

In 2001, WTO Members adopted a unique Ministerial Declaration at the WTO Ministerial Conference in Doha to clarify ambiguities between the need for governments to apply the principles of public health and the terms of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In particular, concerns had been growing that patent rules might restrict access to affordable medicines for populations in developing countries in their efforts to control diseases of public health importance, including HIV, tuberculosis, and malaria. The Doha Declaration states that each Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted[14]. Currently, the system of compulsory licensing for patents in India can be found in chapter XVI of the Patents Act 1970, under sections 82 to 94, which comply with the decisions made in the above mentioned international agreements. Natco v Bayer is the case that granted compulsory licensing in India post TRIPS agreement.

In Natco v. *Bayer Corporation.*[15] The Bayer Corporation owned a patent right concerning its cancer drug 'Nexavar.' The drugs were costly, and the public was not able to afford the same. In 2008, the monthly dose of Nexavar medicines was priced around two lakhs. Due to the lack of access to the medicines, the public was affected, and this made the Indian Company Natco Pharma Ltd. apply for a compulsory license.

The Controller of Patents allowed Natco to have a compulsory license with the condition that Natco shall pay a royalty of about 6% to Bayer Corporation. However, Bayer Corporation appealed against the same, and the matter came up for consideration before the IPAB panel headed by J. Prabha Sridevan. The panel upheld the decision taken by the Controller. The panel reiterated that TRIPS had given sufficient flexibility to member nations under Article 31 to grant compulsory licenses in situations of nonworking of the patent. The same flexibility has also been incorporated in the Patent Act 1970.

[14] The DOHA declaration on the trips agreement and public health. Available at: http://www.who.int/ medicines/areas/policy/doha_declaration/en/(last accessed on 10 Apr 2020)

15, Civ. App. Nos. 2706-2716 (Supreme Court, April 1, 2013) see also; Order No. 45/2013, 40 (Intellectual Property Appellate Board, Chennai), available at http://www.ipab.tn.nic.in/045-2013.html (Last visited on Oct 18, 2019).

Such judicial decisions have raised many eyebrows, especially those of the multinational pharmaceutical companies and US lobbies. The International community has often criticized India for having such unpredictable and unstable IP protection laws. Law is an engine of social progress. It needs to address the changes and has to adapt with time. However, such changes in law must be founded on certain principles which make it stable and flexible at the same time. Such stability is the cornerstone of a robust legislative framework. The lack of specific IP policy and such judicial decisions as aforesaid were the two main reasons that made the IP laws in India unstable. This instability affected the investment inflow in the innovation sector, which ultimately resulted in the stagnation of scientific progress. In this light, many stakeholders, including some TRIPS members, consulted with the Department of Industrial Policy and Promotion [DIPP] to know about India's stance on IP and its policy towards its protection. DIPP also received various submissions from N.G.Os, M.N.Cs, trade organizations, etc. regarding the need for an IP policy.

As the situation was brewing, the Office of President of the US published the "2014 Special 301 Report" in which the Office of United States Trade Representative reviewed the effectiveness of IP laws of India.[16] The Report acknowledged that India had taken substantial steps recently to give strategic protection to intellectual property rights. It applauds the step taken by India for the digitalization of the signals to prevent signal theft by cable operators. This step has ensured better copyright protection for the broadcasters. The 2013 amendments brought forth in the Copyright Act 1957 have also been considered by the report as a significant step. However, a plethora of submissions blaming the lack of an innovation-friendly environment and the challenges faced by the IP right holders in India were put forth before the panel. The report impels India to address these issues through negotiations and consultations. The report identifies the need for satisfying domestic needs. However, the innovation climate and the IP protection regime should not be hampered when the domestic interests are given preference. The US wants India to take a midway approach, which balances the investment environment with domestic needs. The lack of legal expertise and the pending of IP cases in the Courts have also been

16 2014 Special 301 Report available at *https://ustr.gov/about-us/policy-offices/.../reports.../2014/2014-Special-301-Report (last assessed Oct 21, 2019)*

considered by the report as a matter of concern. The report expects active measures from India to reduce the backlog of IP cases and efforts for ensuring quality judgment in IP related issues.[17]

The report specifically deals with the issues of the copyright regime in India. The rising cases of online piracy and the lack of teeth in Indian copyright law to tackle the same have been mooted in the report. Though the Amendment Act has brought forth several changes in the copyright law, online piracy, especially in the movie industry and the threats posed by online movie piracy platforms like a torrent, is not yet addressed by IP laws. The vulnerability of IP rights in such cases are needed to be considered. Another copyright issue that the report discusses is about the cam-cording of movies played in cinema halls. The department relies upon a study conducted by MPDA, which states that there has been a rise in the number of cases of cam-cording in India between 2009 and 2011. Pirated Compact Discs embodying such cam-corded versions of newly released movies are available at low prices in parallel markets in India. The report considers the same and urges India to consider the need for anti-cam cording legislation.

Furthermore, in India, the reproduced versions of the movies and other cinematographic films embedded with the watermark of the licensee are also being subject to the illegal market. This causes huge loss to such licensees, and considering the need to protect the same, the report wants India to take active measures against those who are engaged in such "circumvention of technological protection measures." The ultimate rise in the number of Internet users in India also makes it necessary for India to compact online piracy. The report further looks forward to bilateral cooperation for addressing such online piracy matters.

The report then moves on to the arena of patent law. The first thing that the report advocates are that India should have a patent law that is certain and predictable. The US cries foul over the Indian situation where the patent rights are always subject to the risk of being forfeited or subject to compulsory licensing. Certainty and a specific direction are needed to be developed for the Indian Patent laws. India has a culture of innovation from time immemorial, and the US wants India to rely on this legacy and take appropriate measures to create a

[17]Id at 38

conducive innovation environment. The report acknowledges the proactive steps taken by the government to modernize patent offices and the use of electronic means for filing and examination of the patent applications. However, the report expresses the panic of the innovators regarding the pendency of the patent applications and delay in the examination of the applications.

Further, the US department is deeply concerned about the stance taken by Indian patent law concerning the pharmaceutical and agro-chemical sectors. It criticizes the criteria provided by the Indian patent law for granting patents. According to the International standards laid down by TRIPS, a patent can be granted to an invention that is "new, involving an inventive step and capable of industrial application."[18] The same criterion has been incorporated under the definition of "invention" in the Patent Act 1970.[19] However, the Act excludes the patentability of any invention that relates to the "discovery of a new form of a known substance that does not result in the improvement in its efficacy[20]." In *Novartis A.G* v. *Union of India*[21], The Supreme Court has referred to the provision while delivering the judgment. The Court considered the aforesaid provision as an extra qualification for being an actual invention under the Act. It ensures that the inventions are genuinely new in itself and that it is not a mere improvement of the present invention. By incorporating the word "known substance" under the provision, it has specifically targeted the pharmaceutical and agro-chemical sector. The provision has broad ramifications as it affects those pharmaceutical companies that seek to get patent for drugs with slight chemical alterations of the known drugs. This also curbs the attempts of the pharmaceutical companies to extend its monopoly by seeking patent protection over the patent-expired drugs by making slight alterations to its chemical properties. However, the US department is concerned with this position of the law of India. The report categorically stresses that the effect of the provision is so extensive that even pharmaceutical medicines with fewer side effects and optimum dissolution property will be denied patent rights. Usually, a wise alteration of the chemical composition of a drug will make it less toxic, and it can also reduce the

18*Supra n*.2 at art. 27

19Patents Act 1970, S. 2(j).

20Ibid., S. 3.

21(2013) 6 SCC 1.

chances of side effects significantly. But the provision does not consider such alterations as "invention," and hence it hampers the innovation environment in India.

Furthermore, it is said that such a provision will affect the inventions that are beneficial to the public. The United States department is also profoundly concerned with India's post-grant opposition[22] Procedures. The report states that in India, the patent is not adequately protected after its grant. The scope of the post-grant procedure is such that it can be challenged, thereby tying the patent in indefinite litigations. The post-grant opposition is like a Damocles' sword hanging above the patent, making it vulnerable to expensive and time-costly litigations. The lack of restriction on the interest of the party, making the post-grant opposition often enables the same party who has gone for pre-grant opposition to go for post-grant opposition. Since the term of a patent starts from the date of application, such delays often affect the commercial value of the invention itself.

The department expressed a deep concern about the compulsory licensing regime in India. The decision-making process in granting compulsory licenses is not transparent that often the inventor's rights are made vulnerable to acquisition at any time. Moreover, the criteria followed by the Intellectual Property Appellate Board while delivering its decision on *Nacto v.Bayer Corporation*[23] Also been subject to ruthless criticism. The existing farrago of reasons on which compulsory licensing is granted in India is not well-founded. In the aforesaid case, one of the contentions of Nacto Pharma was that the patent held by Bayers had not worked because the patented drugs were not manufactured in India. The patented drugs were imported by Bayers Corporation into India. Though the panel considered the importation as "working of patent," it raised the same question towards Bayer Corporation. The panel wanted to know why the patented drugs could not be manufactured in India. Though the compulsory license was granted on other grounds in the matter, the department expresses its discontent towards IPAB for considering manufacturing in India as one of the grounds for determining the "non-working" of Patent. The report is of the view that if this criterion is applied for determining the "non-working" of patent, then the patent right holders of green technology and communication sector

22*Supra n*.8 at S. 25.

23*Supra n*.3.

have to ensure that they start manufacturing their products in India to avoid compulsory licensing. This would affect the investment and innovation climate in India. The report urges India to make necessary changes to the compulsory licensing regime in India.

The United States also cried foul over the lack of coordination among the sectoral departments in India.[24] It cites the National Manufacturing Policy as an example of this lack of cooperation. To get complete results, all the departments and sectors must work in tandem. The National Manufacturing Policy endeavors to use compulsory licensing of green technology as a tool for transferring the technology to the country. The same policy was reiterated by India in the United Nations Framework on Climate Change, where the Indian representative opined that it is the Intellectual Property rights like patent, which acts as a stumbling block for the transfer of technology for combating climate change. The report further focuses on the Data Protection regime in India. The report wants India to recognize extensive protection to the data submitted or generated during marketing approval. Pharmaceutical drugs that are patent protected can only be launched with the marketing approval of the drug controller. In the process of getting marketing approval, information regarding the patented drugs is submitted to the approving authorities. However, if the information submitted to the authorities is not protected, then it will be subject to unauthorized use, which will result in unfair competition. The report recognizes the progressive step that India has taken in the Pesticide Management Bill pending before the Parliament, which protects such data concerning agrochemicals for a period of five years. The report expresses hope that the Ministry of Health and Family Welfare, which currently considers the data protection for pharmaceutical products, will come up with practical guidelines shortly. The report has also addressed the problems with the Trademark law of the country. The department is concerned about the piles of pending Trademark applications in the Trademark offices within India. As in the case of patents, the delay caused by opposition proceedings and the undue litigations are detrimental to the shelf life of Trademarks in India.

Moreover, counterfeit goods are freely available in India, and the Indian Trademark law lacks sufficient enforcement measures to counter such infringements. Counterfeit goods affect the public as the use of such counterfeit goods with less quality has even led to air accidents. The

[24] *Supra n.* 5 at 41.

report expresses panic over the rise in the availability of counterfeit goods in various industries in India, including packaged foods. The report blames India for being a haven for people in business who are involved in the illegal trade of counterfeit goods.[25] On the one hand, India is the second-largest manufacturer of pharmaceutical products, and on the other hand, it is the largest market of counterfeit medicines in the world.[26] The report addresses this situation, and it wants India to take urgent measures to compact the situation.

The United States is unhappy about the Trade secrets protection in India. The lack of a sui-generis law to protect confidential information, also known as trade secrets, has invited much criticism from the stakeholders at the conference. India still relies on the Contract Law to protect confidential information. Though the use of confidential information can be prevented in cases where there is an existing contract, the Contract Law does not address a situation where there is no contract. For instance, if a rival market competitor steals confidential information, it won't amount to be a breach of contract.

Moreover, information is not a "movable property," hence the competitor cannot be charged with theft under the Indian Penal Code. Thus India has a weak legal regime for the protection of trade secrets. Confidential Information is a double-edged sword. Once the information is lost, whether, by legal or illegal means, the holder loses his monopoly right. Though legal sanctions can be imposed, the loss suffered by the leak of information is immense. Hence a robust law is required for protecting confidential information. Such a gap in the Indian IP regime has detrimentally affected the innovation climate in India.

In every IP cases and proceedings, we can see that the authorities are inclined in favor of the local manufacturers to some extent. The US department is worried about this tinge of favor shown by the authorities and expresses hope that India shall extend the same approach to the foreign manufacturers as well.[27] This report categorized India into a "priority watch list" and

[25]Id at 42.

[26] Market Research Reports, India Pharmaceuticals Industry Analysis and Trends 2023 available at https://www.marketresearchreports.com/navadhi/india-pharmaceuticals-industry-analysis-and-trends-2023(last accessed on 11 Apr 2020)

[27]Supra n5 at 43.

urged India to make umpteen numbers of changes in the Indian IP laws. A bare reading of the report reveals that it has been drafted to protect the interest of Multinational Corporations and US lobbies. The report is a result of lobbying, and Prime Minister Narendra Modi had been under tremendous pressure to give effect to the report before his US visit.

Moreover, following the report, most of the International organizations had ranked India low concerning innovation climate and IP protection. The US chamber of commerce surveys the effectiveness of IPR protection in various countries across the globe. They rank countries according to the performance assessed based on a predetermined set of rules. This ranking is popularly known as the "Global IP Index." The ranking is significant as it is one of the factors that the manufacturers consider before establishing the market in a country. In 2015 after the publication of the Special 301 report, the Global Intellectual Property center under the US chamber of commerce released the International IP Index ranking, and India occupied the second last position in the list.[28] Even communist China, which has historically disregarded the institution of private property, occupied 19th position in the list of global countries. India performed poorly in all the sectors with respect to which the ranking has been published. This ranking came just a year after the WIPO ranking regarding the Global Innovation was published. The Global Innovation Index was published by WIPO in the year 2014. The ranking was made after surveying in 143 countries. India occupied 76th rank among these countries.[29] Thus the performance of India has been reduced in all these fields. India has been under tremendous pressure from the global community to make necessary changes in the domestic IP laws.

Usually, the Government releases a policy document just before any repealing or amending statute is published. However, the National IP Policy has been released by the Government in the wake of the Prime Minister's US visit. The surmounting pressure created by the Special 301 report and India's poor ranking in the Global Innovation Index are the reasons behind the hasty drafting of policy. The global pressure instigated the Narendra Modi

[28]GIPC International IP Index (3rd ed., Feb 2015), available at http://www.theglobalipcenter.com/wp-content/uploads/2017/04/GIPC_Index_Report2015.pdf (last visited Oct 22, 2019).

[29]WIPO, *The Global Innovation Index 2014,* available at https://www.globalinnovationindex.org/userfiles/file/reportpdf/gii-full-report-2014-v6.pdf (last visited Oct 22, 2019).

Government to take a pro IP stand, and policy has been mooted as a first step towards creating a better innovation atmosphere in India. An IPR "Think Tank," a six-member body, was constituted by the Government to draft the policy. It is ironic that former IPAB Justice Prabha Sridevan, who delivered the *Nacto*[30] Judgment regarding compulsory licensing, was appointed by the Government to lead the Think Tank.

The body was constituted to help the Government in identifying the vulnerable areas in the IPR regime of India, to give valuable inputs to the Government to create a pro-IP environment, and to draft a comprehensive IP policy for India. The Think Tank is expected to work on several fundamental principles, especially for encouraging innovation and creativity. The main aim of IP protection is to create an environment favorable for innovation and the creation of Intellectual property. Intellectual property should not be seen in isolation. Since innovation climate is a result of an interaction of several factors, Intellectual property should be considered about several other sectors like education. An integrated approach is also followed to synchronize the health sector and the IP sector so that the public will be advantaged by the new medicines that can be used to treat the diseases that are haunting the developing and underdeveloped nations. Another principle that is recognized by the Think Tank is that IP is not an asset that is to be kept intact or hoarded. The real purpose of Intellectual property is met only if it is commercialized. The Government required to take steps to enable the innovators to utilize their IP assets for monetary benefit.[31] Many small scale innovators cannot convert their IP assets into valuable assets due to lack of technical expertise or capital. A Government that looks forward to giving impetus to IP protection should always focus on enabling the right holder to commercialize their IP assets. Since IP is considered as one of the economic assets of M.N.Cs, IP always has an interaction with investment. The investment climate is affected by the steps taken by the State to encourage IP. Hence it is crucial in a capitalist economy for the State to give importance to IP assets so that investments can be attracted in different sectors of the economy. Investment and rise in business also lead to economic growth and development. Foreign Direct Investments also allow technology transfer in different fields like clean energy technology.

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[30] *Supra n.*4.

[31] *Supra n.*3 at 14.

Such transfer of technology to India will also promote the manufacturing within India. Right is considered to be in paper unless and until there are proper some enforcement measures. The authorities who are having the responsibility of enforcing the rights lack expertise in the same. Hence proper training must be given to them for better functioning. Another principle that leads the Think Tank is that IP rights are granted to the individuals not only for protecting the interest of the private parties but also for public benefit. The incentive given through IP protection will encourage the IP generators to reveal their invention to the public. In India, the concept of public interest runs through the entire fabric of IP laws. It is for this reason that India allows compulsory licensing for those patented products and services that are not readily accessible by the public. Such a cornerstone of public interest is particularly important as it comes to pharmaceutical products and medicines where patent often impedes the availability of such drugs to the public at reasonable rates. Another principle on which the Think Tank works is that India is committed to giving effect to the minimum standards that are prescribed by TRIPS. The Think Tank worked on these principles and submitted the draft of the National IP Policy to the Central Cabinet, which accepted the same in May 2016.[32]

VISION, MISSION, AND AIMS

The vision statement of the policy is based on the concept that any monopoly right is given mainly made use for the benefit of the public in general. The rationale behind the granting of IP rights is that it will encourage the innovators to share the innovation to the public. Thus National IP policy's vision statement states explicitly that innovation through IP must be utilized for the "benefit of all." India has been a country where the knowledge has been monopolized through centuries through the caste system. Therefore, the policy recognizes the importance of having a mechanism where the knowledge is to be shared with everyone. The policy aims at a comprehensive, inclusive growth and expresses hope that IP rights will lead to development in science and technology, biodiversity, etc. The policy document seeks to foster a culture where each individual in the society shall have access to a pool of ideas, information, knowledge, and inventions.

[32] *Supra n.*2

The vision statement lays stress on the creation of a knowledge-based society with tremendous scientific and technological progress. Human beings cannot seek solitude like a beast, and hence such cultural interaction and exposure to knowledge can effectively shape the personality of individuals. Such freedom of cultural interaction and access to knowledge is also one of the fundamental human rights that are available to every person.[33] The vision statement of the policy recognizes and embodies this principle for ensuring an environment of conducive progress. Thus the policy considers IP as a means to an end- the end is the creation of knowledge-based society racing towards development and scientific progress. The basic concept behind this approach is that the creation and promotion of IP assets add value to the existing knowledge. IP is considered a shot in the arm for further innovation and creativity. However, the policy which relies on IP to foster an innovation-friendly atmosphere also stresses the importance of balancing the private IP rights with that of public interest. Thus the IP policy has a crystal clear vision that a system with IP as the sole focus will neither serve the purpose of IP nor public interest. The policy, while fostering IP rights will ensure that the public interest is not affected by such monopoly rights. The panel members have vividly laid down the principle that permeates the entire document through the vision statement.

The IP policy document sets out the mission that it has undertaken to achieve. The mission statement is precise and definite. The policy has undertaken to enable a system with flexible and robust IP laws with time changes. Technology and scientific progress occur at a fast pace in this world. A decade ago, the Frankenstein monster was just a myth. Now science has grown to such an extent that even human beings can be created in a laboratory. Mechanization and industrialization have transgressed its contours. A dynamic shift is happening in a world where robots have started to work for employers. As technology changes, the boundaries of IP also changes. Questions regarding IP are raised when the robots and printers start doing creative works. IP laws cannot remain static with the progress in science and technology. The policy is on a mission to set out some precise guidelines upon which the IP protection regime of the country will work, and the policy also expects the IP laws to adopt with the scientific and technological advancement. The Think Tank, which drafted the policy, was on a mission to make the dynamic IP regime in India as an engine of economic development. Thus the mission is clear, i.e., to help

33 Universal Declaration of Human Rights, art 27, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

the right holders to commercialize their assets and make them a part of the economic growth of the nation.[34]

Moreover, economic growth is also sought to be achieved through investments. A stable IP regime will create a climate of innovation, and this favorable environment that allows the enjoyment of monopoly rights will attract investments. The policy endeavors to obtain such economic growth through IP protection. The mission is not only confined to the protection of such private IP rights but also focuses on the right to better access to healthcare, food, etc. Thus the policy is concerned about the impediments that the IP protection can create. The monopoly right granted by IP protection often makes the innovator the king of the market. The unique product or service that is in the hands of the IP right holder occupies the market due to its utility. However, the monopoly rights granted by IP laws ensure that only the IP right holder or a person acting on his behalf can launch the product or service in the market. This monopoly in the market often enables the manufacturer to fix prices according to his whims and fancies. It leads to a situation where the common man who toils hard to keep his body and soul together cannot afford or even have a glance at such products or services. When it comes to primary sectors, such monopoly rights often act as an impediment to access to better health care and food. Such an impediment affects fundamental human rights and can affect even human health. Hence the policy undertakes a mission to lay down a system where the IP protection never affects access to health care and food.[35]

It is to be noted that environment technology has also found a place in the mission.[36] This is a progressive step as the policy focuses on the importance of the transfer of technology that can compact climate change and environmental damage. The ideas that form the vision and mission statements of the policy pervades through the entire policy document, and all the objectives and recommendations in the policy are drafted by the Think Tank in a manner that facilitates the achievement of the goals set out therein.

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[34]Supra n. 3 at 4.

[35]Id.

[36]Id at 2.18.

NATIONAL IP POLICY- FEATURES AND OBJECTIVES

On 12 May 2016, the Union Cabinet approved the National Intellectual Property Rights (IPR) Policy, which will set out the future roadmap for IPRs in India. It is a vision document that encompasses and takes all IPRs to a single platform. This approaches IPRs holistically, taking all inter-linkages into account, and therefore seeks to build and leverage synergies between all types of intellectual property (IP), laws, and agencies concerned. This sets up a systemic implementation, monitoring, and evaluation process. This seeks to implement global best practices and adapt them to the Indian scenario. The salient features of the policy are detailed below:

i. The Policy aims to push IPRs as a marketable financial asset, promote innovation and entrepreneurship while protecting the public interest

ii. Cell for IPR Promotion and Management (CIPAM)

iii. Special thrust on awareness generation and effective enforcement of IPRs, besides encouragement of IP commercialization through various incentives, including **Awareness Campaigns.**

iv. IP Cells

v. Generation, registration, and commercialization

v. Traditional Knowledge Digital Library (TKDL):

vi. Cadre Management in IP Offices:

vii. **Access to Medicines** by (a) encouraging cross-sector partnerships between the public sector, private sector, universities and NGOs; (b) promoting novel licensing models, and (c) developing novel technology platforms.

viii. Assistance to smaller firms

ix. Judicial Awareness & Resolution of IP disputes Review

In pursuance of the mission and aims aforesaid, the policy lays down seven main objectives that serve as a guideline to the DIPP in its future actions concerning the IP protection regime in India.

OBJECTIVES

[a] Awareness about IP rights.

The first objective that the policy puts forward is that proper awareness must be created about the benefits of IP rights.[37] Knowledge is traditionally considered as a gift from God in India. The old education system was also not in the form of business. The disciples were to provide only 'guru Dakshin' to their masters. This culture is deep-rooted in the society that knowledge or know-how is not considered as an economic asset in India.

On the contrary, the IP protection laws are based on the rationale that the Intellectual property is economic assets. Therefore, an innovation environment based on higher IP protection is only possible if awareness is created about the value of Intellectual property. The potential of the IP assets to generate economic wealth and the socio-cultural development associated with IP rights are to be made known to the right holders.

The policy aims at launching a nationwide program for creating awareness. Such a realization of the benefits of IP will create an environment of innovation. It will instill development in the public and private sectors.[38] It is necessary to ensure that such awareness programs must reach out to the silent IP creators in the countryside. They rarely have any idea about the value of the Intellectual Property that they create, and an awareness program among them will ensure that such people also reap the benefits of their creativity. For instance, there are local producers of goods protected under the regime of geographical indication protection. Such producers are mostly unaware of the treasure in their hands. Ironically, such producers of goods of high value in the market are still living in poverty without realizing the potential of their business. Some persons are adept in the traditional cultural forms of expressions like folklore, who are unaware of the value of IP assets generated by them. These silent or marginalized IP generators must be made aware of the value of their creativity. Furthermore, there is a layer,[39] Who turns a blind eye to IP because of the web of complex procedures involved in enforcing the protection. Such a category of people must be educated about the procedural formalities and

37 Supra n.3 at 1.2.

38 Id at 1.3.

[39] The less-visible IP generators and holders, especially in rural and remote areas.

about the benefit of creating protection. The slogan for the program has also been charted out by the Think Tank. The tagline of the program is "Creative India; Innovative India." [40] The awareness will also create a climate of competition which will ultimately benefit the consumers in the market.

[b] <u>To encourage the creation of IP assets</u>

The second objective is based on an arguendo that the amount of the IP generated in the country is assessed by analyzing the number of IP applications and registrations that happen within the country. The statement of objective acknowledges that the patent applications have risen significantly during the last half of the decade.[41] However, it is alarming that the majority of patent applications are filed by foreign nationals and entities. The Trademark applications have shot up during the last couple of years. Indians have gone a long way in Trademark applications as the majority of applications have been filed by Indians.[42] There is no ray of hope as far as design applications are concerned.

There is an umpteen number of geographical indications in India that can be IP protected. The policy expresses hope about implementing a better GI protection regime in India. The rich knowledge pervading all walks of life in India can be copyright protected, and such adequate IP protection can stimulate socio-cultural development in India. In terms of human resources and skills, there is no country much better than India. But the skill and manpower are not reflected in the generation of IP assets. Hence the policy endeavors to develop a strategy for the better utilization and tapping of human resources in India to generate more IP assets within the country.[43] The policy seeks to conduct a "baseline survey" for identifying the sectors capable of generating more IP in India. For inspiring the budding innovators, the policy puts forth a suggestion to set incubation centers where initial help and fund is given to the IP generators. Start-up incubators are expected to work in tandem with such innovation incubators to establish a favorable environment for tapping the economic value of such assets. For creating a culture of

40 Id at 5.

41 Id at 7.

42 Id.

43 Id.

IP, the policy envisages to include IPR as a part of the syllabus in educational institutions. [44] The policy wants to change the perception of knowledge and focuses on enabling people to view knowledge as an economic asset. The private entities must also be taken into confidence for implementing the policy. The importance of TKDL is also asserted in the statement of objectives, and its potential will be tapped for economic and social development. The awareness campaign, as aforesaid, should also be tapped towards achieving this objective. There are various reasons for the low generation of IP assets in India. All these problems are needed to be analyzed through a comprehensive survey, and effective measures are needed to be taken to address the problems.

Another essential objective is to stimulate the national laboratories and like institutions to generate IP. The economic benefit must be shared between the entity and individual researchers who generated the IP. [45] The public-funded research institutions will be analyzed based on IP generation. The policy wants public-funded research centers to focus more on the health sector and develop medicines that are affordable to the public. Such new medicines can be IP protected, and thus IP can be utilized for public benefit. Universities and research institutions can work in tandem so that creative ideas can be converted into useful products and services. The policy considers giving "incentives for such Research and Development." Incentives can be in the form of a tax rebate, loans, etc. It is worthy to note that the policy lays emphasis on

public-funded institutions to utilize IP for the benefit of the public. The policy emphasizes taking measures to increase filing in the case of geographical indications. Awareness at the grass-root level is a necessary element for augmenting GI filings. This awareness can be created through educational institutions also. Then the policy focuses on Traditional knowledge. The persons who are handling Traditional knowledge is unaware of the economic aspect involved in the same. Hence they must be taken into confidence for utilizing the knowledge for public benefit. Such utilization should also give a shared benefit to the right holders. TKDL library should be utilized by the PSU and public research institutions for the benefit of the

44*Supra n.*3 at 2.22.

45 Id at 2.6

public.[46] Thus we can see that all the IP generation is aimed at social and economic development. It sets a guideline for the construction of IP statutes in India. The Indian IP laws must always be interpreted in the light of public interest. The main aim of IP must be development and not a mere monopoly. India is home to umpteen number of skilled artisans and craftsmen. Even then, design filings are comparatively deficient in India. The manpower and skill in India must be judiciously tapped to increase design filings in India. Similar utilization of skill and human resources has been mooted by the policy to increase patent filings and its protection in India.

[C] <u>A vibrant IP law regime balancing the private and public interest</u>

The third objective supplements the second objective. IP generation itself will not lead to a sustainable innovation environment unless there exists a healthy IP protection regime to supplement them. Therefore, the policy endeavors to have a dynamic and robust IP protection laws. All the IP laws in India are TRIPS compliant, and the policy sets forth the agenda by stating that India shall remain committed to the minimum standards of IP protection prescribed by TRIPS.[47]However, it keeps in mind the interest of the public while reassuring its commitment to TRIPS. TRIPS is not a rigid document. It allows the member nations to dissolve the IP protection in several situations like health emergency. The compulsory licensing regime allowed by TRIPS is an example of such flexibility. The policy wants the legislators in India to make use of such flexibilities to create IP laws to protect the public interest in parallel to IP protection. Thus what the policy document sets forth is a policy of "being boundless within limits" prescribed by TRIPS. Traditional knowledge is not recognized by TRIPS. Hence the policy states that the TKDL must be utilized for protecting Traditional knowledge from misappropriation. Moreover, the policy recognizes the medical sectors under the AYUSH ministry and states that the medical sectors have immense potential for addressing the public health issues, and hence it must be protected from being misappropriated. [48] The policy emphasizes an IP law which is dynamic enough to address the scientific and technological progress that occurs in society. Timely legislative changes through amendments must be brought to address the newly emerging circumstances. Such changes should take into confidence all the

[46]Id at 2.20

[47]Id at 9

48 Id.

persons affected by the same, and the amendments must be given effect after due consultations only.

[d] <u>Modernize IPR Administration</u>

The government offices established for the administration of IP rights always acts as a platform for intercommunication between the public and State. The Offices provide services to the public concerning IPR, like filing, registration, etc. Hence an efficient administration of IP rights through these offices is a direct manifestation of the Government's commitment to protecting IP rights. A lackadaisical attitude towards the administration of IP rights through these offices shows the lack of Government's support in the efficient protection of IPR in India. Hence the policy recognizes the importance of modernizing the IPR administration to instill confidence in the innovators and to create a climate of innovation in India. The pending IP applications, the delay in the examination, the unending opposition procedures, etc., are some of the problems that affect the efficient administration of IP rights. As a solution, the policy moots the introduction of e-filing and the use of the internet for improving administration. A "service-oriented culture" is what the policy puts forth. Moreover, the officials must be trained to give efficient services to the public. For this purpose, the help of RGNIIPM can be sought. Moreover, valuable inputs from the public-funded research institutions can also be used for the improvement of the administration of IP rights in India.

The major reform the policy sets forth is the change in the authorities for the administration of each of the IP laws. The Copyright Act 1957 was administered by the Department of higher education, and the Semi-Conductor Integrated Circuits Layout Designs Act 2000 was administered by the Electronics and Information Technology Office.[49] The administration of both these laws has been brought under the Department of Industrial Policy and Promotion by the National IP Policy.[50] The policy also moots the creation of an IP cell under DIPP for the promotion of IP rights in India. Furthermore, the misuse of traditional knowledge and its misappropriation by other persons can only be prevented by the effective integration of IP offices with the TKD library. For the protection of Plant varieties, the policy envisages that the

49 Id at 4.1.

50 Id at 4.2.

research centers should be coordinated with each other for better protection of the varieties. India registers low filing in the case of Integrated Circuit Layout Designs. The policy wants the department to conduct an integrated survey to find out the reasons behind the low filing and take steps to remedy the same.

[e] Commercial utilization of IP assets

IP rights are granted to the innovators as an incentive for their innovation. The rights are in the nature of monopoly rights for a limited period to use the invention exclusively by the innovator for commercial benefit. The real intention behind the grant of rights is not fulfilled unless and until it is commercially exploited. It is for this reason that efforts should be taken to stimulate the commercialization of the IP assets that are created in India. The nationwide integrated approach is the need of the hour to create a favorable environment for the commercial utilization of the IP assets. Public research institutions should be given support to convert their IP assets to commercial products. This will ensure that the public is also benefitted from the commercialization of the IP assets.

All institutions which create may not be able to commercialize their IP assets as the commercial exploitation often requires an initial investment. To stimulate such small scale entities to commercialize their IP assets, the policy puts forward to create incubation centers and support units to give an initial impetus to such commercialization. The commercial benefit can be derived out of most of the IP assets only if some standard-essential patents are available. Therefore, it should be ensured that the SEPs are available to all the innovators at fair and reasonable terms. [51]

[f] Better enforcement of IP rights

The right remains merely on paper if it is not adequately enforced. IP rights are private rights, and hence the IP rights owners need some mechanism to enforce their rights against infringement. There must be effective statutory remedies and enforcement measures for the better protection of IP. The public should be acquainted with the importance of IP to have sufficient protection of IP rights. The policy wants the State Governments to establish IP cells in

[51]Id at 5.5.

the Police departments for better protection of IP. Many problems are created by counterfeit goods and pirated copyright goods. The creation of IP cells in Police Departments will help the seizure of pirated and counterfeit goods.[52] This helps in the enhanced protection of Trademark and copyright. Novel methods of IP enforcement are to be mooted through seminars and workshops. Commercial Courts are to be established for the adjudication of IPR.[53] The potential of Alternate Disputes Resolution must be utilized for protecting IPR. This makes sure that IPRs are not dragged into unnecessary litigations. The objective reiterates the need for creating awareness among the public about the ramifications of the use of counterfeit and pirated goods. Traditional Knowledge misappropriation is also considered to be an issue that needs to be addressed.

[g] Human Capital Development

These objective states identify the importance of using the human resources available in India for better promotion and development of IP. It envisages that the people must be trained in generating more IP, and a favorable environment must be created so that the creativity of the people are utilized to the maximum. An increase in research and innovation culture is what the policy strives to achieve. As a part of developing the culture in IP, the policy moots the inclusion of IP in the school and college curriculum. Moreover, IP generation is expected to occur from school and university levels. The persons who are to deal with IP in public offices must be specially trained for the same. It also wants individual institutions, government departments, etc., to have their IP Policy. Thus it strives to develop an overall conducive atmosphere favorable to IP.

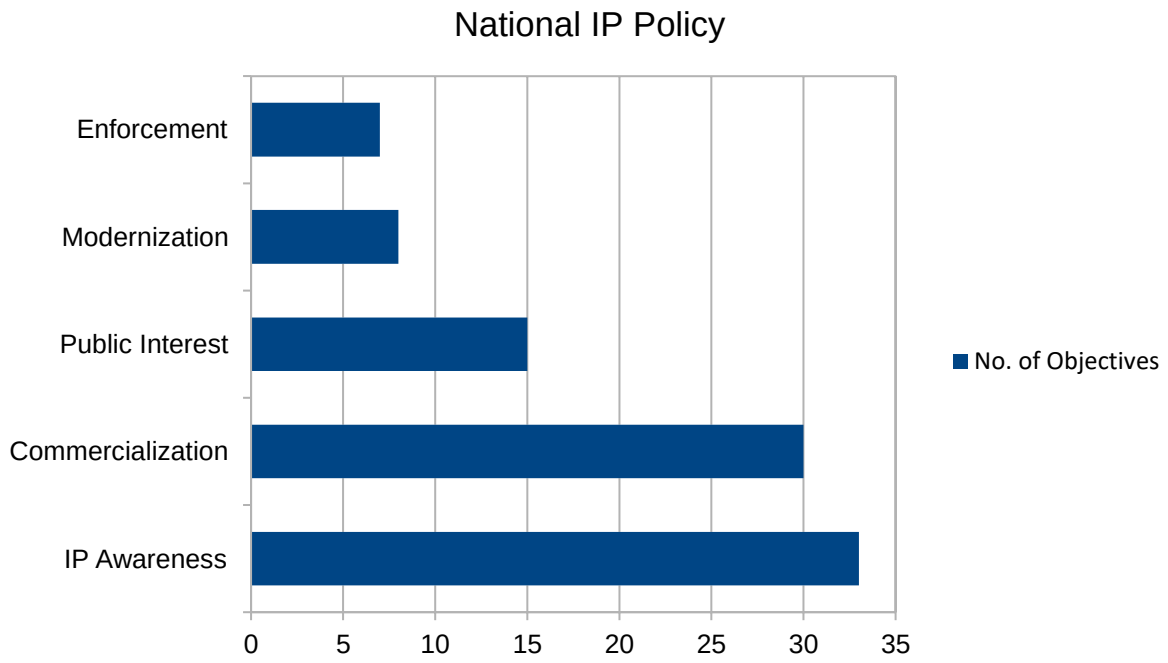
The policy wants DIPP to take adequate measures for bringing different departments together for the implementation of the policy in an integrated manner.[54] The policy has been developed with much hope that it will create a favorable innovative atmosphere in India. However, new problems are likely to arise out of the permutation and combination of the circumstances to which the policy is expected to be applied and the real “testing times” for the

[52] Id at 6.8.2.

[53] Id at 6.10.1.

[54] Id at 19.

policy is yet to come. Considering the number of objectives embodied under each category against the total number of objectives, the National IP Policy of India can be graphically represented



PROGRESSIVE STEPS

One of the vital steps that are incorporated in the policy is that it seeks to promote IP as a "marketable asset." It is based on the understanding that the real intent behind the grant of IP rights is only fulfilled if it fetches economic return. Any innovation, any invention, and the prosecution of IP rights entail high costs. The grant of monopoly rights serves as an incentive to level all the costs involved and to reap benefits out of his innovation. Thus the policy stands upon the underlying philosophy behind the granting of Intellectual Property Rights.

Furthermore, the policy, while acknowledging that the IP laws are TRIPS compliant, pushes forward the State to reform the existing laws to address the dynamic changes in society. Thus the policy envisions that the State should not remain idle and sit on the existing IP laws without effecting sufficient changes with time. The effort to create IP awareness in the society is also appreciable as it will create a culture of respect for IP. Often the small scale entities

involved in innovation and IP generation are not adequately protected, and the established business giants devour them. Moreover, the lack of IP awareness will also make them vulnerable to exploitation by big players in the market as they tend to buy such IP assets at trivial rates. The awareness initiative will thus bring positive changes in society and would be a turning point to a knowledge-based economy. Another essential step is taken by the policy when it recognized the importance of traditional cultural expressions and folklore. Another significant step taken by the policy is that it ensures that people are not deprived of their right to access "affordable medicines." [55]This reveals that the Government is not ready to yield towards the pressure exerted by US and pharmaceutical lobbies.

A reference to the progressive steps taken by the policy will not be complete without mentioning the objective which states that generic medicines should not be treated as spurious drugs.[56] Generic medicines contain the same "Active Pharmaceutical Ingredient" as compared to other medicines sold under a brand name.[57] Such generic medicines tend to have the same effect and result as compared to their branded counterparts. The only difference is that the branded ones contain several other inactive chemicals that render them particular shape, taste, etc. [58] These branded drugs are often subject to counterfeiting, and such counterfeit drugs are treated as spurious drugs according to WHO standards. However, the WHO standards have classified "generic drugs" as "counterfeit drugs," which has affected the health sector of India. For instance, in 2008, the European Union seized the generic antibiotics exported by India to other developing countries by "labeling it as counterfeit."[59] Taking all these into consideration, the IP policy states explicitly that generic drugs should not, in any case, be considered as "spurious or counterfeit drugs." This manifests the intention of the Government not to go with the US recommendations. Thus the policy pulls down all types of lobbying, and the Think Tank should be appreciated for protecting the interest of the public from the profit-motivated eyes of the

55 Id at 5.8.

56 Id at 6.2.

57 Virtual Medical Centre, "*Generic Medicines and Branded Medicines*", available at https://www.myvmc.com/treatments/generic-medicines-and-branded-medicines(last visitedJan 20, 2019).

58 Id.

59Drug Counterfeiting & IPR contravention: WHO relief for Indian generic exporters, available at http:/www.financialexpress.com/opinion/drug-counterfeiting-ipr-contravention-who-relief-for-indian-generics-exporters/459791 (last visited Jan 31, 2019).

International pharmaceutical giants. It is noteworthy that precisely one year after the release of the Indian policy, WHO has considered changing the definition of "substandard and falsified medical products."[60]

STRUCTURAL CHANGES

One of the most important structural changes that the policy proposes is that it recommends the states to constitute "IP cells" in their respective Police departments.[61] The State of Telangana has successfully implemented the same, and they have been taking strict measures against counterfeiting and piracy since then. The policy document itself states that the policy shall be reviewed every five years, thereby slating its intention to have a dynamic IP regime in India. The IP offices all over India will be modernized, and the department shall take steps to implement e-filing concerning the IP applications. Moreover, the examination time about the Trademark shall be reduced from 13 months to 8 months, and the target is to reduce it to 1 month by 2017. The policy has brought drastic changes concerning the administration of the respective IP portfolio in India. The Copyright Act 1957 was administered by the Department of higher education, and the Semi-Conductor Integrated Circuits Layout Designs Act 2000 was administered by the Electronics and Information Technology Office. The administration of both these laws has been brought under the Department of Industrial Policy and Promotion by the National IP Policy.

CONCLUSION

The NIPR Policy comes with the primary motive to raise the consciousness of IPR's legal, cultural, and economic benefits to all parts of society. Not only does it promote innovation and creativity generation, but it also offers ways to market them. The strategy with its slogan "Creative India: Innovative India" seeks to disseminate information to the highest possible people so that their expertise, imagination, and innovation do not waste away. From this, people

60WHO, Essential Medicines and health products, available at http://www.who.int/medicines/regulation/ssffc/definitions/en/ (last visited Jan 29 , 2019).

61*Supra n.*3 at 16.

can understand leveraging their ability economically and putting it to better use for the country and themselves.

The policy lists several targets but seems ambiguous in some places where some of the points have been explicitly identified to be listed in the policy, but there are no detailed follow-ups on those. Innovation and creativity, for example, may be considered the two foundations of this policy, but to develop and build, there is no reference in the policy on how information can be obtained.

The propositions above form the backbone of the National IP Policy of India, and in this context, it would be proper to analyze the shortcomings and disadvantages that are inherent in the policy to have foresight into the working of the policy. Hopefully, the objectives of this policy would be achieved so that India can be tagged as one of the countries with a healthy and adequate Intellectual Property Regime.

CHAPTER-3

WORKING OF THE POLICY-AN OVERVIEW

INTRODUCTION

The US Chamber of Commerce's Global Innovation Policy Center (GIPC) released its International IP (Intellectual Property) Index on February 5, 2020. India was in position 40 of the 53 economies according to the ranking.[62] The IPR Policy acknowledges the value of a country's robust, vibrant and balanced IP framework as a means of achieving social and economic welfare and of building an innovation ecosystem in the draft's implementation and vision. It does not, however, follow up on this when it comes to the details. Consequently, while steps to raise the consciousness of IPRs are certainly most welcome, the draft is completely silent on the principle of knowledge sharing and access to knowledge. While acknowledging that the benefits of IP laws are mainly enjoyed by foreign IP holders, there is no talk of measures to increase the number of domestic patent filings.

"Patience is bitter, but its fruit is sweet," said Aristotle.[63] Concerning the National IPR strategy, 2016, this quote has proven to be a hundred percent accurate. This much-awaited Policy finally secured cabinet approval on May 13, 2016, and all sectors were able to achieve a positive response. The NIPR policy comes with the primary motive to raise the consciousness of IPR's legal, cultural, and economic benefits to all sections of society. Not only does it promote innovation and creativity generation, but it also offers opportunities to market them. The Policy with its slogan "Creative India: Innovative India" aims to disseminate information to the highest possible people so that their expertise, creativity, and innovation do not waste away.

The Policy is one of its kind, involving every imaginable field, from a village industry to an academic and research institution, in the process of effectively developing and exploiting IP on the one side, while balancing the public interest on the other. India has an abundance of ruthlessly flowing creative and revolutionary energy, which will result in a global transformation of its economy if adequately channelized.

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[62] GKTODAY, Intellectual Property current affairs 2020 available at https://currentaffairs.gktoday.in/tags/intellectual-property(last accessed 15 Apr 2020)

[63] Legal service india.com,National IPR policy 2016 available at National IPR Policy 2016. http://www.legalservicesindia.com/article/2102/National-IPR-Policy-2016.html(last accessed 16 Apr 2020)

The Policy acknowledges that India has a well-established legislative, administrative and judicial system compliant with TRIPS to safeguard IPRs, which fulfills its international obligations while making use of the flexibilities offered by the international regime to tackle its developmental concerns. It reaffirms India's involvement with the Doha Development Agenda and the TRIPS agreement.

GOALS OF THE IP POLICY

• Reducing the time taken to clear the backlog of current IPR applications from 5 to 7 years to 18 months by March 2018.

• Approve applications for trademarks within one month until 2018; a label approval usually takes on average around 13 months.

• Designate DIPP as the nodal organizing, directing, and regulatory body.

• Cover Copyright films, songs, and technical drawings.

• Evaluation of the program in consultation with stakeholders within five years.

• The Policy also aims to promote domestic IPR filings across the value chain from the generation of IPRs to marketing. It aims to encourage research and development with tax advantages.[64]

The Policy acknowledges the value of innovation and creativity within an information economy's growth and development. This equates innovation with the generation of IPs the Policy's dual emphasis is to allow IPs to be marketed through knowledge generation, and to alleviate administrative bottlenecks through lessening procedures. Copyrights, currently administered by the Ministry of Human Resources, are expected to be put under the control of the Department of Business Policy and Promotion (DIPP) to make them consistent with the IPs opposite.

The Policy recommends a study to look at the viability of an IPR swap to improve commercialization and value for IPs. Such dedicated network exchange may encourage

[64] GKTODAY, National Intellectual Property Rights (IPR) Policy 2016 available at https://www.gktoday.in/gk/national-intellectual-rights-policy-2016/(last accessed 18 Apr 2020)

investment in industries led by network moving investors and ip owners/users together. The Policy further urges the govt. To explore the possibility of expedited review of patent applications to drive development in the Asian region. Also, the Policy takes care of the vulnerable and rural economy.

Bringing traditional knowledge into the IPR sector is a commendable task for policy framers. However, such conventional knowledge is a rare commodity, and access to its database should be limited to the degree that multinationals cannot make minor variations and use it to their advantage. A notable highlight of this approach is the need to acknowledge the adoption of a sui-generis rule for conventional expertise. The TKDL system has been expanded to a great extent for tackling biopiracy. Relaxations have been granted by the RBI notification dated June 23, 2016, to startups to stimulate their IP generation capacity. The notification was passed under Section 10(4) of FEMA, 1999.[65] The scope of a Traditional Knowledge Digital Library was extended by this Policy and how it can be worn for research and development purposes. Nevertheless, the Policy does not clarify aspects of traditional knowledge ownership.

This notes that providing financial support through rural banks or cooperative banks to the less sceptered cluster of ip house owners or producers, such as farmers, weavers, artisans, craftsmen, etc. In a view to speeding up the adjudication of conflicts and ensuring the enforcement of IPR, the Policy recommends that separate business courts deal in ip related matters.

This further suggests that the possibility of ip conflicts being resolved by different conflict resolution processes should be discussed. Strengthening the system of social control is just another policy priority objective. This could be achieved by enhancing cooperation among various Govt agencies as well as non-governmental actors (such as producing an awareness of the economic, social and cultural edges of IPRs and encouraging the generation of IPRs to provide a comprehensive and useful legislative structure to align the rights of IPR holders with that of the general public at large.

Numerous alternative initiatives proposed by the Policy include restrictions on unwanted film duplication, promoting company Social Responsibility (CSR) support for open innovation, and

[65]Notification No. FEMA 10 (R) /2015-RB, available at https://rbidocs.rbi.org.in/ rdocs/notification/ PDFs/ FEMA10RCF8197169BD44E0B9B40BC393E9B5456.PDF (last accessed 25 Mar 2020).

building IPR capacity through coaching, educating research, and capacity building. The strategy, however, aims to promote ip as an associate in nursing rather than placing it into the broader sense of the innovation scheme in itself.

This suggests that publicly funded analytics establishments should turn their findings into ip assets by connecting researchers' career advancement in these establishments with IP generation. It might hamper the long-term free flow of data. India has no clear trade secrets legislation. With this in mind, the purpose of the Policy is to establish clear trade secrets laws and their security. Apart from books and magazines, the scope of the Copyright Act also been expanded by incorporating films and music. The Cinematography Act will have allowed for duplication of films.

In particular, the Indian economy, startups are the most promising field in any economy. As part of the program, the program provides for significant benefits and ease of IP registration for startups and other small and medium-sized enterprises, such as tax rebates given and a 50 percent reduction in fees. And, this would inspire entrepreneurs to invent and make more. On September 2, 2017, the patent rules were changed to include "startups" among the applicants. The amended rule (2fb) considers startups to be "enterprises founded within the last five years with a turnover of no more than 25crores and working towards innovation or technological advancement." They shall be entitled to an 80% reduction in patent fees.[66]

The Policy also focuses on taking down the trademark, copyright, and patent registration terms. A "Trademark Index" portal is made accessible online, where people can search for registered trademarks, TM applications or pending applications, etc., without charging any fees. When such a shortened amount of time was reached, a world-class standard will be set. The Policy talks about hiring and educating people to tackle the pendency of IP applications and also to modernize the process as a whole. Training shall also be given to IP office workers to educate them on the operational aspects of forthcoming laws and technologies. Additional inspections of the agents of the patent and trademarks must also be carried out to make them capable of what they are doing.

[66]*See generally*, http://www.ipindia.nic.in/writereaddata/Portal/IPORule/1_76_1_2018-01-02_2_.pdf (last accessed 29 Mar 2020)

RECENT STEPS TAKEN TO ACHIEVE THE OBJECTIVES

- An Android Application named PAMS [Patent Analysis Management System] has been launched by DIPP. The application carries "IPR updates, IPR news, patent alerts," etc., and thus it aims to create a sense of IP among the public.
- The department has launched a program named "Kids nook" aimed to inculcate a culture of IP among kids. As a part of the scheme, the department has published a comic book named "KIPS."
- The patent rules were amended on September 2, 2017, to include "startups" among the patent applicants. The amended rule (2fb) considers startups as "entities established within the last five years with a turnover of not more than 25crores and is working towards innovation or technological advancement." They shall be entitled to an 80% reduction in patent fees.[67]
- The 2016 Finance Act provides for a 3-year income tax exemption for startups in 5 years if it is incorporated between April 1, 2016, and March 31, 2019.[68]
- IP cells have been set up in several institutions and universities like JNU, IISC, etc. to harness the potential of the institute in the field of IP.[69]

Impact of the Policy on Pharmaceutical production

India is one of the world's leading exporters of pharmaceutical products, and is often referred to as the 'Pharmacy of the World' because it offers low-cost, life-saving drugs to developing nations; the UNICEF Supply Annual Report 2012 described it as the largest supplier of generic medicines. Besides, the availability of generic medicines for millions of Indians has increased access to quality medicines at low cost. Presently the vibrant Indian pharmaceutical industry produces a range of formulations, has the expertise for active pharmaceutical ingredients (APIs), and sees significant value-creation opportunities. Hence, the theme of IPC's 63rd edition,

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[67] *See generally*, http://www.ipindia.nic.in/writereaddata/Portal/IPORule/1_76_1_2018-01-02_2_.pdf (last accessed 29 Mar 2020)

[68] startup India, Slide Share available at https://www.slideshare.net/SuryadiptaDutta/startup-india-69128099(last accessed 17 Apr 2020)

[69] See generally, https://www.jnu.ac.in/ipm-responsibility (last accessed 28 Mar 2020).

'Pharma Dream 2020: India: The Pharma Power House,' encapsulates the Indian pharmaceutical industry's actual stature.

Thus authorizing drug patents, the Patents Amendment Act of 2005 has strengthened the legal structure governing patents in the pharmaceutical domain. The same Act does, however, provide for legislation to protect the public's interests and ensure that the Act is not abused to establish a commercial monopoly for a company. Section 3(d), by having slight changes which do not automatically enhance the medicinal effects of the original patented product, avoids the 'evergreening' of patents, i.e., prolonging the patent life. This also calls for mandatory licensing of drugs to ensure that safe medication is available to the public under Section 84.

However, the judgments passed by the judiciary enabling NATCO's compulsory licensing of the drug Nexavar under Section 84 of the Bayer v NATCO case, or the decision not to grant Novartis a patent extension for its bestselling cancer drug, Glivec, according to Section 3(d), has called for criticism from multinational pharmaceutical firms, the United States and the EU complaining of a weak IPR law in the country.

In our opinion, this criticism is unwarranted as India has a strong IPR law and has shown a high degree of maturity in dealing with intellectual property rights over and over again. The Doha Declaration also underlines the importance of implementing and defining the TRIPS Agreement in a way that promotes public health. Also, the CL application was rejected on several occasions. BDR Pharmaceuticals Pvt has recently been denied by the Inspector General of Patents (from now on the Inspector) in India. Application for CL for the cancer drug SPRYCEL by Bristol Myers Squibb (BMS) Ltd. SPRYCEL is a brand name under which DASATINIB is the active pharmaceutical ingredient used for patients with chronic myeloid leukemia protected for patent number IN203937. The drug has earned the status of Orphan Drugs in the USA, Europe, and Switzerland. The controller rejected BDR's compulsory license application for arguing that BDR had failed to figure out the prima facie case for making an order under section 87 of the Act[70].

[70] K & K Advocates and IP Attorneys, Indian Patent Office Rejects Compulsory Licensing Application: BDR Pharmaceuticals Pvt. Ltd. Vs Bristol Myers Squibb available at https://www.khuranaandkhurana.com/2013/11/13/indian-patent-office-rejects-compulsory-licensing-application-bdr-pharmaceuticals-pvt-ltd-vs-bristol-myers-squibb/(last accessed 17 Apr 2020)

It is therefore disappointing that the draft policy is silent on the need to incorporate the issues of public interest into the law, and does not recommend any practical steps to do the same. Moreover, while the paper seeks to draw a link between strong IP security and increased foreign investment, it should be noted that in its 110th Report on FDI (Foreign Direct Investment) in the Pharmaceutical Sector, the Parliamentary Standing Committee on Commerce observed that 100% of FDI in the sector had not resulted in increased employment opportunities, technology tranches.

Essentially, any dilution in the country's current legal framework could adversely affect the domestic pharmaceutical industry, especially the powerful and rapidly increasing generics segment. The maximum impact will be felt in the present Telangana, Andhra Pradesh, Himachal Pradesh, Punjab, Gujarat, Madhya Pradesh, and Maharashtra states Pharma-clusters. In particular, if the manufacturing of generic drugs takes a blow, Hyderabad, which accounts for 20 percent of all exports, will be affected. Now domestic manufacturers dominate 77 percent of the country's market, and with patented drugs worth about $170 billion expected to go off by 2015, there will be a huge increase in generic products and will provide Indian companies with an opportunity to expand further. In such circumstances, the legislation must seek to protect domestic manufacturers' interests and ensure millions of people in India and across the globe have access to affordable healthcare.

Impact of the Policy on Information Technology Industry

India has a substantial and well-known outsourcing sector of information technology and business processes, with exports in 2013-14 exceeding USD 85 billion. As regards IPR relating to the IT field, the Patents Act, 1970, provides for the exclusion of a computer program per se other than its technical application to industry or a combination with hardware under section 3(k). Approximately 64 percent of the software used in India is pirated, however, which is a major concern for tech companies. However, India is not granting patents on mere software and instead is protecting software under the Copyright Act. Also, the Government has advocated open standards, and in 2010, the IT Department finalized its Open Standards Policy on e-Governance. The draft policy does note the point that the Policy would support the GoI's Digital India initiative because it will enable e-commerce and other IT-based startups to use IPs. It spoke

extensively on the need to combat piracy and recommended tighter compliance to ensure the same thing. Nevertheless, if it had addressed alternatives to the IPR system in the IT sector, such as the need for free/open-source software or the need to follow open standards, it would have been useful.

Role of States in protecting and promoting innovation

States have a significant and integral part of India's growth story, and it is in this regard that they are required to play a constructive role in promoting the national IPR regime and in fostering innovation through an institutional set-up. The National Innovation Council (NInC) has supported the establishment of State Innovation Councils (SICs) to support its efforts to push the agenda for innovation. Accordingly, in the country, 31 SInCs were created. Andhra Pradesh and Telangana, in particular, have yet to set up a SInC in the state.

Furthermore, states like Gujarat took the lead in creating an IP friendly environment; Gujarat did so by launching the State Innovation Portal and the IPR Center under the auspices of the Gujarat Science & Technology Council (GUJCOST) at Gujarat National Law University. Some states have also established IP cells under the Economic Offences Wing within the police department. It is, therefore, critical that the states actively participate in developing the right climate for IPR by concerted action.

MULTILATERAL NEGOTIATION

The legislation calls for the improvement at different levels of IP compliance agencies, including the strengthening of IPR cells within state police forces. It proposes adjudication of disputes over the IP through commercial courts. The proposal represents a significant deviation from the well-established interpretation of the 1970 Indian Patent Act framing commissions of Bakshi Tekchand and Justice Iyengar. The model patent act provided for the granting of rights for the use of new processes to support the pharmaceutical and food industries, and laid the foundation for innovative imitation or reverse-engineering approach, which led Indian R&D institutions to develop over 50 new chemical reaction processes for more than 100 critical drugs.

The policy notes in writing that the Government should participate in the negotiation of international treaties and agreements constructively. This also notes that it will seek accession to

certain multilateral treaties that are of interest to India. Is this an indication that India could be a party to the Trans-Pacific Partnership (TPP), where the TRIPS-plus agenda already exists?

The Policy seeks respect for IP, and the present Government wants to take that message to schools, colleges, and the public in its usual style. It needs multinationals to be active in IP education programs. Targeting the judiciary through "information" and "training" on an IP maximalist agenda that is likely to disrupt the delicate balance between the public interest and the IP that the courts have struggled to uphold is perhaps the biggest concern. Publicly funded research investments must meet the standards of strict intellectual property licensing. India can also enter UPOV 1991, which would prohibit farmers from saving their seeds and using them. The IPR strategy is not in the national interest, provided that farmers' rights, safety, and access to information are at stake.

While the reason cited for this Policy is that a strong framework of intellectual property rights is required to encourage creativity and innovation in India, there is plenty of evidence to the contrary. The right to monopolies stifles radical creativity. Monopolies don't foster the trajectories of sustainable innovation. Barriers to cooperation in research will evolve. Knowledge diffusion fails, and business and research tend to be creative with difficulty. A strong IP program means the people of India have reduced access to innovation. As a coin has two sides, does the Policy too, it does possess certain drawbacks.

DRAWBACKS OF THE POLICY

The policy, which is one of its kinds, suffers from various flaws and drawbacks that can impair the better protection of IP in India. The research shall include the first center around some inherent flaws in the foundation of National IP Policy and later analyze the apparent changes that occurred in the subsequent years after which the policy has been drafted.

The vision statement of the National IP Policy does not match the methods proposed in the policy document. The vision is to share the “benefit of IP” with all.[71]But the policy stresses on the increase in the formation of IP assets across the country. More IP means more monopoly

[71]*Supra n.*3 at 4.

over the assets. So an increase in monopoly and IP assets will impair the sharing of knowledge among the people.

Maximization and excessive emphasis on the IPR regime will impede development. The high protection for IP will create an environment where IP assets are protected vigorously, and this will impede the creation of a social culture where information is shared. Thus what the policy endeavors, it fails to seek. Though IP is an inspiration for the innovators, it is often criticized that a rigid application of IP often leads to negative results and hampers a climate of innovation. Any monopoly for a short time leads to a disproportionate allocation of the resources and leads to inequality in society.

The mission statement, which stresses the sharing of knowledge among all, is a progressive step. But the policy is silent on the method of reaching the same. One of how this sharing of knowledge can be attained is by providing sufficient exceptions to existing IPR laws. In this way, the mission of ensuring "shared benefit" can be attained. An excessively rigid infringement proceeding will affect the effective IP regime. Therefore, it must be ensured that IPR infringement remedies are reasonable ones. The mission statement does not make any reference to the provisions of the Constitution so that the policy is implemented without violating any constitutional provisions. Since most of the IP assets are prone to acquisition by the Government in India for public purposes, "due process of law" should be recognized concerning IP. The IP laws also incorporate sufficient provisions for such acquisitions. In most of the cases, such governmental acquisitions are made without following just, proper and transparent procedures imposed by law. Hence it is the need of the hour to recognize "due process of law" concerning IP. Such recognition will ensure that IP assets are not acquired without following "just, fair and reasonable procedures established by law." Furthermore, the mission statement is silent in several sectors, such as access to knowledge, disability rights, education, etc. Although the mission statement envisages a dynamic IP regime with the sharing of knowledge, it does not refer to the need for ensuring that the knowledge is disseminated to all the sections of the society. The disabled and other marginalized layers of the society cannot be expected to have access to the IP knowledge of their own. Special care and attention must be taken to provide such categories of citizens with access to IP knowledge, to attain an inclusive growth concerning IP.

One of the objectives of the IP policy is to create awareness among the people about the developmental prospects of IP and its socio-economic and cultural benefits. However, the rationale behind the awareness program is not proved or well-founded. Whether IP creates competition and economic growth is still to be proved. There is no data to prove that innovation is directly linked to the quantity of IP created.[72] Moreover, the existing studies do not establish a direct link between an increase in innovation and a grant of IP rights. In the opinion of Michele Boldrin, "though there has been a tremendous rise in patent filings in the US, it is not reflected in technological advancement. In the US, there has been an increase of 2 lakhs patent applications after the 1980s. However, at the same time, the statistics with the Labour Department show a stark decline in growth in productivity over the same period. This happens at a time when about 2.5% of the total GDP is spent on research purposes every year.[73] IP rights seem not to affect relatively new industries like software and biotechnology. Researchers like Boldrin and Lavine have conducted a survey and found that IP protection and innovation are not connected factors, and hence it would be wrong to conclude that better IP protection will lead to greater innovation. It is also pertinent to take note that the relation between IP and innovation if any, would only have different connotations in developing and underdeveloped countries when compared to developing countries. Prof Bryan Mercurio has conducted empirical research on the enterprises involved in IP and found that excessive protection regime has often created barriers on innovation as the IP protection leads to a rise in the cost of innovation.[74] Any advancement can only be made with the use of existing patents in a particular field whose license will not always be available at fair and reasonable terms. It is also found that innovation- IP nexus does not apply to developing and least developed countries. There are judicial decisions in Canada, which states that the increase in a monopoly over the resources will impair innovation in the long term.[75] Thus the first objective of the policy is based on something that is yet to be proved with practical evidence. The policy should not be based on a mere theory on paper. So, whatever data that is used for awareness programs must be practical and not hypothetical. It is only when the tested

72 Michele Boldrin & David K. Levine, *the Case against Patents*, 27 J. ECON. PERSPECT 3, 3-22 (2013).

[73]U.S Dept. of Labor, News Release, Bureau of labor statistics, available at https://www.bls.gov/news.release/pdf/prod2.pdf (last accessed 25 Mar 2020).

74 Petra Moser, *How Do Patent Laws Influence Innovation? Evidence from Nineteenth-Century World Fairs* , NBER Working Paper Series (2003) available at http://www.nber.org/papers/w9909 (last accessed 22 Mar 2020).

75*CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339.

data is used for such purposes that we can instill confidence in the stakeholders and the general public.

Another objective under the awareness head is to target public research and development institutions. However, the public institutions, instead of focusing too much on awareness programs, must engage itself in the research and identify the problems that plague the system at the implementation level. The policy at the next level wants to inculcate a culture of IP through IP education in schools. But the policy does not make a vision statement regarding the inclusion of IP in the school curriculum. If the students in schools and universities are taught to monopolize every intellectual property, it will inculcate a corporate culture that only aims at the making of profit. The policy is silent on the need to teach the drawbacks of the rigid journey behind IP and the necessity to balance those private rights with that of public interest.

Such a balanced IP educational policy will ensure that awareness is generated about an idea of IP, which serves the public interest and private interest at the same time. At this juncture, it is to be noted that though the policy's first objective deals with the need for creating awareness about IP in the country, the policy repeats the necessity of awareness in multiple instances till the end. For every objective, the policy considers awareness as a way to its achievement. The policy lays too much emphasis on creating awareness and fails to put forward practical solutions for the real problems faced by the IP regime.

The second objective of the policy mainly focuses on stimulating IP creation in India. The objective fills around two and a half pages of the policy. But apart from awareness creation and stimulating state-funded research organizations, the policy does not offer much under this head. The objective of the IP generation is also founded on a wrong notion. The statement of the second objective extends to providing incentives for generating IP. However, the incentive theory of IP states that the grant of monopoly rights on the innovation for a limited period is an incentive for the time and effort that the innovator has invested. In the words of William Fisher, "A person needs to invest a lot of time, energy and money in the creation of an invention. Such persons who generate intellectual property must be encouraged to create more and more Intellectual assets. However, such encouragement is possible only if the innovator is given some recognition or incentive for his effort. Since the inventions have the potential to generate wealth,

it will be just and proper to allow the innovator the exploit his invention economically to the exclusion of others for a limited period. This will further encourage other people to come up with innovations. Thus the Intellectual Property Rights over the innovation is an incentive for the innovator for his time and effort. IP is not an end in itself, but it is just a means to an end. This is the basic philosophy behind IP."[76] However, the objective statement of the National IP Policy deviates from this basic foundational concept behind Intellectual Property. The Policy considers IP as an end and tries to give incentives for generating Intellectual Property. It does not consider the fact that IP is itself an incentive for innovation. These objectives are drafted by the Think Tank without application of mind, and, unfortunately, the IP Policy does not even recognize the basic philosophy behind IP. This inherent flaw is a step over which the implementation of the IP policy may fall. Another flaw under the head of the second objective is that it addresses the public-funded institutions like research laboratories, universities, etc., to generate IP. This is against the basic notions of public policy. The public-funded research institutions are operating with public money. Any IP asset that is created by these institutions is made out of public money. Giving monopoly rights to exploit the intellectual property generated by these institutions means that the public will be forced to buy the products that are made out of their own money. The interest of the public can only be safeguarded if the State is made the owner of the IP created. However, the policy is silent in this aspect. The same policy which seeks to balance the IP rights with the public interest incorporates an objective that fails the interest of the public. The government of Kerala has adopted a policy regarding the protection of IP generated in public-funded institutions. The policy of State of Kerala envisages that the IP asset created by State-run institutions "belongs to all" and it should be considered as a common property so that the big corporations are not able to exploit the scientists in such institutions to procure the IP generated for re-establishing their monopoly in the market.[77] The policy envisages that the State shall be the owner of IP generated by that research, which is funded by the State and puts forth a scheme where the State provides royalty to the scientist who has generated the same.[78]

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76 A.B. Jaffe, *The U.S. Patent System in Transition: Policy Innovation and the Innovation Process* 29 RES. POLICY 531, 531-557 (2000).

77 Intellectual Property Rights Policy for Kerala 2008 at ¶ 16, available at http://www.wipo.int/edocs/lexdocs/laws/en/in/in048en.pdf (last accessed 20 Mar 2020).

78 Id.

In this context, the policy is also silent about the Protection and Utilisation of Public Funded Intellectual Property (PFIP) Bill, 2008 pending before the Parliament. The bill envisages boosting innovation by allowing the public-funded institutions to get protection for Intellectual Property generated by them. [79] The scientist who made the invention and the institution shall share the benefits of such IPR protection. The researcher of the public-funded institution who created the IP is needed to inform the government within a stipulated period. He is barred from disclosing such invention to the public, and penalties shall be imposed on him for such default. He shall be given royalties by the Government for using his invention.[80]Moreover, the bill seeks to have a provision that allows having IPR protection over the assets above in other countries. The State shall own the IPR in such other countries. The bill seeks to aid MSMEs and SMEs by allowing it to cooperate with the government-funded research institutions in creating IP assets. The bill, in its overall sense, aims to allow the commercialization of the IP assets created by the public-funded research institutions. It is often argued that it is unjust to commercialize the IP assets made out of public money as it will force the public to buy products made out of their own money. However, the bill views the commercialization of IP assets created by public-funded institutions from a different context. Three fourth of the money used for R&D in the country is met by Government exchequer, and a part of the total GDP is pumped to the research institutions. This investment is to be regained through the commercialization of the IP assets. Once profits are generated out of the commercial exploitation of the assets, the money can be used for public welfare. The bill is based on this concept of utility and envisages development in society with the help of IP assets generated by publicly funded research organizations. Thus the second objective of the IP policy is incomplete without any reference to the PFIP Bill shall be incomplete.

The only reference to green technology in the policy is contained in the second objective. The Policy states that incentives shall be provided for the generation of IP in green technology. However, it is in contrast to the stark reality that India has a National Manufacturing policy that promotes compulsory licensing in green technology. The National Manufacturing Policy has

79 Protection and Utilisation of Public Funded Intellectual Property (PFIP) Bill, 2008, available at https://www.prsindia.org/uploads/media/1229425658/LB_Protection%20and%20Utilisation%20of%20Public%20Funded%20Intellectual%20Property%20Bill.pdf (last accessed 22 Mar 2020)

80 Id.

been drafted by the Department of Industrial Policy and Promotion in the year 2011 to put forward mechanisms for creating a favorable environment for the growth of the manufacturing sector in India.[81] Ironically, the two policies with diagonally opposite provisions have been drafted by the same Government Department. The National Manufacturing Policy states that the environmental harms posed by the growth in manufacture should be addressed by the use of green technologies in India. [82] A chapter in the policy is dedicated to green technology and the policies to be adopted for the "acquisition and development" of green technology in India.[83] The manufacturing policy recognizes that the competence of a nation in the International sphere depends much on the technological development in that country. Therefore, green technology is not a choice but a necessity for technological development in India. However, green technology is available in the world is somewhat costly and is not affordable by the Small Scale and Medium Scale Enterprises in India.[84] The manufacturing policy seeks to use the existing schemes of the Government to promote green technology in the manufacturing sector.[85]

The manufacturing policy also moots several methods to acquire such technologies. One of the methods is by the making of a "Technology Acquisition and Development Fund" (TADF), which shall be used to acquire the green technology techniques and create a patent pool to which access shall be granted to MSMEs who can get the technology at subsidized rates.[86] Pollution control mechanisms and other environment safeguard techniques will be given subsidies and incentives from the fund. Another important objective of the manufacturing policy is specifically dedicated to the "compulsory licensing of green technology."[87] Each undertaking in the manufacturing sector shall be accessed for the pollution that it is causing to the environment, and this access parameter is known as "carbon footprint." Sometimes it will not be profitable for the enterprise to use green technology with a license from the patent holder. In such circumstances,

81 Department of Industrial Policy and promotion, National Manufacturing Policy of India, available at https://dipp.gov.in/sites/default/files/po-ann4.pdf (last accessed 22 Mar 2020).

82 Id at 1.7.

83 Id at 12.

84 Id.

85 Id at 4.1.

86 Id at 4.2.

87 Id at 4.4.

the TADF, which has a patent pool of the necessary green technology patents, will license them to such enterprises at low royalties, and such enterprises can use it for developing or making products out of the IP asset.[88] In some cases, the TADF may not be having the required patent for the enterprise, and it may not be able to work with minimum impact on the environment due to such no availability of the sufficient green technology patents.[89] The situation worsens when there is a lack of willingness on the part of the patent right holder to give it on license at Fair and reasonable terms to the enterprise.[90] In such cases, the manufacturing policy recommends that the TADF will have to apply for a "compulsory license" with the Government for getting a license for using such green technologies.[91] It is a ridiculous position that the same department which promotes compulsory licensing as a method to procure green technology in the manufacturing policy has recommended to take steps for creating IPRs concerning Green technology in the National IP policy. This shows the lack of commitment to promoting IPRs in green technology. Moreover, any approach to "make in India must not be done at the cost of IP."[92] Innovation climate is not an isolated cloud created by the National IP policy. It depends upon several factors, and hence any policy for promoting IP is useless without an integrated approach dealing with other policies of related sectors. The non-reference to the National Manufacturing policy concerning green technology is hence an inherent flaw of the policy.

During the discussion stage, the Think Tank mooted a proposal to give protection to the utility models in India. The first draft of the policy even contained a recommendation regarding the same.[93] All the utility models are considered as less of a patent due to the low threshold of conditions for getting IP protection. [94] Often persons will make some improvements in the already existing inventions, which increases their utility to a large extent. In most circumstances, such improvements will not involve significant "inventive step" to grant patents. Therefore, such

88 Id at 4.4.2.

89 Id at 4.4.1.

90 Id.

91 Id at 4.4.3.

92 The Hindu, Apr 28, 2016.

93 IPR Think Tank, National IPR Policy, First Draft (Dec. 19, 2014) at ¶ 2.10, available at https://www.scribd.com/document/250945147/NAtional-IPR-Policy#from_embed (last accessed 23 Mar 2020).

94 WIPO, Protecting Innovations by Utility Models, available at http://www.wipo.int/sme/en/ip_business/utility_models/utility_models.htm (last accessed 24 mar 2020).

improvements are protected for a short period as utility models. It is not mandatory for the member countries in TRIPS to provide IP protection to "utility models."[95] Such "jugged type of inventions" are common in India, and the Think Tank has initially considered giving protection to the same. However, DIPP did not take a favorable stand to the same as it was concerned about the "evergreening of patents" if such utility model protection is granted in India.[96]Evergreening of patents refers to a situation where a person extends the IP protection by merely making improvements that increase the efficiency of the existing patents. The Think Tank believed that granting such a utility model protection in India would boost the climate of innovation and increase the recognition of the silent IP generators at the grass-root level. This opinion was countered by the Department on the ground that there is a lack of evidence to substantiate the same. Moreover, the Department opined that in the present scenario, Section 3(d) of the Patent Act of India prohibits the grant of patents to those "inventions that are mere improvements of the existing inventions." If utility model protection is granted in India, then a person can go for utility model protection in all those cases where they could not get patent rights for their invention. [97] This rejection by DPIPP is to be considered as something done without proper application of mind. The small scale industries often need to make some improvements in the existing patents for their mechanical and manufacturing needs. They tend to reap more benefits when such improvements are granted IP protection.[98] These needs of MSMEs and SMEs have made several countries like Australia to give utility model protection in their respective IP regime. However, India, which has the highest density of silent IP generators in the world, is still contemplating the need to give utility model protection.

In the Indian context, utility models can be considered as "poor man's patent." The reason for the same being that the utility models are often created at the "grass root level" by the innovators who are the common men who are not having a white-collar culture of the creamy layer innovators. For instance, Prof Shamnad Basher refers to the "coconut tree climbing

95 Id.

96 DIPP not in favour of utility patents proposed by IPR Think Tank, Business Line, May 21 2015, available at https://www.thehindubusinessline.com/economy/dipp-not-in-favour-of-utility-patents-proposed-by-ipr-thinktank/article7232186.ece (last accessed 24 Mar 2020).

97 Id.

98 Id.

machine" that has been developed in Kerala. The original innovator behind the same is still unknown, and due to the lack of utility model protection, the person is not enjoying any benefit out of the same.[99] The objective of the policy to reach out to the grass-root level innovators is only possible when the utility model protection is given by the IP laws in India. The decision of DPIP to turn down the recommendation of the Think Tank to have "utility model" protection in India has made the National IP Policy incomplete.

The policy does not deal with traditional knowledge and its protection in a comprehensive manner. The policy under the head of the third objective states that India shall provide effective protection to Traditional Knowledge against its misappropriation. Moreover, it wants the Government to engage itself in International consultations and discussions to create a "binding international instrument to protect Traditional knowledge, genetic resources, and traditional cultural expressions."[100] The policy also speaks about the importance of using TKDL as a means to evaluate whether the misappropriation of traditional knowledge has occurred. [101] Thus the policy document merely reiterates what is already there in the chartered plane in India and simply reasserts the need to protect traditional knowledge in India. The Traditional Knowledge Digital Library [TKDL] is considered as India's trump card to the protection of traditional knowledge. TKDL is an integrated database under the control of CSIR and the AYUSH department of India, which contains codified and organized information about the traditional medications, traditional knowledge, and practices in India.[102] The idea behind TKDL was mooted when several patents were granted in the US and Europe, which related to the traditional knowledge in India.[103] For instance, the grant of a patent which involved the use of medicinal healing power of turmeric, by the US Patent Office. In the past, there was a dearth in mechanisms to whether a patent filed has misappropriated any traditional knowledge. India introduced TKDL as a panacea to this problem. After the introduction of TKDL, the patent

99 Mathews P George, "Is Utility Model worth considering?"https://spicyip.com/2015/03/is-utility-model-worth-considering.html (last accessed 25Mar 2020)

100 *Supra n.*3 at 3.3

101 *Supra n.*3 at 4.9

102 WIPO, Protecting India's Traditional Knowledge, available at http://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html (last accessed 26 Mar 2020)

103 Id.

examiners across the world can check for misappropriation using the large precise database available at their fingertips. The latest studies show that India has been able to prevent the registration of some 215 patents in the last year through the use of TKDL. [104]However, TKDL is like a Trojan horse, which allows the Multi-National Companies to misappropriate Traditional knowledge through the back door. For instance, all the patent offices in the world have access to the TKDL. So whenever an allegation is raised that a patent is not novel to the existence of prior art in the form of traditional knowledge, details regarding the prior art containing TK is submitted before the patent office. Since the TKDL contains detailed information about the TK used, it leads to a situation where an interested person in the application proceedings and its opposition procedures can gain access to the TK knowledge that was not otherwise in the public domain. The situation can be exploited by MNCs in various ways. For instance, Senior Scientist Praveen Raj believes that if an MNC is having a bare basic idea about a traditional knowledge existing within a community, it can file a patent for some invention that is theoretically based on that knowledge.[105] During the examination proceedings, the complete information regarding the concerned traditional knowledge will be placed before the table of the patent office. The necessary implication of this process is that the MNCs can gain access to the complete data regarding that TK and can use it to develop their products and gain commercial advantage or monopoly in the market. Thus TKDL can now be used as a platform for organized biopiracy. To this problem, Praveen Raj suggests that the recommendations in Kerala's IPR Policy can be followed.[106]

The first step towards protecting the Traditional knowledge from misappropriation is to define it properly in the legal regimes. The IPR policy of Kerala [after this Kerala's policy] makes a significant step by defining the contours of traditional knowledge in its policy. Kerala's policy differentiates two components of traditional knowledge; the first component is that knowledge which is preserved by communities through generations and the second component is the knowledge that is used for earning a livelihood and is not confined to specific

104 Id.

105 L. Gopika Murthy, Traditional Knowledge Protection: What is the way forward?, available at https://spicyip.com/2015/09/traditional-knowledge-protection-what-is-the-way-forward.html (last accessed 26 Mar 2020)

106 Id.

communities.[107] Kerala's policy then identifies the domain in which it is desirable to keep this knowledge. The community or the custodian shall be considered as the owner about the knowledge of the first component. Whereas State shall be considered as the owner of the knowledge of the second component. Moreover, no private entity shall have the right to own any traditional knowledge.[108] Kerala's policy also elucidates the rights of the persons holding traditional knowledge. The holder of the knowledge that constitutes the first component is entitled to its exclusive use. Any other person should obtain a license known as "common's license" from such right holders for the use of such knowledge.[109]

Kerala's policy further provides for constituting a Traditional Knowledge Authority in which all those who are practicing in traditional knowledge will be registered. Kerala's policy seeks to have traditional knowledge in the "Knowledge commons" instead of the "public domain."[110] The necessary implication of the concept of "Knowledge commons" is that the traditional knowledge practitioners will be considered as the trustees and the State as the beneficiary. Therefore, such practitioners will be allowed to exploit the knowledge commercially as it will be beneficial to the state itself. The relation between the practitioners and the State will be that of trustee and beneficiary, respectively. One of the aspects of this relation is that the trustees are themselves considered to be under the "Commons license."[111] While they can use the knowledge for commercial purposes, they are not allowed to sublet the same for commercial exploitation. A third party can only use the knowledge for non-commercial purposes and that too with only a license. Any "developments" made by the use of such knowledge will be added to the "knowledge commons," and this system can be called as the Traditional knowledge Docketing System [TKDS].[112] Thus this system ensures that the knowledge is not disclosed fully into the "public domain," which makes it vulnerable to biopiracy. This is in stark contrast to TKDL, which discloses the Traditional Knowledge into the public domain, which makes the

107 *Supra n.*86 at 3.

108 Id at 4.

109 Id.

110MrinaliniKochuPillai, Kerala's IPR Policy, available at https://spicyip.com/2008/06/keralas-ipr-policy.html (last accessed 27 Mar 2020).

111 Id.

112 Id.

knowledge vulnerable to biopiracy. However, the National Policy of India has not mooted such issues before releasing the draft of the policy. Unfortunately, DIPP has not done half of what a small state in India has done to protect traditional knowledge.

In India, one of the inherent problems of traditional knowledge is the lack of sufficient legal safeguards. The Biodiversity Act, 2002 of India, is not comprehensive in this aspect. For instance, the Biodiversity Act[113] states that "any foreign citizen or a body corporate not registered in India shall have the right to appropriate or obtain the biological resources situated in India or knowledge associated with it for commercial exploitation or utilization only with the approval of the National Biodiversity Authority." However, the interest of the traditional communities of a State is best manifested through the State Biodiversity Board. Hence an additional provision regarding the need for consulting the State Biodiversity board may be included in the Act. Furthermore, the same Act provides[114] that "any Indian citizen or body corporate registered in India shall obtain permission for the use or commercial exploitation of the biological resources from the concerned State Biodiversity Board." The concerned provision does not cover knowledge associated with the biological resources, and the Indian corporates are exploiting the loophole in this provision to appropriate and gain unfair advantage in the market through misappropriation of the traditional knowledge. The National IP policy does not make any effort to address such problems with the protection of traditional knowledge.

Furthermore, the policy does not make any reference to the Protection of Traditional Knowledge Bill, 2016, that is an initiative of the Thiruvananthapuram MP Shashi Tharoor. [115] One of the primary issues surrounding the protection is the lack of a definition regarding traditional knowledge. The TK bill seeks to fill this gap by defining traditional knowledge.[116] The bill considers the importance of the Traditional Knowledge Docketing System instead of TKDL, which can ensure that traditional knowledge is protected from biopiracy. The provisions of the Bill are more or less similar to the IPR policy of Kerala. Though the bill is yet to be

113 Section 3

114 Section 7

115 The Protection of Traditional Knowledge Bill, 2016 , available at http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/3013.pdf (last accessed 27 Mar 2020).

116 Id at S. 2(1)(ix).

considered, the policy should have laid down a guideline for the passing of the bill. Traditional knowledge will fall into oblivion if the same is not practiced. The maximization of use can be achieved only through developing an awareness and respect for traditional knowledge. The policy document, which stresses the importance of creating awareness about the need for generating new IP and its nexus with innovation, fails to address the importance of traditional knowledge protection in India. Moreover, a policy document with clear guidelines on the manner of protection of traditional knowledge would have acted as a touchstone for the future legislations on traditional knowledge on India. Apart from stressing the need to protect knowledge about the traditional forms of medicinal practices, the policy does not put forward anything substantial to protect traditional knowledge. The inclusion of general provisions for the maximization of IP in India and the failure to address the issues concerning the traditional knowledge protection in India shows that the policy document has been drafted only to serve the interest of the business giants and corporates. The policy fails to offer something constructive for the protection of traditional knowledge, and it remains as an inherent flaw of the policy.

A policy drafted by the Government is considered as a manifestation of the approach of the Government towards a particular subject manner. Though it is not enforceable through Courts, it gives a reasonable expectation among the stakeholders regarding their rights. When it comes to IP policy, it shows the commitment of the Government to protect IP, which has a direct impact on the innovation atmosphere in the country. The National IP policy specifically states that India should consider signing treaties which it has implemented in essence.[117] This means that India should consider becoming a member of WIPO internet treaties, the provisions of which have been strategically adopted by India in its copyright legislation. A strict application of the provisions of these treaties will lead to unnecessary rigidity where even the transfer of files will lead to circumvention. It is this astringency that has made India adopt the provisions of such treaties without itself becoming a member of such treaties. This approach allowed India to enact limitations to the anti-circumvention provisions, to balance the rights of the copyright owners and the public who uses the same. Moreover, the same problem will arise when India becomes a member of the Regional Comprehensive Economic Partnership [after this RCEP]. RCEP is a free trade agreement proposed by ASEAN countries, and some of the SAARC countries like

117*Supra n.*3 at 3.2.

India have agreed to become a part of the agreement. It is often criticized that the provisions of the agreement are so harsh that it does not balance the interest of the copyright owner and the public. [118] Though the copyright can be considered as a private monopoly right granted to the author of a work, the fundamental philosophy behind IP envisages that the public should also be benefitted by such a grant of rights. It is for this reason that the copyright laws often incorporates the limitations to the copyright when it comes to research, education, etc., and the entire regime of fair use and fair dealing provisions stem from this rationale behind copyright.[119] One of the aspects of RCEP is that it obliges the member states to ratify agreements WCT and WPPT, which are TRIPS-plus in character. [120] Such treaties oblige the members to have a Digital Management Rights System (DRM), which are anti-circumvention techniques in the digital world.[121] When India becomes a member of RCEP, the limitations prescribed by law to anti-circumvention provisions will be scrapped, and a rigid system favoring the IP right holders will be established in India. Furthermore, RCEP obliges the members to increase the term of protection provided to the broadcasters. RCEP proposes to provide 50 years' protection to broadcasting rights. Implementation of these provisions without analyzing the ground effects will create an embargo on the better dissemination of knowledge and information in the society. It is reported that the broadcasting lobbies have urged the ASEAN countries to consider giving the broadcasting organizations the right over the content broadcasted in addition to the right over the signal.[122] This leads to a ridiculous situation where a person has to take the license of the content owners as well as the broadcasters for dealing with the content that has been subject to broadcast.

It is further reported that several countries and MNCs have been lobbying for rigid IP laws that go beyond TRIPS. This will have significant impacts on India's stance on

118 Arul George and Anubha Sinha, RCEP IP Chapter: A Serious Threat to Access to Knowledge/ Cultural Goods?, available at http://www.livelaw.in/rcep-ip-chapter-serious-threat-access-knowledge-cultural-goods/ (last accessed 28 Mar 2020).

119 Id.

120 Id.

121 Id.

122 Id.

pharmaceutical drugs and Section 3(d) of the Patent Act.[123] One of the objectives of the National IP Policy is to create a balanced framework of law that protects the interest of the public as well as the IP owners. On the other hand, the same policy envisages the Government to become parties of the International agreements covering IP. Additionally, the commercialization of the Intellectual Property can only be effectively done through free trade agreements like RCEP, which tends to compromise the interest of the public to protect IP owners. In this light, it can be logically derived that the National IP Policy has not put forward a clear cut strategy that enables the commercialization of IP without disturbing the balance between the interest of the IP owners and the public.

The policy is more or less silent about Geographical Indications [GI] and its protection in India. While all other Intellectual property assets like patents, designs, etc., found a place in the policy and "Make in India" program, geographical indication has been left out. Other than certain casual references, the policy document does not recommend anything substantial to protect GI. The geographical indication can be considered as people's IP for the reason that it can bring prosperity and welfare to local producers and villages. It is for this reason that the famous IP lawyer, FlorentGevers, had described Geographical Indication as "sleeping beauty."[124] The registration of GI in India has increased over the last decade, which is a harbinger to a bright future for GI in India. However, it is unfortunate that the policy which seeks to bring social and economic progress in India has left out GI, which has the inherent capacity to bring such progress in India. Moreover, there are certain problems with GI that the DIPP should have taken cognizance while drafting such a policy. GI lags in India due to the lack of legal mechanisms for ensuring quality and monitoring the registered indications. This is particularly significant because GI products derive their market from its quality and reach in a particular market. While Europen Union has such a mechanism to ensure the quality of GI products,[125] India doesn't have

123 RenjaSengupta, A trade pact that could hit India hard, available at https://www.thehindubusinessline.com/opinion/a-trade-pact-that-could-hit-india-hard/article9714546.ece (last accessed 29 Mar 2020).

124Latha R Nair, Making India GI brand conscious, available at https://www.thehindu.com/opinion/op-ed/comment-article-by-latha-r-nair-making-india-geographical-indications-gi-brand-conscious/article14158353.ece (last accessed 29 Mar 2020).

125 ECR 1151/2012, available at http://www.wipo.int/wipolex/en/details.jsp?id=13384 (last accessed 30 Mar 2020).

similar provisions for ensuring quality apart from the rule which asks for specifying "inspection body" before GI registration.[126] Another problem with GI in India is that the holders of GI do not adequately represent the interest of the producers. The purpose of GI will be served only when the benefit of its exploitation reaches the producers. Such problems continue to plague the GI regime in India, which needs immediate attention. The omission to include a comprehensive policy for the protection of GI shows that the policy only focuses on those IP assets that are commercially beneficial to corporates. The policy in this respect falls itself to be a policy drafted to protect the IP assets of the corporates only, and this stands as an inherent flaw of the National IP Policy.

The National IP policy is entirely silent about the "confidential information" regime in India. Though confidential information is recognized in TRIPS,[127] India has not enacted any specific statute for its protection, and effective enforcement and "confidential Information" are protected in India under the regime of Contract Act and common law.[128] None of the Indian laws define confidential information, the extent of protection, the remedies in case of infringement, etc. Indian law seeks to provide contractual protection to confidential information that came into the possession of the employee in the course of his work. The protection extends even after the termination of his employment, and it is covered as an exception under an "agreement in restraint of trade." However, this system of protection provided by the Indian law to "confidential information" is considered inadequate due to the reason that the current law lacks tooth and nail to protect the theft of confidential information, especially when there is a lack of contractual agreement. An action for theft of confidential information does not lie under the Indian Penal Code for the reason that it is difficult to prove that such information constitutes a "movable property" under the Code. Moreover, under the current legal regime, the onus is upon the aggrieved party to prove that there is a violation of "confidentiality." The policy does not address all these issues. In 2008, the Department of Science and technology had published a draft bill titled 'National Innovation Act, ' which seeks to provide a mechanism for the

126 Rule 32(6) (g) and Form GI-1.

127*Supra n.*2 at art. 39.

128Dr.ShrikantKamat, Trade Secrets Protection in India- A law whose time has finally come, available at https://www.linkedin.com/pulse/trade-secrets-protection-india-law-whose-time-has-finally-kamat(last accessed 30 Mar 2020).

protection of confidential information.[129] The significance of the bill lies in that it covers the protection of confidential information even in the absence of a contract. Thus the bill has provisions that recognize the equity rights of a person who holds confidential information. However, the bill does not find mention in the National IP Policy. Thus it can be seen that the National IP Policy of India does not bring hope to a confidential information protection regime, and it remains a neglected area in IP within India. On one side, the policy strives to maximize IP, and on another side, it blatantly fails to address the problems with confidential information in India. The implementation of the policy through the "Make in India" project will yield results only if problems concerning trade secrets are addressed by the policy, and it remains a massive gap in the National IP Policy.

Finally, it can be seen that the policy neither mentions the pharmaceutical sector nor the compulsory licensing regime in India. From this, it can be inferred that the existing legal regime shall continue to address the pharmaceutical sector. However, considering that India is an exporter of drugs to the African countries, it would have been a prudent act if the Thinktank had mentioned the stand on compulsory licensing concerning pharmaceutical drugs. The real problems concerning the policy will pop up only when it is implemented at the practical level. No policy can foresee all the permutations and combinations of the problems that may arise when it is implemented. Despite these drawbacks, the Government has moved forward in implementing the policy, and it would be relevant at this juncture to analyze the working of the policy and the practical aspects that came up during its implementation.

129 Id.

CONCLUSION

The present IP Policy seeks to incorporate IP into national growth strategies as a policy and strategic tool. It foresees a concerted and integrated growth of the IP system in India and the need to follow a comprehensive approach to legal, administrative, institutional, and regulatory issues related to the IP. Some critics had argued that the policy was implemented as a result of U.S. pressure to help their pharmaceutical industry profit on Indian markets. However, the policy phased that claim out by seeking to affect national interests in the pharmaceutical industry. The policy outlines several targets but remains ambiguous in some places where some of the points have only been listed to be stated in the policy, but there are no detailed follow-ups on those. It is expected that the Government would put out a thorough follow-up on all unaddressed policy issues in the form of new and revised laws and regulations.

CHAPTER -4

NATIONAL IP POLICY VIS-A-VIS WIPO DEVELOPMENT AGENDA

INTRODUCTION

The WIPO Development Agenda can be considered as an effort by WIPO to have an integrated approach to IP. Traditionally WIPO has been concerned only with the interest of the right holders regarding IP. However, WIPO decided to moot an agenda for protecting all the stakeholders along with the IP right holders, after considering the interests of the developing countries and the "Geneva Declaration on the future of World Intellectual Property Organisation."[130]

The declaration identified the interplay between innovation, creativity, and development. It also focuses on the global crisis faced by humanity in the governance of knowledge, technology, and culture. The crisis is manifest in many ways, such as; Denial of access to essential medicines, Inequality exists in the access to education, knowledge, and technology. Anticompetitive practices may retard the incentive of innovation, concentrated control of knowledge, biological resources. It may harm diversity, and democratic institutions, IP Protection in the digital field threaten crucial exceptions in copyright laws for disabled persons, libraries, educators, authors, and consumers, and undermine privacy and freedom. Private interests misappropriate social and public goods and lock up the public domain.

The "right to access" of the people and the problems faced by the developing countries concerning the IP rights over "intellectual creativity" has been systematically aired by the declaration.[131] The developing countries opined that the socio-economic framework of each country differs and the application of one universal TRIPS to every country will lead to undesirable outcomes. Therefore, the declaration reminded WIPO of the need to take cognizance of the "developmental needs of developing and least-developed" countries and to set out an agenda for protecting all the stakeholders along with the IP rights holders.

130Geneva Declaration on the future of World Intellectual Property Organisation, available at https://www.opensocietyfoundations.org/sites/default/files/wipo_declaration_0.pdf (last visited Oct.13, 2019).

131Ibid.

BACKGROUND

The concern was first voiced by the Latin American counterpart's, i.e., Argentina and Brazil, in 2004, and they were backed by the other twelve members recommended the General Assembly of WIPO to consider drafting such a model.[132]Following consultations, Member States decided to hold a series of Intergovernmental Intersessional Meetings (IIM) to review proposals proposed initially by Brazil and Argentina as well as additional proposals from the other Member States. In 2005, three IIM sessions were held, at which eight papers were presented, containing specific proposals. WIPO also organized an International Seminar on Intellectual Property and Development in May 2005, in collaboration with other multilateral organizations such as UNCTAD, UNIDO, WHO and WTO that was open to all stakeholders including NGOs, civil society and academia.

This is an extensive unsettled and much required first step toward a new WIPO mission and work program. It is not perfect. The WIPO Convention should formally recognize the need to take into account the "development needs of its Member States, particularly developing countries and least-developed countries," as has been proposed, but this does not go far enough. The functions of WIPO should not only be to promote "efficient protection" and "harmonization" of intellectual property laws but to formally embrace the notions of balance, appropriateness, and the stimulation of both competitive and collaborative models of creative activity within national, regional and transnational systems of innovation.

Several discussions and deliberations were conducted with the stakeholders. A provisional committee named PCDA was constituted to recommend the proposals for drafting the agenda. The Committee met on two instances in the year of 2006, and 111 proposals were adopted in actionable and operational form for consideration. The foundation for these came out of 14 proposal papers by the various Member States.

The 45 Adopted Recommendations under the WIPO Development Agenda

132WIPO Development Agenda: Background (2004-2007), available at http://www.wipo.int/ip-development/en/agenda/background.html(last visited Oct.12, 2019).

In the words of Christopher May, "The Development agenda of WIPO stresses on the public policy aspects of Intellectual property and presupposes that IP is not an end in itself."[133] A long list of recommendations was first submitted by the Committee which was later cut down to 45 recommendations.[134] All the recommendations were adopted in the 2007 session. However, some of the recommendations of the agenda were earmarked for immediate implementation considering the less socio-economic costs involved in its implementation. The recommendations are divided into several clusters and these together forms the development agenda of WIPO. They are divided into following six clusters such as:

• Cluster A: Technical Assistance and Capacity Building

• Cluster B: Norm-setting, flexibilities, public policy and public domain

• Cluster C: Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge

• Cluster D: Assessment, Evaluation and Impact Studies

• Cluster E: Institutional Matters including Mandate and Governance

• Cluster F: Other Issues

The implementation of all these recommendations throughout the countries requires concerted and harmonious efforts, and therefore, WIPO constituted a "Committee on Development and Intellectual Property" [CDIP] for the purpose. It includes all WIPO member states as observers and allows them to participate in the intergovernmental organization, non-governmental organizations that are admitted by the Committee on an ad hoc basis. The Committee was established with a mandate to:[135]

- Introduce and implement work plans for 45 adopted development recommendations.

133JEREMY DE BEER, IMPLEMENTING WIPO'S DEVELOPMENT AGENDA available at https://www.idrc.ca/sites/default/files/openebooks/454-3/index.html#ch01fn01 (last accessed 28 Apr 2020).

134Ibid.

[135] Committee on Development and Intellectual Property (CDIP) available at https://www.wipo.int/policy/en/cdip/ (last accessed 28 Apr 2020)

- Evaluate, scrutinize, and report on the implementation of all recommendations adopted.
- coordinate with relevant WIPO bodies;
- Evaluate issues related to IP development

The Committee shall make reports and may give necessary recommendations annually to the General Assembly. It shall make a "programme" for the implementation of these provisions and shall coordinate with International bodies for the practical enforcement of these proposals.[136]

One of the recommendations of the agenda is to set up "norms" for undertaking developmental activities through IP.[137] It is expected from the member countries to draft the norms only after consultation with all the stakeholders and organisations dealing with IP. The recommendations envisage a balanced model where IP is seen as a step to progress and development. Another pertinent recommendation is that WIPO will render advice to the developing and less developed countries to effectively use the malleable provisions of TRIPS so that the entire IPR can be used for socio-cultural and economic development. In contrast, developing countries and civil society organizations can allege success in putting development more squarely on WIPO's radar.

The inter-governmental Committee drafted several projects embodying effective mechanisms for the proper implementation of the agenda. There are around 38 projects for the implementation of the agenda, with one among them being "Improvement of National, Sub-Regional and Regional IP Institutional and User Capacity."[138] This project incorporates that WIPO shall render required help to the developing and least developed nations to draft National IP Strategies.[139]The various completed projects include: Project on augmentation of WIPO's Results-Based Management (RBM) agenda to Support the Monitoring and assessment of enlargement Activities, Patents and the Public Domain, IP, and the Informal Economy, etc..

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136 The WIPO Development Agenda, available at http://www.wipo.int/edocs/mdocs/africa/en/wipo_ip_recs_ge_16/wipo_ip_recs_ge_16_t_3_d.pdf (last visited Jul. 20, 2019).

137Id.

138 WIPO, Projects for Implementation of Development Agenda Recommendations, available at http://www.wipo.int/ip-development/en/agenda/projects.html (last visited Apr. 20, 2020).

139 WIPO, National IP Strategies, available at http://www.wipo.int/ipstrategies/en/ (last visited Apr. 20, 2020).

WIPO AGENDA V. NATIONAL IP STRATEGY

All countries hold resources in the form of human capital, universities, academic institutions, and business enterprises. The objective of an IP strategy is, therefore, to have, over time, a plan whereby all national stakeholders will work together to produce, own, and leverage research outcomes, inventions, new technologies, and creative works.

National IP strategy is the policy of the Government towards IP protection in the country, and it lays down certain guidelines and standards that have direct nexus with the plight of IP protection in that country. A national strategy concerning IP also allows the stakeholders to know what to expect from the Government, and it has an impact on the innovation climate of a country. It is known that the national policy with regard to IP in each country will depend upon the needs and aspirations of each country, the presence of similar issues suggests that having a common resource for use in implementing these strategies would be a more effective and productive way to manage the task. Against this context, the WIPO Development Agenda Project DA-10-05 was developed with the goal of providing a consistent and harmonized approach, including a collection of instruments and mechanisms, to direct Member States in the development of a national IP strategy.

Thus, WIPO undertakes to give guidelines to the members to draft the policy so that uniformity can be attained in the IP regimes across the world. WIPO ensures that the guidelines do not befall itself into a set of minimum standards with a "one-size fits all" approach like TRIPS. In formulating the guidelines WIPO has given specific stress to the developmental needs of the developing and least developed countries. The idea that there must be a balance or consensus between IP rights and public interest has pervaded the entire model. These guidelines form the WIPO model for the National IP strategy and it would be relevant to analyse the National IP Policy of India in the light of this model.

The methodology of drafting a National Policy according to WIPO will include eight different steps.[140] They are as follows:

i. Assessment mission

140 WIPO Methodology and tools for the Development of National IP Strategies, available at http://www.wipo.int/ipstrategies/en/methodology/ (last visited Apr. 29, 2020).

ii. Project team
iii. Desk research
iv. Data collection
v. National consultation
vi. Drafting on the strategy
vii. Validation of the strategy and
viii. Implementation

The first step is considered as a groundwork where all the stakeholders are consulted, and they are taken into confidence for drafting the policy. Moreover, such an exercise ensures that all the interested parties are involved in the policy drafting. This is essential to ensure better participation of people so that a people-friendly policy can be drafted. The subsequent step is to form a team to undertake basic studies about the political, social, economic and cultural environment of a country. This understanding helps the Government to formulate a policy that is in harmony with the social structure of a country.

The process involves data collection by the use of a "baseline questionnaire," a model questionnaire prepared by WIPO for collecting data regarding the socio-political and economic infrastructure of the country.[141] The data collection further facilitates the identification of the shortcomings of the existing IP regime in a country and helps to give shape to a policy that fills the existing gaps in the legal regime. WIPO also proposes that the policy should be based on the inputs received from the stakeholders during the stage of consultations.[142] The process shall also involve a second round of consultations in which the suggestions and inputs received in the first round are made more refined.

The entire wheel of the procedure ensures that all the concerns of the stakeholders are manifested properly through proper channels. After that, the refined inputs are made concrete through the policy drafting mechanism under the auspices of the Government. However, the

141WIPO Methodology and tools for the Development of National IP Strategies, Tool 2: Baseline Survey Questionnaire, available at http://www.wipo.int/edocs/pubdocs/en/intproperty/958/wipo_pub_958_2.pdf (last visited Apr. 11, 2020).

142 WIPO Methodology and tools for the Development of National IP Strategies, Tool 3: Bench Marking Indicators, available at http://www.wipo.int/edocs/pubdocs/en/intproperty/958/wipo_pub_958_3.pdf (last visited Apr. 12, 2020).

manifestation of the model into the national level by WIPO has been marred by several factors like the lack of stringent measures for its enforcement. The model is construed as a compromise or agreement that arrived between the parties and lacked the implementation wing.

In light of the significance attached to the WIPO guidelines, it would be just and proper to evaluate the National IP Policy of India against the backdrop of the guidelines. First of all, the Think Tank that has been constituted to draft the policy has not revealed the "methodology" for formulating the policy.[143] Though comments have been invited from the public, the same has not yet been published by the panel.[144] The policy merely mentions about the IP laws in India and the necessity to make such laws dynamic to address the changing needs in the society. It recommends the Government to take steps for increasing the IP filings by Indians. Apart from such references the policy document does not mention about any studies undertaken to analyse the position of the existing IP regime, as envisaged by WIPO in its model. Moreover, the "baseline questionnaire" method to collect data regarding the socio-economic structure of the country finds no mention in the policy.[145]

The National IP Policy goes against the WIPO model as the Think Tank had consulted with the stakeholders only after the first draft of the policy has been published. The WIPO model states that the consultation with the stakeholders had to be done before the drafting of a national IP strategy. It ensures that the inputs from the stakeholders are ultimately used to draft the policy. If the stakeholders are consulted only after a draft is published, sufficient inputs from them cannot be obtained and the entire process is reduced to a mere discussion on the policy drafted. It is argued that DIPP has invited comments from the stakeholders before finalising upon the first draft.[146] But mere invitation if comments will not be effective as constructive consultations. Hence the National IP policy falls short of a vital requirement put forth by the WIPO model.

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143 CIS, *National IPR Policy Series: India's National IPR Policy- What would WIPO Think?*, available at https://cis-india.org/a2k/blogs/national-ipr-policy-series-indias-national-ipr-policy-what-would-wipo-think#_ftnref1 (last visited Nov 21, 2019).

144 Id.

145 Id.

146 Id.

The WIPO model suggests that a National IP Strategy should address the policies for different sectors.[147] The IP policy has addressed several sectors like pharmaceutical sectors, green technology etc. For instance, the policy states that "R&D, including open-source research, must be encouraged for the diagnosis and treatment of new diseases."[148] Furthermore the need for developing IPR in the climate change technology or green technology sector has also been emphasised.[149] Therefore the policy has fulfilled this aspect of the WIPO model.

Another recommendation of the WIPO model is that a National IP Strategy should have a "long term development plan." The objectives of the policy which focus on the generation of IP, creating awareness, human capital development, etc., more or less represent a long term agenda, and the policy satisfies the particular requirement of the WIPO model. Similarly, the requirements like strengthening the national IP office, International obligations etc., have been touched by the policy in its main objectives itself. The policy stresses the need for the generation of IP through universities[150], the better administration of IP through government offices[151], strict actions against piracy[152], balance IP rights with public interest[153] etc. In these respects, the policy complies with the model suggested by WIPO. However, the policy is silent on the "baseline survey," which means that no data regarding the socio-economic structure of the country and the flaws in the existing IP regime were collected before drafting the policy. This remains as a fundamental flaw in the policy.

The final and most important recommendation of the WIPO model is the need to have mechanisms for the implementation of the National IP Strategy.[154] The WIPO model further suggests that the implementation must also include continuous assessment and monitoring of the

147WIPO Methodology and tools for the Development of National IP Strategies, Tool 1: The Process, available at http://www.wipo.int/edocs/pubdocs/en/intproperty/958/wipo_pub_958_1.pdf (last visited Dec. 21, 2019).

148National Intellectual Property Rights Policy, ¶ 2.10 available at http://dipp.nic.in/sites/default/files/National_IPR_Policy_English.pdf(last visited Oct.21,2019)

149Id at ¶ 2.18.

150*Id* at 2.4.

151*Id* at 11.

152*Id* at 6.8.7.

153Supra n18 at 6.8.7.

154 Id at 9.

implementation. The implementation criteria are addressed by the policy in basically two prongs. The first prong is that the policy identifies the IP as private rights which can be enforced by the IP owners.[155] The function of the State is to provide efficient legal remedies for the IP owners, check the abuse of IP, and to take steps for ensuring that the public interest is balanced with the IP monopoly rights. Additionally, the policy seeks to constitute "specialized commercial courts" for the adjudication of IPR disputes.[156]

Thus at the first level the policy strives to promote the enforcement of IP rights as a private right. At the next level, the Think Tank strives to implement the IP policy by clubbing it with the "Make in India," "Digital India," and other pilot projects of the Government. The last part of the policy talks about its implementation. The policy under this head acknowledges that considering the diversity in different sectors, the application of single standard IP policy is likely to create inconsistency in different areas of society.

Therefore, the DIPP has to undertake the duty of coordinating all the departments to implement the entire policy in an integrated and balanced manner. However, the policy lacks any specific enforcement mechanism, and the implementation of the principles contained therein depends on the Government's commitment towards the implementation of the same.

CONCLUSION

In light of the propositions above, it can be said that though the National IP Policy has complied with many of the principles embodied in the WIPO model, it has failed to follow two fundamental and significant recommendations of the model viz., baseline questionnaire and enforcement. Thus the policy drafted by the Think Tank misfits into the National IP strategy as proposed by WIPO.

155*Supra n.*3 at 16.

156 Id.

CHAPTER-5
BRICS AND IP POLICY

INTRODUCTION

Goldman Sachs first used the term BRIC in their Global Economics Article, "The World Needs Better Economic BRICs," in 2001.[157] The 1st BRIC Summit was held on 16 June 2009 in Yekaterinburg, Russia. It was decided to extend BRIC into BRICS with the addition of South Africa at the meeting[158] of the BRIC Foreign Ministers in New York in September 2010.BRICS brings together five major emerging economies, namely BRAZIL, RUSSIA, INDIA, CHINA, and SOUTH AFRICA, comprising 43 percent of the world's population with 30 percent of the world's GDP and 17 percent of world trade.[159] Since India is a member of the BRICS and has a detailed understanding of the national IP policy, it is essential to examine the IP policing of BRICS country

POSITION OF BRAZIL

In Brazil, it is the responsibility of the Chamber of Foreign Trade (CAMEX), established in 1995, to develop, adopt, organize, and enforce trade policy in goods and services. In Brazil, the theft of intellectual property has strong social acceptance. It has long been the public opinion that stealing from Hollywood is no big deal. A strong example of social acceptance took place in 2005 when then-President Lula made very positive remarks about a Brazilian movie he had just watched in his private airplane. However, the film was only available in the movie theaters, and Sony Pictures, who was the distributor, declined to give the president any personal copy.

Brazil boasts substantial intellectual property rights. The anti-piracy law was established in 2003, and it punishes the criminals with imprisonment up to four years and a fine. Brazil's issue is that the laws are not applied as planned, and there is a little political will to order the police to implement such laws. The ability to enforce the laws on intellectual property could soon

[157] BRICS states stick together in Crimea crisis | World. available at https://www.dw.com/en/brics-states-stick-together-in-crimea-crisis/a-17546606(last accessed 04 May,2020)
[158] 3rd BRICS Summit in Sanya, China on 14 April 2011.
[159] BRICS INDIA 2016: **B**UILDING **R**ESPONSIVE, **I**NCLUSIVE & **C**OLLECTIVE **S**OLUTIONS available at http://brics2016.gov.in/content/innerpage/about-usphp.php (last accessed 1 May, 2020)

improve. The Brazilian film and music industry has vigorously campaigned for stricter implementation of the laws over the last years. The idea of stealing from Hollywood is about to shift as more than 50 percent of pirated films are currently being made in Brazil.

Intellectual property policies have been a significant area of improvement in the review period 2004-2007, the official said[160], as new legislation has been introduced and the IP law has changed. The country complies with all main aspects of the TRIPS agreement, and grants rights in areas such as copyright law and pipeline patents beyond the minimum requirement, the review report of the WTO secretariat said.

Many improvements after the previous analysis include guidelines and legislation for genetically modified organisms, and a 10 percent margin of preference for small and medium-sized companies bidding for government procurement contracts was adopted in 2006. Brazil being a non-member of the WTO Accord on Government Procurement. It was invited to participate but suggested that "it's not in the cards for the moment," Major said.

This worried the United States, which said in a statement that it was "worried with the untransparent government procurement practices of Brazil as well as the lack of involvement in the WTO GPA." The US agreed with the WTO secretariat and urged Brazil to "consider the benefits of joining," the statement added. This support has resonated with the European Union. The European Union has called for compliance and listed the "common backlog" of patents and trademark applications.

IP POLICY OF EU

The members of the European Union have shown tremendous progress in the innovation index and is "catching up with the US and Canada" in terms of IP protection.[161] EU as a whole has a better innovation-friendly environment, and one-third of the total economic activity and

[160] Intellectual property watch, International IP Policy news available at https://www.ip-watch.org/2009/03/11/wto-review-finds-brazil-progressing-on-trade-policy-ip-rights-protection/(last accessed 09 May 2020)
161 EC, European Innovation Scoreboard, available at http://ec.europa.eu/growth/industry/innovation/facts-figures/scoreboards_en(last accessed 09 May 2020)

employment generation in the EU happens through IP.[162] It is the IP framework and the approach towards IP that has helped the EU to create such a favorable climate for innovation. Therefore, it would be proper to analyze the IP activity and policy followed by the EU and identifies the model that can be followed by India. The EU IP regime seeks to protect "human innovations" through formal recognition and enforcement measures.[163] The enforcement measure concerning IP has been given as a directive by the European Council.[164] The directive has to be imbibed into the national laws by each member of the Union. It is to be noted that the Commission has always stressed on the importance of IP as the first step of a marathon with the finishing point is the improvement and better protection of the Intellectual Property. The Commission is committed to improve the protection mechanism available to IP and take actions against counterfeiting.[165] To improve the innovation climate in the EU, the European Commission has decided to have a "knowledge market" with patent pool and licensing.[166] This mechanism ensures optimum innovation costs and balances the grant of patent rights with the prospects of future innovation.

The Commission continuously reviews its competition policy to check the abuse of IP, which affects market competition and to bring harmony between IP rights and public interest.[167] The Commission has formulated a long term strategic plan named Europe 2020 for increasing IP flow in the Union. Since the innovation climate is directly related to the favorable opportunity for commercial exploitation of IP assets, the plan focuses mainly on "patents, and it's licensing." The Commission acknowledges "licensing" as a tool to decrease the number of "non-workable" assets. Furthermore, as a part of the EU project "Horizon 2020," the Commission is

162 SERGIO S GAMBATO ET AL., REPORT ON THE DIFFERENCES BETWEEN EUROPE AND INDIA FOR EUROPEAN SMES: HOW TO TACKLE THEM? 20(2015).

163 Id.

164 EU Directive 2004/48/EC (April 29, 2004), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=126986 (last accessed 05 Apr 2020)

165 *Supra*

166 Id.

167 *Supra* at art. 23.

implementing an "Innovation Union" program which aims at creating a framework for transforming innovation into marketable assets.[168]

The "Innovation Union" forms part and parcel of the IP Policy of the EU, and it recognizes that those member states that have invested more in Research and Development have overcome the economic depression of 2008 better. Thus it underlines the developmental and economic aspects of innovation. The flagship program envisages the members of the Union to utilize three percent of its GDP on research and development. The member states were directed to review their IP framework and take measures consistent with the Innovation Union program to improve the innovation climate. According to the directive, countries like Slovakia, Germany, etc. have brought desirable changes to their IP regime.[169] As part of the program, the member countries, including Denmark, Poland, etc., have declared tax rebates and other incentives for Research and Development in their respective territories. Slovenia, Germany, and some other countries have increased their budget allocation on R&D to increase the IP flow in the country, and the development potential attached to the IP assets are identified in the fiscal allocation of these countries. In addition to these initiatives, the focus is also given in creating a single market in the entire European Union for the free inflow and outflow of IP among the members of the Union. Since the high cost attached to the registration and maintenance of IP rights acts as a stumbling block to innovation, the Union aims to reduce the cost of IP filings in all the members. A European Union package has also been declared to enable the members of the Union to cut down the costs of IP filings.

Moreover, the members are expected to have an integrated approach harmonizing all the related sectors for the protection of Intellectual Property. This is based on the notion that the plight of IP in a country is dependent on several factors, and it should not be viewed in isolation. The European Commission further seeks to etch out strategic alliances and bilateral agreements

168 EC, The State of the Innovation Union 2011, available at https://ec.europa.eu/research/innovation-union/pdf/state-of-the-union/2011/state_of_the_innovation_union_2011_brochure_en.pdf(last accessed 10May 2020)

169Id.

with other countries like India and China, to promote the developmental aspects attached to IP assets.[170]

The European Union also addresses the issue of technology transfer and the marketability or commercial utilization of the IP assets created. The Union seeks to address the problem through its pilot program named TETRACOM. An IP right is said to be complete only when the right holder can exploit his IP assets and monopoly rights effectively. However, commercial exploitation is dependent on several factors like the availability of Standard essential patents at fair and equitable licensing terms. Therefore, the Union envisages its members to provide incentives and financial assistance to startups and new innovators to help them in the timely exploitation of the IP assets. The program also includes the setting up of incubation centers and assistance wings to generate IP assets for better productivity.

Furthermore, every enterprise is evaluated based on the environmental damage that it causes in the course of its operation. Environmentally sustainable operation is possible only if there is an availability of green technology or climate change technology for these enterprises. This availability depends a lot more on the initiatives taken by the individual States to facilitate technology transfer. In this context, the Union focuses on the need to take international efforts to facilitate technology transfer. As a part of the initiative, the EU has actively participated in discussions regarding the technology transfer in WTO, taken steps to implement Nagoya protocol concerning the transfer of technology about biodiversity, and implemented directive to enable "university to industry technology transfer."[171] The European Commission has drafted out several programs for the improvement of the IP regime and innovation climate in the member countries. This includes the Constitution of an IP help desk and a web portal for the same through which the investors can seek help concerning the plight of their IP assets. Another web server has been created through which the patent applicants can search for all international patent applications to check for the existence of "prior art."

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170 Id.

171 EC , Technology Transfer, available athttp://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150991.pdf (last accessed 12 May 2020)

Furthermore, the program drafted by the Commission envisages the charting of actions aimed at early commercialization of the IP assets generated, encourage private investment, etc. The Commission recognizes that the innovators will be encouraged to come up with innovation only if they are given a guarantee that their invention will be given a "stronger level of protection." The investments will come from foreign countries only if the investors are taken into the confidence of the strength of IP protection that is given to them.

The European Commission has distinguished counterfeiting and piracy as a threat to the better protection of IP in the European Union. To boost innovation and to remain competitive in the global market, the European Union needs to take steps for addressing the perils caused by counterfeit and pirated goods. The Union estimates that counterfeiting and piracy lead to a loss of 8 billion EUR annually, and much of the threat comes from third world countries.[172] The Commission addressed this problem by charting out a "Strategy for the enforcement of Intellectual Property Rights in third countries."[173] The strategy document expresses concern over the increase in piracy and sale of counterfeit goods that take place in the online world. The root causes of the counterfeit culture have been identified by the European Commission. One of the factors that lure the customers into buying such goods the non-availability of the original goods at affordable rates. Thus the lack of access is one of the problems that encourage counterfeiting. So the first strategy is to ensure access to the customers of the goods without being prejudicial to the rights of the IP owner. The second strategy is to create awareness about the ill effects caused to economy and health by the rampant use of counterfeit goods and nip the budding counterfeit culture.[174] The next strategy is to give flesh and blood to the existing enforcement measures and border control measures. The Commission further recognizes the challenges posed by Online piracy and moots to implement the WIPO Internet treaties in its real sense to counter the same. The Commission further envisages the member countries to form bilateral treaties and cooperate with other countries to tackle counterfeiting and piracy.

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172 CEBR, THE IMPACT OF COUNTERFEITING ON FOUR MAIN SECTORS IN THE EUROPEAN UNION 13 (2000).

173 2005/C29/03, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52014DC0389 (last accessed 29 Mar 2020)

174 Id.

The European Commission has charted out a strategy in the Brussels Conference for the creation of a "single market for IPR, boost creativity and innovation to provide economic growth, high-quality jobs, and first-class products and services in Europe."[175] The strategy, commitment, and approach of the European Union towards the IP rights can be inferred from this program of the Commission. Firstly the Commission recommends the Union to have a single system of patents that governs all the jurisdictions within the Union. Thus it focuses on creating a single market for IP in the Union. The IPR strategy focuses on the importance of commercialization of IP, and therefore it recommends the Union to have a conventional valuation system that enables the IP holders and companies to evaluate the value of their IP assets. Such a system ensures better commercial transactions concerning IP assets. The trademark registration and protection is a success story in Europe with the registry showing an increase in filings about both community mark and national application.[176] However, the Commission suggests the member states to modernize the TM offices to improve efficiency and to cope up with the dynamic changes in the IP arena. Modernization, as such, includes the speedy registration process, compliance with the digital technology of the contemporary era, clarify the qualification for the trademark, etc.

The Commission further moots on copyright issues in the digital world. The Commission believes that on the Internet, which boundaries the copyright of the authors and owners of the work are subject to constant violation. Adequate copyright protection and anti-circumvention measures must be put in place to counter piracy in the online world. However, the Commission identifies the need to ensure that the accesses to the works by the internet users are not prejudiced by such measures. Thus the Union moots to have a balanced approach towards online piracy. The report also emphasizes "cross border licensing" as a method for countering online piracy and to enable the same; the strategy is to establish an online portal that contains the information regarding the right holders to improve the "licensing infrastructure." Perhaps the most revolutionary aspect of the strategy is that the content created by the amateur Internet users

175 EC, A single market for IPR, boost creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, available at http://ec.europa.eu/internal_market /copyright/docs/ipr_strategy/COM_2011_287_en.pdf(last accessed 13 Apr 2020)

176 Id at 8.

is given protection under the EU copyright regime.[177] Internet users are often engaged in the creation of trolls, memes, blogs, dubsmash, mashup, etc., and these involve the substantial use of already created works. The EU Commission believes that the majority of such users will use such works for "non-commercial purpose," and if they are not granted protection, it will lead to injustice.

Moreover, the other part of the user pool uses such work for commercial purposes, and IP owners are affected if such infringements are not checked. Considering both the aspects, the Commission urges the members of the Union to set up a comprehensive, sophisticated and straightforward mechanism for online licensing. The Commission gives specific focus on the taking measures for setting up digital libraries for the dissemination of information concerning European Culture. Such works that are copyrighted and not in circulation can be disseminated by way of "collective licensing."[178] Thus the Commission seeks a balanced approach whereby harmonization is brought about between protection of copyright and right to access of people. One of the significant features of the EU strategy is that it takes into consideration the neglected sectors of authors in case of copyright. For instance, the report gives a categorical focus on journalists and reporters and envisages that proper measures must be taken to ensure that their creative works are protected from being misused. Another aspect in which the Commission concentrates is the availability of the copyrighted works to the blind and disabled. The Commission seeks to ensure the same by entering into a bilateral agreement with other countries. Thus it can be seen that the EU Commission has altogether laid down a progressive policy for the protection of copyright in the Union.

The strategy comprehensively focuses on the "non-agricultural Geographical Indications." It moots the need to have a single legal framework in the Union to do away with the difference in the level of protection adduced to the GI by different members of the Union. The strategy goes in line with the Strategy of the Commission to create a single market in the Union and seeks to create a sophisticated innovation climate by addressing the problems created by counterfeiting and piracy. The strategy includes actions for creating awareness in public about

177 Id at 12.

178 Id.

the ill effects of the use of counterfeit goods and the economic losses involved in it. [179] The strategy reiterates its commitment to have strict border measures for protecting IP assets and moots International cooperation as a means for effecting the same. The Commission seeks the members of the Union to improve the enforcement laws and customs laws to instill confidence in the IP generators.

The policies mentioned above of the European Union reveals that the Union recognizes IP as a method of reaping economic development, and the Union acknowledges that the future is of IP. The inclusion of progressive policies and the identification of changes in technology show the commitment of the Union to make a dynamic framework of IP laws. Thus the IP strategy of the European Union can be considered as a precise and well-drafted document that seeks to create a better IP legal regime among the members of the Union, and it can be considered as a better model of IP policy from which India can follow to some extent.

IP POLICY OF SOUTH AFRICA

The Department of Trade and Industry of the Republic of South Africa published the draft of its IP policy [from now on referred to as RSA policy] in 2017 after due consultations and deliberations with the stakeholders. Since the legal framework of the BRICS countries India and South Africa are somewhat similar in lines, it would be just and proper to study the IP model of South Africa. The National IP Policy of RSA is integrated with the "National Development Plan," and it seeks to utilize the IP assets in the country for developmental purposes. The RSA policy aims to promote innovation, technology transfer, research, etc., in the country and utilize the economic benefit received out of the IP flow for the progress of the nation.[180] The RSA policy states that excessive dependence on the natural resources to boost the economy is not a sustainable model of development, and therefore it seeks to convert the economy to a

179 Id at 18.

180 Draft Intellectual Property Policy of the Republic of South Africa Phase 1, 2017, available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170825intellrctualpropertypolicy-draft.pdf (last accessed 1 May 2020)

"knowledge-based economy."[181] The RSA policy recognizes Intellectual property right as a constitutional right under Article 25 of the Constitution of South Africa.[182]

The IP policy of RSA is more comprehensive in the sense that it has set out diverse goals to be attained in different sectors of the society and it moots to identify the prospects of IP as a developmental tool in the health sector, and it forms one of the primary aims of the policy. The RSA policy focuses on the utilization of IP for socio-cultural development in society and on the creation of an "IP culture" in the country. The RSA policy seeks to employ techniques that are consistent with the Constitution for the achievement of these primary aims of the policy. The department envisages a dynamic system, and the policy will be implemented through different phases, with each phase focusing on different sectors based on priority. The RSA policy is sought to be implemented along with the developmental policies charted out in other sectors like "National Drug Plan," "National Industrial Policy Framework," etc., [183] to ensure that the policy implementation does not hamper the interest in another sector. The RSA policy also suggests several reforms be affected in the IP legal framework of the country by using the flexibilities that are allowed by TRIPS. The RSA policy recommends that the Government should take measures to launch a "patent search mechanism," which enables to protect the patent of the right holders effectively. The South African IP policy also seeks to give protection to the "utility models" for the development of Small and Medium sector industries. Like the Indian policy, the RSA policy also focuses on the importance of creating awareness about the importance of generating and protecting IP in the country.

Furthermore, it emphasizes the significance of protecting the traditional forms of IP that forms an integral part of the rich culture of the country. The RSA policy document seems like one that is drafted after due research and deliberation as it sets out a comprehensive "problem statement" and recommendations under different heads. [184] The RSA policy expresses concern on the interplay between IP and the health sector, and the problem statement states the need for a policy to resolve the conflict between these two critical sectors of the country. The country has

181 Id.

182 Id.

183 Id.

184 Id at 6.

faced severe health emergency issues due to the non-availability of drugs at affordable rates. The entire situation springs out the monopoly rights that have been granted by the IP protection regime in the country. Hence the RSA policy elucidates that it is the call of time to draft a comprehensive policy for balancing the interest of the right holders and public interest at the same time.

The RSA policy seeks to roll a compendious "patent search" mechanism to identify prior art. Such a system assures that only those inventions that strictly fall into the criteria for a patent are given protection by the IP regime in the country. The high level of scrutiny raises the "integrity" of the patents that are granted, and it inculcates a sense of respect for the patent rights granted by the authorities. The RSA policy took a progressive step when it stressed the need to have cooperation between different departments so that in International consultations concerning IP, it can be warranted that the interest of all the sectors of the society is not prejudiced.[185] The RSA policy further recommends the Government to reinstate its commitment to preventing biopiracy on its traditional knowledge associated with its rich culture. The South African approach is quite applaudable in the sense that it does not base its policy on unproven theories or philosophies. The RSA policy states that though the maximization of IP is said to increase R&D, spur economic development, boost innovation, etc., it is not proved yet by empirical evidence. Therefore, the department seeks to set down the boundaries and regulate IP in the country through its policy. The RSA policy envisages that any action taken in pursuance of the protection of IP should align with the principles of social justice and welfare recognized in the Constitution. The Constitutional of RSA creates an embargo on the "arbitrary deprivation" of a person's private property.[186] However, the appropriation of the property is allowed by the State in such cases where it is warranted by public interest. The RSA policy hence seeks to create a balanced approach whereby the public interest is not affected by the protection of IP rights.

Moreover, the RSA policy does not approach IP as an "end in itself." Instead, it views IP as a means of development. The approach is manifested in the aims of the policy, which envisions using IP for better healthcare, boost innovation, enable technology transfer, intra-

185 Id at 8.

186 RSA CONST., S. 28.

sectoral development, etc. The department constituted an "Inter-Ministerial Committee" to make consultations with the stakeholders to get ample inputs for drafting the IP policy. Thus the department had made sure that the policy complies with the guidelines issued by the WIPO development agenda.

Furthermore, the Committee is expected to work "towards the future" to achieve the goals set out in the "Development agenda 2030" of the country. The first phase of the policy focuses on the public health sector and its interplay with the obligations of the State to protect IP in the country.[187] The RSA policy aspires to commit itself to the Doha Declaration on public health and constructively use the flexibility available under TRIPS. This commitment springs upon the constitutional obligation upon the State to ensure the right to "access medicines" to all the sectors of the public. The RSA policy reminds the Government to secure the interests of the marginalized people in society in the process of securing IP rights in the country. The first objective of the RSA policy is to take appropriate measures for improving the domestic production of drugs to meet the requirements of the public. The objective is relevant as it includes the interplay between the IP Policy and development policy of the country. The country is laboring under the menace caused by several diseases, and the lack of development in the pharmaceutical sector has burdened the economy as medicines have to be imported. The RSA policy recognizes the potential of the Pharma sector of the country and considers the grant of IP rights as a method to boost innovation in the sector.

Moreover, it focuses on taking appropriate steps to facilitate technology transfer concerning the pharmaceutical industry. While the USA criticizes the countries for providing pre-grant and post-grant opposition proceedings, the RSA policy shows the courage not only to introduce pre-grant opposition but also seeks to increase the participation of the public in the same, to raise the standard of the grant of patents.[188] The RSA policy is of the stand that such an earlier opportunity will reduce the pain of going for lengthy revocation proceedings later. However, such an opportunity will be fruitful only if the participation of the innovators is increased, and the RSA policy focuses explicitly on raising such participation. The RSA policy

187*Supra* at 12.

188 Id at 16.

further aims to make "third parties" competent enough to supply information in pre-grant opposition proceedings. The RSA policy recognizes the need to put the patent granted to "use" as it states that the real intent of IP rights is achieved only when the IP assets are commercialized. The RSA policy expresses concern about the lack of clarity given by TRIPS to the "inventive step" for the grant of patents.[189] The RSA policy states that the criteria should, therefore, be interpreted in a manner harmonious with the constitutional provisions, public policy, and "development goal" of the country. The RSA policy further seeks to the extent the disclosure requirement for the grant of a patent as it envisages the Government to ask the patent applicants to disclose the status of their international applications while applying for patents. This raises the threshold of integrity that is attached to the patents granted in the country.

While a debate is going on surrounding parallel importation, the RSA policy addresses the issue and suggests boosting parallel imports by taking the "stakeholders" into confidence to develop sectors like public health in the country. It contends that the parallel importation does not constitute IP infringement, and it can be allowed in a "controlled manner" to give an impetus to market competition. Moreover, the policy document makes sure that the parallel importation in no way affects the right holders and that a constructive balance is achieved with the right to access of the public. The RSA policy seeks to develop on the Bohlar exception as it states that it is essential to allow the competitors to test their drugs before the expiry of the patent over those drugs so that it will reach the market soon after the expiry of the patent term. The policy document identifies such a measure as beneficial to society as it facilitates the access of drugs to the public. It is one of the stated objectives of the policy that the State must make use of the exception to allow technology transfer and further research in the sector.

The policy document further envisions that the IP right holders should be given a framework which allows them to license out their IP rights to other persons on fair terms.[190] Such a mechanism ensures that the IP assets and knowledge associated with it are disseminated in the society at the behest of the right holders. This reduces State interference in such rights. However, the policy breaks its silence on the compulsory licensing regime in this context. The RSA policy

189 Supra n.2 at art. 27.

[190]*Supra n.*170.

states that the regime of compulsory licensing is essential in the sense that South Africa exports many essential drugs to its African counterparts.

Moreover, it recognizes that its health sector has also been benefitted by the compulsory licensing regime. In light of these circumstances, the RSA policy seeks to reform the compulsory licensing regime to provide it sufficient tooth and nail to address the contemporary challenges. The RSA policy reinstates its commitment to TRIPS by stating that a compulsory license regime shall not be abused, and it shall be granted only through a "judicial process." It states that the license shall be granted only after strict scrutiny. The RSA policy also gives sufficient reference to "government use" of patents, and it moots to use the flexibilities that are allowed by TRIPS to continue with the regime of government use of patents. The RSA policy also refers to the conflict between competition law and IP rights. It seeks to address the conflict by harmonizing the competition policy of the country with that of the IP policy. The fundamental mechanism involves the use of the precautionary approach to ensure that the enforcement of competition law in the country does not affect the interest of right holders. It seeks a mid-way approach as it states that the Government shall also ensure that the monopolies granted by the IP laws are not unnecessarily abused by the right holders. The RSA policy also puts forward that the State shall constructively involve them in International cooperation for protecting IP. The document itself manifests the determination of the Government to comply with the International agreements concerning Intellectual property, and it also refers to the International agreements like TRIPS to which the State is a party. The RSA policy also refers to the CBD and Nagoya Protocol and further states that it shall remain committed to the conventions to ensure that the benefits arising out of the use of traditional knowledge and genetic resources are subject to "fair and equitable sharing."

An essential reference is there in the RSA policy document, which affects India viz, the stress on the need to cooperate with BRICS countries to utilize the developmental aspects of IP.[191] Apart from these recommendations, the RSA policy further identifies the key issues to be addressed in the second phase. The key issues include green technology, IP awareness, the need to brand the products of South Africa, etc. among several other things. The last part of the policy document

[191]Id at 14.

emphasizes that the Intergovernmental Ministerial Committee shall take steps to enforce the policy. Thus, the IP policy of South Africa is a continuing process spread over several phases with a long-term agenda of utilizing IP for developmental purposes, and India as a member of BRICS, can take lessons from the IP Policy of South Africa.

IP POLICY OF CHINA

The Council of the People's Republic of China drafted and adopted a strategy for Intellectual property in the country in June 2008. Due to the political dictatorship, the IP strategy has not been drafted democratically with inputs from the stakeholders. However, the stunning journey of China in the case of IP makes it necessary to dissect the strategy that it follows for IP. Though it is a communist country that is ideologically against the institution of private property, it has made outstanding progress in IP protection and is placed above India in the Global innovation index.[192] Apart from that, China is one of the leading players in the BRICS group of nations. Therefore, it would be just and proper to study the Chinese National Intellectual property strategy. [After this referred to as IP strategy]

The IP strategy of China envisages a shift of the economy to a knowledge-based one. The IP strategy states that China has made tremendous progress after the scientific and Cultural Revolution, and it is a harbinger to the idea that the knowledge-based economy can bring progress in society. The main idea behind the strategy is that when knowledge fetches money, it will ease the constraint and burden created by the economy on the country's natural resources. Once this burden is removed, the State can ensure the effective allocation of the resources among the people. Moreover, this will bring social justice and welfare to the entire country. The IP strategy also considers the importance attached to it by the International community. The competeness of the nation and the amount of progress is nowadays judged by innovation and knowledge. Hence the IP strategy seeks to utilize IP to boost development and improve the level of competence of the nation among the international community.[193] The IP strategy acknowledges the amount of progress that China has achieved in the field of IP over the years

192*Supra n.* 17.

[193] Outline of the National Intellectual Property Strategy of China, available at http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn021en.pdf (last accessed 20 Apr 2020)

and the economic progress made through IP. The institutions and entities have, over the years, generated many IP assets, and it has contributed to the economic progress of the country. However, despite the progress, the strategy identifies the fundamental weakness that remains with the IP regime of the country. The IP strategy is concerned about the lack of awareness concerning IP, the weakness of enforcement mechanisms, abuse of IP, etc.[194] It is said that the IP assets generated in China do not satisfy the country's developmental needs. It is in light of the circumstances, as mentioned earlier, that China drafted an IP strategy for itself. At the very outset, the IP strategy sets out the aim of the policy. It aims to generate IP within the country so that the nation will be self-reliant in terms of IP generation and its commercialization. Thus China aims to utilize IP for residential development, which reinforces its independent stand in the world economy. Moreover, the benefits arising out of IP are sought to be utilized for the well-being of the "socialist economy." While the IP policies of most of the countries focus on domestic well-being, China moves one step forward and addresses the competitiveness of the country in the International sphere. This aspect of IP strategy indicates the intent of the legislators to build a China that leads the world in terms of IP and knowledge. The IP strategy is based on the communist ideology followed by the country. Hence the IP strategy ensures that every action taken in pursuance of the quest for the development of IP shall be "people-centric."

China focuses on the year 2020 as the deadline for achieving the quintessence of the IP strategy. It envisions China in 2020, where there are a balanced generation and circulation of IP assets in and out of the country and a self-reliant China in terms of knowledge or IP. Moreover, the vision includes a model society with an IP culture where people are aware of the significance of IP. The IP strategy focuses on increasing the number of patents filed in the country and recommends steps for increasing domestic applications. It envisages that the future is that of China, where the renowned brands will play an essential role in the market. The mission is to have an IP based market that contributes significantly to the country's GDP.[195] The IP strategy lays its eyes on the agricultural sector and visualizes that China should increase its IP input in case of plant varieties.

194 Id.

195 Id at 7.

Furthermore, China recognizes the tremendous economic potential attached to Integrated circuits and seeks to increase R&D in the sector. The IP strategy does not show any partiality to traditional knowledge and cultural expressions as it attempts to bring about a cultural revolution through IP dissemination. The IP strategy presupposes the nexus between investment and IP. Therefore, it ensures the entities that their IP assets will be protected so that they will not be reluctant enough to invest in their respective R&D arenas. China wants all these entities to have an IP Management mechanism, which enables them to have an edge in the market. China seeks to improve its economy through this culture of market competition between the entities. The IP strategy recognizes counterfeiting and piracy as fundamental threats to IP protection. This reference is essential because most of the counterfeit goods and pirated copies come from China. The country occupies the most significant space in the market of counterfeit goods across the world. The developed countries often allege that China has built its economy upon the counterfeit goods and connected IP infringements. The country has a bad reputation in the case of counterfeit goods and Trademark infringements. In light of these circumstances, the IP strategy which identifies counterfeiting as a problem can bring positive changes concerning IP protection across the globe.

The IP strategy recommends the State to bring reforms in the administration and protection of IP assets in the country. The reforms must be in such a way that the "public services" granted by the State concerning IPR should be one with quality and coherence. The persons responsible for rendering such services must be professionally trained in IP. Like the South African counterpart, the IP strategy of China also seeks it to be implemented harmoniously without any conflict with the policies pursued in other sectors of the society. China focuses on integrated growth in all sectors like IP, culture, science, and technology, etc.[196] The IP strategy seeks to utilize Alternate dispute mechanisms as a means to redressal in cases of IP infringement. It also makes a progressive step as it recommends the State to roll out a warning mechanism to the right holders regarding the retrospective and prospective IP violations. This mechanism is based on the "precautionary principle" and on the notion that since IP infringements cannot be justly compensated, it is always better to prevent such infringements. Another essential feature of the IP strategy is that it recommends the State to share the benefit arising out of the utilization

196 Id at 10.

of the IP generated in State-funded Institutions.[197] It is based on the socialist philosophy that anything made out of public money should be returned to the public itself. The IP strategy is also concerned about the problems with the "securitization" of IP. The economic transactions like pledging, bailment, etc., will increase concerning IP, only if a legal framework regarding the securitization of the IP assets is created by the State. Such a legal framework will also give flesh and blood to China's developmental agenda based on IP. The IP strategy also focuses on the need to have IP outputs from Universities and research centers as it will boost the economic transactions in the country. Another objective of the IP strategy is to bring about sufficient reforms in the IP enforcement regime via more significant sanctions for infringement, lesser costs for litigation, etc. The conflict between market competition and the monopoly rights granted by the IP laws are also addressed by the IP strategy. It envisages having a proper system that can prevent the abuse of IP rights and etch out a balance between the different segments. The IP strategy also proposes to have awareness programs that can inculcate a culture of respect for IP in society. Such a culture should individually view plagiarism, counterfeiting, and piracy as moral wrongs.[198] It advocates the inclusion of IP education as a part of the syllabus in schools and universities.

The IP strategy states that the country should have a reliable patent system to encourage innovation in comparatively new sectors of science and technology like oceanography. However, it stresses the need to balance such private rights with that of public interest and envisages utilizing the flexibilities available under TRIPS to carve out a foolproof compulsory licensing regime. The IP strategy further moves forward to enable the entities to brand their trademark and protect them. An essential feature of the IP strategy is that it clubs the trademark protection with the agricultural sector and seeks to promote the branding of agricultural products. The IP strategy makes a significant recommendation by stating that the State shall take steps to address problems concerning "mortgage recording and transfer contracts.[199] It further envisions providing "incentives" for the promotion and development of new varieties of plants and getting it

197 Id at11.

198 Id at 15.

199 Id at 26.

protected under the IP laws. An essential recommendation for GI is that it directs the State to identify the GI in China and give protection to them.

Further, a monitoring and quality control mechanism is also mooted. The IP strategy also mentions folklores and seeks to enable the sharing of benefits received out of the use of folklores with the community, which preserves the same.[200] China aims to utilize the Intellectual property protection regime to boost innovation and reinforce self-reliance in the defense sector. In this way, it aims to cut down the burden caused by the defense sector on the economy. Though the IP strategy of China is a less democratic one with less or no inputs from the stakeholders, many recommendations can be considered by India as a BRICS member.

CONCLUSION

The IP Strategy of the EU significantly differs from India in many aspects. Though the EU strategy mainly deals with the entire European market, there are some policies that India can adopt into the Indian scenario. For instance, the EU IP Strategy mainly identifies counterfeiting and piracy as a menace to the better protection of IP. It aims to have International negotiations and agreements for tackling the same and further moots to create awareness among the public about the ill effects on the use of counterfeit goods. Such a strategy can be adopted by the Indian Think Tank to save the Indian market, which is suffering from the menace caused by counterfeit goods. The EU strategy also contains several recommendations regarding the increase in the strength of enforcement proceedings, the procedures for creating securitization of IP assets, cross border licensing, etc. India can take lessons on all these aspects and draft a policy that is consistent with the aspirations of the Indians.

The IP Policy of RSA is drafted with much deliberations and inputs from the stakeholders. It can be considered as a democratically drafted document. An essential feature of the RSA policy is that it refers to the RSA Constitution and seeks to take measures that are consistent with the constitutional provisions. A country like India, which depends on the Constitution for securing social justice, can follow the South African example. Furthermore, RSA policy states the importance of cooperation with the BRICS countries explicitly. India

200 Id at 35

being a BRICS member, can thus enter into International agreements to tackle counterfeit and piracy issues. Moreover, the RSA policy concentrates on an improved compulsory licensing mechanism, the balance between IP and interest of the public in the health sector, etc. India is the biggest exporter of drugs to the African countries can adopt such provisions from the RSA policy document and implement it in the Indian way.

Though the Chinese IP policy is too much national in nature and is filled by the elements of the communist dictatorship, there are some provisions which can be considered to be implemented in the Indian context. The Chinese strategy involves the setting up of a "warning system" that helps the IP right holder to foresee infringement. This helps the right holder to protect their IP, and it cuts down litigation costs and damage. China envisages using IP as a tool for development, which can make the nation self-reliant. Furthermore, Chinese strategy involves the securitization of IP, sharing of the benefit of IP with the public, commercialization of IP, etc. and India being a BRICS country, which is developing economy like China it can adopt such provisions from China that can make India self-reliant in terms of IP.

CHAPTER-6

CONCLUSION AND RECOMMENDATIONS

The National IP Policy, 2016, acknowledges the importance of innovation and creativity to an information economy's growth and development. It equates innovation with the generation of IPs the policy's dual focus is to enable IPs to be commercialized through awareness-raising and easing administrative bottlenecks through easing procedures. The policy suggests a report to look at the viability of an IPR exchange to improve commercialization and value for IPs. Such dedicated ip exchange could facilitate investment in industries driven by ip transferring investors and ip owners/users together. Also, the policy urges the govt to explore the likelihood that expedited review of patent applications which will push production in the Asian country. Additionally, the policy takes note of the marginalized and agricultural markets.

It notes that providing financial support through rural banks or cooperative banks for the less sceptered cluster of ip house owners or producers, such as farmers, weavers, artisans, craftsmen, etc. To speed up the adjudication of disputes and ensure enforcement of IPR, the policy suggests that dedicated business courts should be set up to deal with ip related matters.

It further suggests that the possibility of ip conflicts being resolved by different conflict resolution processes should be discussed. Strengthening the system of social control is just another policy priority objective. This could be done by enhancing cooperation among various Govt agencies, in addition to being non-governmental actors (such as producing an awareness of the economic, social and cultural edges of IPRs, and encouraging the generation of IPRs to have a robust and effective legislative structure to align the rights of IPR holders with those of the general public at large.

Numerous alternative measures planned by the policy include legislation on unauthorized film repetition, encouraging company Social Responsibility (CSR) funding for open innovation, and enhancing IPR capacity building through coaching, teaching, analyzing, and building skills.

Nevertheless, the strategy aims to position ip as a nursing partner in its own right rather than placing it into the broader sense of the innovation scheme

FINDINGS

1. The policy focuses on pushing IPRs as a marketable financial asset, promote innovation, and entrepreneurship while protecting the public interest.

2. The policy has been drafted without any consultation with the stakeholders concerned with IP.

3. The policy merely states its mission of "shared benefit for all" and fails to suggest measures for achieving the same.

4. The failure of the policy to make any reference to the Constitution makes the IP rights vulnerable to Government acquisition.

5. The policy does not make any reference concerning the access to knowledge by the marginalized sections of the society.

6. The policy does not talk about a specific approach related to section 3(d) related to pharmaceutical patent and 3(k) categorical exclusion of mathematical and business methods and software patents.

7. The policy approaches IP as an end in itself.

8. The entire IPR policy is viewed by the Government as a one-time event that takes place every five years. It is not considered as a continuing process.

9. The problems associated with TKDL and biopiracy are not addressed by the policy.

10. The National IP policy and the Manufacturing Policy of India are contradictory to each other for the IP protection of green technology.

11. The policy is silent about the need for protecting Geographical Indications and the mechanisms for the same.

12. The policy is utterly silent about the compulsory licensing regime in India.

13. The policy fails to lay down substantial steps for protecting traditional knowledge.

14. The policy does not seek to give strategic emphasis on public health and its interface with IP protection in India.

15. The policy neglects trade secrets as an IP and the need for protecting the same.

16. The policy does not set guidelines for the Government in entering into bilateral agreements for the protection of IPR.

17. The policy does not adhere to the guidelines set forth by the WIPO Development Agenda.

RECOMMENDATIONS

Since the policy has been drafted without initial consultations with the stakeholders as suggested by the WIPO development agenda, the current policy may be revised, or a new policy may be drafted in compliance with the agenda. Concerning the policy, the following changes are recommended:

1. The Think Tank may make consultations with all the stakeholders related to IP, and their concerns should be addressed through the policy.

2. The maximization of IP in the country should be undertaken in such a manner that the public interest is not affected thereby.

3. The policy may provide sufficient exceptions to the individual IP rights so that it will enable the State to achieve its mission of "shared benefit" for all.

4. Reference may be made by the IP policy to the Constitution of India to ensure that any action taken in pursuance of the policy does not conflict with the constitutional provisions. The importance of recognizing "due process of law" clause in terms of IP to protect it from arbitrary actions of the Government should also be acknowledged.

5. Provisions may be included in the policy regarding the right to access IP by the marginalized sections of the society.

6. Instead of keeping five years as the minimum gap for revising the IP policy, the entire policy and its implementation may be made a continuing process. It ensures a dynamic IP protection regime in India.

7. The IP curriculum included in the school and university level shall not only focus on the advantages of IP but also the drawbacks of the rigid pursuit of IP. They must be taught about the importance of a balanced IP regime.

8. IP should be considered as an incentive for innovation, and it must not be viewed as an end in itself.

9. It is just to make the State the owner of IP generated by the public-funded institutions. Moreover, provisions may be made for the sharing of the benefit received out of such IP with the researcher of the public-funded institution who has created the concerned IP.

10. The conflict of the IP policy with the Manufacturing Policy of India must be resolved. The approach of the nation concerning giving IP protection for green technology should be made clear.

11. The inherent drawbacks of the TKDL system must be addressed by the policy, and the DIPP may recommend the steps to be taken for addressing the same. The feasibility of adopting the TK docketing system, as followed by the State of Kerala, may also be considered.

12. The loopholes existing in the Bio Diversity Act may be dealt with by the policy. The policy may recommend the State to amend the provision of the Act, which does not create an embargo on the Indian corporates to appropriate biological resources.

13. The approach of the State towards intellectual property rights like geographical indication and traditional knowledge must be covered by the policy. Excessive stress upon patents, trademark, etc., which serves the interest of the corporates, will make the policy an imbalanced one.

14. The policy should mention that any international agreement like RCEP should be signed or ratified by the State only after considering the interest of the public.

15. The significance of increasing the practice of traditional knowledge must be acknowledged by the policy. The practice of TK ensures that they do not go into oblivion.

16. The policy must make references to the need for having full provisions for protecting confidential information, especially when the employment contract is absent. Trade secrets are a neglected IP in India, and the IP policy must have provisions for encouraging the development of the trade secret protection regime in India. The lack of enforcement mechanisms in cases of theft of confidential information must also be addressed by the policy.

17. The pharmaceutical sector and export of medicines form a primary area of importance in India. Hence IP policy must always make references to the pharmaceutical sector and its interplay with IP. The need to safeguard public health and balance the same with IP protection is to be considered by the policy.

18. Proper references to the compulsory licensing regime and the need to address public health emergencies must be included in the policy. Moreover, the policy may provide such guidelines regarding the conditions and circumstances under which compulsory licenses should be issued. This ensures that compulsory licensing is not abused by the Government machinery.

19. The policy may contain recommendations for having bilateral agreements with other countries to cooperate among themselves for the better protection of IP. Such concerted actions will be valid in tackling the problems created by counterfeiting and piracy.

20. The policy may also consider International cooperation as a method to facilitate technology transfer. Such a method will reduce the dependence on a compulsory license as a backdoor mechanism for technology transfer.

21. It would be desirable if the policy refers to the Nagoya protocol and the ABS mechanism therein. This communicates the intention of the Government to utilize resources for the benefit of the community

22. The policy may include specific provisions for creating awareness in public about the ill effects of the use of counterfeit goods. This awareness will help the State to take strict enforcement measures against counterfeiting.

23. The policy must address the copyright issues in the digital world and put forward the guidelines to use the anti-circumvention measures in a manner that is not prejudicial to the right to access of the public.

24. The policy may include provisions like "cross border licensing" for preventing and countering piracy and copyright violation.

25. The policy should have stressed upon the need to have cooperation between different departments to have an integrated development plan for IP.

26. The policy may include recommendations for increasing the participation of the public in pre-grant and post-grant opposition proceedings concerning patents.

27. In the case of patents, the policy shall strive to give guidelines as to what constitutes an "invention" for making it eligible for patents.

28. It would be desirable for the IP policy to address the issues regarding the health sector and make recommendations to utilize bohlar exceptions for the benefit of the public.

29. The policy may also stress the importance of cooperation with the BRICS countries for better protection of IP in India.

30. The policy may include a new vision to utilize IP in the field of defense. This helps to reduce the burden on the economy and considerably reduces the unnecessary draining of the economy.

31. The amount of GDP that the country seeks to achieve through IP flow and the percentage of GDP to be utilized for R&D may also be included in the policy document. This will serve as a guideline to the State. \

32. The policy document may add to its mission that it seeks to make the nation self-reliant in terms of IP and knowledge. Such an aim will help the nation to improve its competitiveness in the International pane and utilize IP for developmental needs.

33. The IP policy can take lessons from China and set up an emergency response team and warning mechanism to adequately protect IP. If such a precautionary approach is followed, the right holders will be able to protect their rights at lesser costs effectively.

34. The policy may also consider the potential of ADR in resolving the IP infringement cases in a user-friendly manner.

However, the real challenges are faced only when the National IP policy is put to implementation. It is nearly impossible for any human-led machinery to foresee all the permutations and combinations of the situations that may arise in the future. Therefore, the DIPP should be prepared enough to tackle the new problems that may arise during the implementation stage. A recent example is that on May 5, 2020, WIPO launched a new tool that tracks policy changes related to COVID-19 Intellectual Property (IP) or other measures that WIPO member states are implementing in their response to the global pandemic.[201] This is the latest in a series of COVID-19 pandemic-related measures taken by the Organisation.

201 WIPO Launches Tool to Track IP Policy Information in Member States during COVID-19 Pandemic available at https://www.wipo.int/pressroom/en/articles/2020/article_0010.html(last accessed 20 May,2020)

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ANNEXURE

PLAGIARISM CHECK

General metrics

70,107	11,008	0	44 min 1 sec	1 hr 24 min
characters	words	sentences	reading time	speaking time

Writing Issues

No issues found

Plagiarism

This text seems 100% original. Grammarly found no matching text on the Internet or in Pro Quest's databases.

Unique Words Measures vocabulary diversity by calculating the percentage of words used only once in your document	0% unique words
Rare Words Measures depth of vocabulary by identifying words that are not among the 5,000 most common English words.	0% rare words
Word Length Measures average word length	0 characters per word
Sentence Length Measures average sentence length	0 words per sentence

Chapter 3rd and 4th

General metrics

86,429	13,140	855	52 min 33 sec	1 hr 41 min
characters	words	sentences	reading time	speaking time

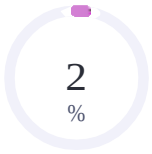
Score

This text scores better than 94% of all texts checked by Grammarly

Writing Issues

360	49	311
Issues left	Critical	Advanced

Plagiarism



31 sources

2% of your text matches 31 sources on the web or in archives of academic publications

Writing Issues

260 Clarity

136 Intricate text

10 Passive voicemisuse

87 Wordy sentences

16 Hard-to-read text

11 Word choice

81 Correctness

25 Punctuation in compound/complex sentences

14 Comma misuse within clauses

2 Incorrect verbforms

9 Wrong or missing prepositions

2 Misplaced words or phrases

2 Incomplete sentences

8 Determineruse(a/an/the/this,etc.)

1 Incorrect nounnumber

1 Faulty parallelism

1 Faulty subject-verbagreement

7 Mixed dialects of english

3 Misspelled words

4 Improper formatting

2 Confused words

1 Delivery

1 Potentially sensitive language

19 Engagement

18 Word choice

Unique Words

16%

Measures vocabulary diversity by calculating the percentage of words used only once in your document

unique words

Rare Words

45%

Measures depth of vocabulary by identifying words that are not among the 5,000 most common English words.

rare words

Word Length	5.1
Measures average word length	characters per word
Sentence Length	15.4
Measures average sentence length	words per sentence

PLAGIARISM CHECK 5th and 6th

General metrics

60,243	9,570	542	38 min 16 sec	1 hr 13 min
characters	words	sentences	reading time	speaking time

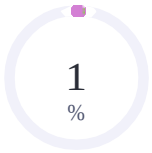
Score

This text scores better than 93% of all texts checked by Grammarly

Writing Issues

202	6	196
Issues left	Critical	Advanced

Plagiarism



7 sources

1% of your text matches 7 sources on the web or in archives of academic publications

Writing Issues

191	**Clarity**	
101	Intricate text	
59	Wordy sentences	
10	Passive voice misuse	
14	Hard-to-read text	
7	Word choice	
10	**Correctness**	
2	Determiner use (a/an/the/this, etc.)	
2	Punctuation in compound/complex sentences	
2	Comma misuse within clauses	
1	Improper formatting	
1	Misspelled words	
2	Misplaced words or phrases	
1	**Engagement**	
1	Word choice	

Unique Words

16%

Measures vocabulary diversity by calculating the percentage of words used only once in your document

unique words

Rare Words Measures depth of vocabulary by identifying words that are not among the 5,000 most common English words.	45% rare words
Word Length Measures average word length	5 characters per word
Sentence Length Measures average sentence length	17.7 words per sentence