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**National IPR Policy:
Towards Creative
India, Innovative India**

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National IPR Policy: Towards Creative India, Innovative India

T C James*

I. INTRODUCTION

In law, Intellectual Property Rights (IPRs) are of comparatively recent origin. The first major international treaty on the subject is the *Paris Convention for the Protection of Industrial Property* of 1883. Soon thereafter, the *Berne Convention for the Protection of Literary and Artistic Works* was finalised in 1886. Between these two treaties most IPRs were covered by international law. The challenges posed by technological developments were addressed through periodic revisions to these treaties. India became a member of the *Berne Convention* in 1928¹ but joined the *Paris Convention* in 1998 only². Institutional mechanisms for the management of the two treaties were also set up in the form of two International Bureaus, one for each treaty, in Geneva. It took a long time for the establishment of a full-fledged single international organisation to administer all treaties in the area of IPRs. This finally came through the establishment of the World Intellectual Property Organisation (WIPO) as a specialised agency of the United Nations System of Organisations in 1967. India became a member of WIPO in 1975³. Later, substantive provisions of all major IPRs were incorporated in the *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)* in 1994. This Agreement, which is one of the 22 treaties that formed the final set of documents at the end of the Uruguay Round of GATT (General Agreement on Tariffs and Trade) negotiations (1986-1994), i.e., the *Marrakesh Agreement*, leading to the establishment of the World Trade Organisation (WTO), became the defining international instrument on IPRs. Because of the strong link it established for IPRs with trade and economy, all countries started paying more attention than hitherto to the law and policy relating to IPRs in their governance. The mandatory nature of the WTO treaties made it obligatory for all countries to adapt their IPR legislations to the requirements of *TRIPS Agreement*. India is a founder member of the WTO and has the obligation to have an IPR regime fully compliant with that treaty.

II. EVOLUTION OF IP LAW AND POLICY IN INDIA

India's tryst with IPRs goes back to the 19th century even before the *Paris Convention* in view of

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¹ https://www.wipo.int/treaties/en/ShowResults.jsp?country_id=80C. Accessed on 7 July 2020.

² *Ibid.*

³ https://www.wipo.int/members/en/details.jsp?country_id=80. Accessed on 7 July 2020.

the British presence in the country. The first IP legislation in India is Act No. XX of 1847 enacted by the Governor General of India on the 18th December, 1847, “*for the encouragement of learning in the Territories subject to the Government of the East India Company, by defining and providing for the enforcement of the right called Copyright*”. The first Patent legislation is the Act VI of 1856 on Protection of Inventions, again enacted during the Company regime. This was based on the British Patent Law of 1852. Both these legislations were effectively making applicable to British India, the corresponding legislations in Britain. This position continued till India’s independence. During the British regime more IPR legislations were introduced for patents and designs in 1911, for copyrights in 1914, and for trade marks in 1940. This was the position at the time of India’s Independence. The Constitution of India has recognised IPRs as a subject of governance by the central government since “Patents, inventions and designs; copyright; trade-marks and merchandise marks” have been included as item 49 in List I – Union List. Thereafter, fresh legislations were introduced in the areas of copyright (in 1957), trade and merchandise marks (in 1958), and patents (in 1970). Designs were continued to be governed by the provisions regarding designs in the Patents and Designs Act, 1911. The Patents Act, 1970 was a path breaking legislation. It restricted patents in the field of pharmaceuticals and food items to processes only. This was based on the report of Justice N. Rajagopala Ayyangar on the Patents Amendment Bill, 1953, submitted in 1959⁴. This modification turned out to be a major game changer in that a strong generic pharmaceutical industry emerged in India which produced quality drugs and marketed the same at a cheaper price than MNC pharmaceutical companies. Consequently the country earned the sobriquet, ‘pharmacy of the world’.

As per the TRIPS Agreement, member countries were required to provide for legal mechanisms for the enforcement of the following IPRs:

1. Copyright and Related Rights
2. Trademarks
3. Geographical Indications
4. Industrial Designs
5. Patents
6. Layout-Designs (Topographies) of Integrated Circuits
7. Protection of Undisclosed Information, and
8. Control of Anti-Competitive Practices in Contractual Licenses.

⁴ History of Indian Patent System. Available at <https://ipindia.nic.in/history-of-indian-patent-system> . Accessed on 8 July 2020.

Copyright and Patents Acts were amended to accommodate the provisions of TRIPS Agreement; copyright law in 1999 and patent law in 1999, 2002 and 2005. New legislations were enacted for Trademarks and Designs in 1999 and 2000, respectively. *Sui generis* legislations were introduced for Geographical Indications in 1999 and Layout-Designs in 2000. The Monopolies and Restrictive Trade Practices Act was replaced by Competition Act in 2002 and Indian Contract Act, 1872 was considered as sufficient for protection of undisclosed information.

Apart from the above-referred legislations, India also has separate legislations on the following subjects closely linked with IPRs:

1. Protection of Plant Varieties and Farmers' Right, and
2. Biological Diversity.

While India had long history of IP protection and also up-to-date legislations in IPRs and fulfilled its obligations under international treaties, it did not move for announcing a national policy on the subject, until recently although in areas like education, health, science and technology, etc. policies were announced from time to time. In view of the growing importance of IPRs in international economic activities and concerns of some countries on Indian stand on IPRs, there were occasional demands for a national policy to make India's approach to IPRs clear terms and public. Successive governments, however, did not consider it necessary probably because they felt that the extant IPR legislations were sufficient to guide policies. Many, however, were of the view that there is a real necessity to bring out a national policy on account of various reasons. For one, in India IPRs were being administered by different Ministries. This was a consequential result of historical developments. For example, copyright law was administered by the Ministry of Human Resource Development, under which the Department of Education came. Book promotion was part of the subjects allotted to that Department and copyright was closely associated with books and publications. The Acts relating to the four industrial property rights, namely, patents, designs, trademarks and geographical indications, were with Department of Industrial Policy and Promotion, Ministry of Commerce and Industry. At the same time, law relating to plant varieties and farmers' rights came under Ministry of Agriculture and Semiconductor Integrated Circuits layout-design law was enacted by the Ministry of Information Technology. The Biological Diversity Act was administered by the Ministry of Environment and Forests and the Competition Act remained with the Ministry of Corporate Affairs. This created a multiplicity of Ministries and Departments dealing with IP matters. It was necessary to have a common document setting out the broad policy on IPRs so that the different departments followed a common approach to all IPRs. For another, there was a general perception among countries like US, Japan, EU members, etc. that in India IPR is not a priority

item for the government and that the enforcement mechanism is very weak in the country. The US Special 301, an annual report on state of enforcement of IPRs in other countries by US Trade Representative regularly used to categorise India as a priority watch list country. Although it is a report mainly reflecting the complaints of the US pharmaceutical and software industries and the US cannot take any unilateral trade action in view of the TRIPS Agreement outside of the WTO Dispute Settlement Body, every year the report would get much media coverage and contributed to the above perception about India. A comprehensive policy statement making India's stand on IPRs would go a long way in remedying the situation. This is especially so since after the revocation of the earlier industrial policy and with India's membership of WTO, it has moved into the global economy and policy assurances and certainties are of prime importance in the new market economy.

iii. NATIONAL IPR POLICY, 2016

On 12th May, 2016, the Union Cabinet has approved a comprehensive National Intellectual Property Rights Policy to “lay the future roadmap for IPRs in India”.⁵ The Policy was the result of a long process of thinking and deliberations. The Government set up an IP Think Tank under the chairpersonship of Justice Prabha Sridevan, former Judge of Madras High Court and former Chair Person of Intellectual Property Appellate Board, in October 2014. This Think Tank came out with a draft policy which was released by the government in December 2014. The Think Tank had extensive interactions with all stakeholders and submitted the final draft in April 2015.⁶ Presumably after consultations among all Ministries concerned, the Policy, as approved by the government, was announced by Shri Arun Jaitley, Minister of Finance and Commerce & Industry on 12th May 2016 itself. This is the first time a National Policy on IPRs for India was declared; a path breaker.

iv. SALIENT FEATURES

Announcing the policy, the government brief stated:

“The National IPR Policy is a vision document that encompasses and brings to a single platform all IPRs. It views IPRs holistically, taking into account all inter- linkages and thus aims to create and exploit synergies between all forms of intellectual property (IP), concerned statutes and agencies. It sets in

⁵ Department of Industrial Policy and Promotion, National IPR Policy. Brief About the Policy. Available at <https://dipp.gov.in/policies-rules-and-acts/policies/national-ipr-policy>. Accessed on 7 July 2020.

⁶ Prathiba M Singh (a member of the Think Tank). National IPR Policy, 2016 & Its Implementation. PowerPoint presentation. Available at http://nja.nic.in/Concluded_Programmes/2016-17/P-1009_PPTs/9. Accessed on 8 July 2020.

place an institutional mechanism for implementation, monitoring and review. It aims to incorporate and adapt global best practices to the Indian scenario.”⁷

This is an essential summation of the policy and its objectives.

The Policy underlines the role of IPRs as a tool for economic development and innovation promotion. It also makes a strong pitch for IP awareness and education starting from school onwards so that an IP savvy generation comes out of the schools in the future who would nurture an IP culture in the country. The Policy has not made any major departure from existing IPR legislations and India’s stated views on IP protection. What it has achieved is consolidating all these within a broad policy framework. It has also prescribed detailed implementation strategies, which, perhaps, is its best achievement.

The Policy is a vision statement, as any national policy should be. It is of an India where IP “promotes advancement in science and technology, arts and culture.” Essentially it looks upon IP as the principal stimulator of creativity and innovation. While there may be different opinions about the role of IP in creativity and innovation, the statement is reassuring for those who would like India to give high priority to IP since it has been linked with innovation, a major pillar of India’s development strategy. It is also a welcome feature that protection of traditional knowledge and biological diversity found mention in the vision statement itself.

Besides a vision statement, the Policy also contains a Mission Statement giving signal that government is taking IPR policy and strategy seriously and through a mission approach, i.e., the objectives will be achieved in a time bound manner. This indicates government’s determination on the issue. In this statement creativity and innovation promotion has also been referred to, besides entrepreneurship development. The latter is a vehicle for taking innovation to the market. A welcome feature of the Mission Statement is the commitment to focus on access to health, food security and environmental protection, three sectors of concern often voiced by developing countries in international negotiations on IP. Patent monopoly has been a major factor in high cost of many medicines.

Proceeding from the mission approach, the Policy has laid down seven objectives that are to be achieved. They cover almost all aspects of IP promotion that academics, policy makers and industry stakeholders were discussing about. These are the following:

1. To create public awareness about the economic, social and cultural benefits among all sections of society through outreach and promotion in a campaign mode with the slogan

⁷ ibid

“Creative India; Innovative India;”

2. To stimulate generation and acquisition of IPRs by research laboratories, universities, etc.;
3. To have strong and effective IPR laws, which balance the rights of owners with larger public interest;
4. To modernise and strengthen service-oriented IPR administration;
5. To promote commercialization of IPRs thereby increasing the value of IPRs;
6. To strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements; and
7. To strengthen and expand human resources, institutions and capacities for teaching, training, research and skill building in IPRs.

The objectives in themselves are unexceptional and present directions in which IP policy in the country should move forward. Each of the objectives is also accompanied with clearly laid down steps on how to proceed towards it. There are 22 steps to be taken to achieve Objective 1; 33 steps for Objective 2; 12 for Objective 3; 47 for Objective 4; 26 for Objective 5; 20 for Objective 6; and 11 for Objective 7; altogether prescribing 171 steps to be taken for achievement of the Objectives.

The steps are very elaborate and detailed and have covered all central government IP and related institutions, including the statutory IP offices. Broadly they fall under the categories of strengthening institutional mechanisms for IP administration, IP process re-engineering, IP awareness generation, and strengthening registration and commercialisation of IPRs. There are specific positive recommendations for Micro, Small and Medium Enterprises (MSMEs), start-ups, Traditional Knowledge Digital Library (TKDL), Open Source Drug Discovery (OSDD), and Ayurveda, Yoga & Naturopathy, Unani, Siddha, Sowa-Rigpa and Homeopathy (AYUSH) systems. The recommendations also encourage research studies in the area. For example, an in-depth study to determine application of existing laws to protecting Traditional Knowledge (TK), Genetic Resources (GRs) and Traditional Cultural Expressions (TCEs) and to propose changes required, if any, although the approach indicates that the government does not look forward to introducing any *sui generis* legislation for protection of TK in India. The existing IP chair programme has been recommended to be continued with appropriate changes. In order to facilitate grant of IPRs and make the process more user-friendly the Policy recommends bringing the administration of the Semiconductor Integrated Circuits Layout-Design Act and the Copyright Act under one Department, namely, the Department of Industrial Policy and Promotion, who were already administering the legislations relating to patents, designs, trademarks and geographical indications. It also recommended bringing the Semiconductor

Integrated Circuits Layout-Design Registry and the Copyright Registry to the Ministry of Commerce and Industry. The Policy has made a plea for increased use of technologies in IP administration. One of the important recommendations is to create a Cell for IPR Promotion and Management (CIPAM) to facilitate promotion, creation and commercialization of IP assets. Addressing the industry concern about NBA clearances, the Policy recommends a formal consultation and coordination mechanism between National Biodiversity Authority (NBA), Intellectual Property Office (IPO) and other concerned Ministries including AYUSH Ministry. The Policy also recommends setting up of Commercial Courts for adjudication of IP disputes and also developing Alternative Dispute Resolution (ADR) capabilities. It has also made far reaching recommendations on IP education and research. Another welcome feature is the recommendation to encourage educational, research and technical institutions to formulate institutional IP policies. Ultimately IPs, particularly patentable inventions, are generated mostly in such institutions.

The Policy does not stop with Objectives and the steps to be taken for achieving them. It also stresses the importance of implementation. The aim of the IP policy is “to integrate IP as a policy and strategic tool in national development plans.” It stresses the need for taking a holistic approach on legal, administrative, institutional and enforcement related matters of IP. Overall it gives a good blueprint for promotion and development of IP regime in the country.

v. POLICY IN ACTION

Four years have passed since the announcement of the Policy which as per the statement in the introduction is “to catalyse the full potential of intellectual property for India’s economic growth and socio-cultural development, while protecting public interest.” Though the period is not long enough to make a fair and complete assessment, it is sufficient to draw certain indicators on the trends. Most of the recommendations of the Policy have already been acted upon. These include transferring administration of copyrights and semiconductor integrated circuits layout-designs Acts to the Ministry of Commerce and Industry. CIPAM has also been set up. Modernisation and digitisation of IP offices have also been progressing well. A large number of IP awareness programmes are being held all over the country. To encourage filing, annual awards are being presented to persons with high number of IP filings. There has also been strengthening of the IP office human resources.

Other steps taken in compliance with the Policy include merging of Copyright Board with the Intellectual Property Appellate Board, amendment of Patent Rules, 2003, new Trade Mark Rules 2017, accession to more WIPO treaties, and inclusion of IP in school curriculum. The new

Trade Mark Rules have reduced the number of forms required for trade marking process from 74 to 8.

The Policy gave a boost to the IP office functioning. The activities of the office has shown marked improvement as per the *Annual Report of the Office of CGPDTM* for the year 2017-2018 over the previous year: patent application examination by 108.2 per cent, registration of trade marks by 20.3 per cent, and registration of designs by 21.17 per cent. Two year disposal figures of the Patents, Designs and Trademarks given below (Table 1) are indicative of the improvement.

Table 1 : IPR Disposal (Gross)

IP	2016-17	2017-18
Patents	30,271	47,695
Designs	8,332	10,788
Trade Marks	2,90,444	5,55,777

Source: CGPDTM Annual Report 2017-2018. P. 10.

Consequently, the pendency in the IP office has been reduced. The pendency in examination of patent applications has been reduced to about 54 months from the earlier 72 months from the date of filing of request for examination. In trade marks, the pendency in examination has been maintained at less than one month. Pendency in examination of new design applications has also been brought down to about one month. In copyright the pendency period for examination has been reduced to less than one month during 2017-18 from the earlier period of 13 months.

The stress laid by the Policy on enhancing applications for IPRs has also borne fruit. As per the afore-cited report, filing of patent application has increased by 5.3 per cent, of design applications by 15.9 per cent, and of copyright by 7.4 per cent during 2017-18. A remarkable feature is the increase in the share of domestic filing of patent applications from 29.2 per cent in 2016-17 to 32.59 per cent during 2017-18 in the total filing.

The following Table 2 presents the gross figures of IP application filing in two years:

Table 2: IP Applications

IP	2016-17	2017-18
Patent	45,444	47,854
Design	10,213	11,837
Trade Mark	2,78,170	2,72,974
Geographical Indications	32	38
Copyrights	16,617	17,841

Source: CGPDTM Annual Report 2017-18

In order to encourage development of institutional policies by universities for IPRs, CIPAM has published a draft for *Model Guidelines on Implementation of IPR Policy for Academic Institutions* in September 2019. The Guidelines empower the researcher since the institution has to convey to the researcher the decision regarding pursuing for IP protection in a time-bound way. The Government has also launched a *Scheme for Pedagogy & Research in IPRs for Holistic Education and Academia (SPRIHA)*⁸. The Ministry also launched a scheme titled *Start ups Intellectual Property Protection*. Through various programmes besides creating awareness, the youth and budding entrepreneurs are encouraged to be more productive and become leaders and champions of IP.

VI. IP AND JURISPRUDENCE

IP jurisprudence in the country has reflected the philosophy and principles underlying the National IPR Policy. This has been the position before and after the formal announcement of the Policy. In a conflict between private rights and public interest, it has generally been inclined towards the public interest as in the case of the CL. At the same time, the courts have been supportive of the rights. In the *Biswanath Prasad Radhyeshyam vs. Hindustan Metal Industries*, the Hon'ble Supreme Court gave a landmark judgement stating the objective of the Patents Act in the following words⁹:

“The object of the patent law is to encourage scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the product patented for the limited period, stimulates new inventions of commercial utility. The price of the grant of the monopoly is the disclosure of the invention at the Patent Office, which after the expiry of the fixed period of the monopoly passes into public domain.”

One of the provisions of the Patents Act that was criticised by the MNC pharmaceutical

⁸ CIPAM website. <http://cipam.gov.in/ipr-awareness-2/university>.

⁹ AIR 1982 SC 1444.

companies was Section 3(d) that prescribed an efficiency criterion for deciding the patentability of pharmaceutical patents. In the Novartis case¹⁰, the Supreme Court upheld this provision stating that it

“clearly sets up a second tier of qualifying standards for chemical substances/pharmaceutical products in order to leave the door open for true and genuine inventions but, at the same time, to check any attempt at repetitive patenting or extension of the patent term on spurious grounds.”

The court was clearly against the ‘Evergreening’ of pharmaceutical patents. The Policy has continued with this approach since it is a major pro public health provision.

The Patents Act has a provision for working of the patent. Section 83 (a) says,

“that patents are granted to encourage inventions and to secure that the inventions are worked in India on a commercial scale and to the fullest extent that is reasonably practicable without undue delay.”

This is also one of the grounds for grant of compulsory licence under section 84. In the case of Bayer Corporation vs. Union of India¹¹, the court held that the expression ‘worked in India’ can be satisfied if the patent holder can furnish valid reasons for not manufacturing in India, but that should satisfy section 83. In this case since the reasonable requirements of the public were not met the court upheld the grant of the CL.

The courts have not hesitated to uphold the rights of copyright owners against infringers. In the *Gramophone Company of India Ltd. Vs. Birendra Babadur Pandey*, even a bilateral agreement between India and Nepal did not deter the court from upholding the rights¹². At the same time, the courts have not hesitated to interpret provisions of fair dealing in section 52 of the Copyright Act, 1957 liberally to make works available for educational purposes¹³.

It should also be remembered that the judiciary also did not hesitate to goad legislative action if that was warranted in the interest of creative artists. A case in point is the footnote by Justice Krishna Iyer in the *Indian Performing Right Society vs. Eastern Indian Motion Picture Association* wherein he urged extending rights to Indian music composers and singers, stating “Of course, law making is the province of Parliament, but the Court must communicate to the lawmaker such infirmities as exist in the law extant.”¹⁴

¹⁰ *Novartis AG vs. Union of India and others*, 2013 (54) PTC 1 (SC).

¹¹ AIR 2014 Bom. 178.

¹² AIR 1984 SC 667

¹³ *Chancellor Masters and Scholars of the University of Oxford vs. Rameshwari Photocopy Services and Others* (2016) 160 DRJ (SN) 678. Delhi.

¹⁴ AIR 1977 SC 1443.

One of the issues noted in the Policy was that of delays in IPR cases. The Policy has recommended the implementation of the *Commercial Courts Act, 2015* which gives separate treatment to commercial cases including IPRs. The Act was brought into force in 2016. In order to reduce the delays in litigation, the Supreme Court in 2018 directed that in all pending cases where stay against proceedings in a civil or criminal trial is in operation, the same will come to an end after six months.¹⁵

Thus one finds that the National Policy, the legislations and the judiciary have taken a balanced view of rights of creators and innovators and public interest in accessing the fruits of creativity and innovation.

VII. ROAD TO AN INNOVATIVE INDIA

At the time of announcing the National Policy, the Hon'ble Finance Minister had stated that the plan will be reviewed every five years in consultation with the stake holders.¹⁶ This is quite a welcome approach since the experience with implementation and the new developments in the fields of technology and economy may necessitate course corrections in the Policy for the objectives to be achieved and for the plans and programmes to be relevant to the contemporary realities. It is also an opportunity to have a relook at some of the premises on which the Policy was based so that the ultimate objective of the Policy to make India an innovation leader is realized. The following critique of the Policy is made in that light.

While IP is generally perceived to play an important role in modern economies, one should also not over estimate the same.¹⁷ Most of the time, its actual role is to protect private investment in commercialising patented inventions and copyright works and to provide incentive to private capital to invest in R&D which may lead to innovations. Do public funds need a commercial incentive to invest in R&D is a moot question. Government as such cannot be considered a profit making organisation like a private firm. It is not a business organisation, though it may run business. Be that as it may, various studies have established that the percentage of patents getting commercialised is very limited, usually around 3 per cent. Wester and Jenson in

¹⁵ *Asian Resurfacing of Road Agency Pvt. Ltd. Vs. Central Bureau of Investigation* (2018) 16 SCC 299.

¹⁶ The Hindu, 14 May 2016.

¹⁷ Peter Moser says, "Overall the weight of the existing historical evidence suggests that patent policies, which grant strong intellectual property rights to early generations of inventors, may discourage innovation. On the contrary policies that encourage the diffusion of ideas and modify patent laws to facilitate entry and encourage competition may be an effective mechanism to encourage innovation." Josef Taalbi says that most innovations are a creative response to problems and imbalances emerging in the process of economic development or spurred by the observation of new technological opportunities.

a 2009 study state that “patents are not quite the omnipotent force... on the economics of innovation” and that “patents appear to have a small (but positive) effect on commercialisation.” (Wester and Jenson). Linking public funding for research to commercialisation may bring undesirable results in educational and research institutions like avoiding fundamental research which generally have long gestation periods with uncertain results and instead, they concentrating on market oriented product research. Basic research is what will foster excellence in science and technology. Institutions also may not give due importance and attention to social sciences and humanities, Faculties that may not be in a position to generate good licensing income from IPs. For a country like India to establish itself as a scientific power in the current world, it will have to come out with fundamental research results. This requires huge public investment in research. India’s R & D expenditure as a percentage of its Gross Domestic Product (GDP) is low (0.65 per cent) compared to countries like United States of America (2.84 per cent), Germany (3.09 per cent), Japan (3.26 per cent), United Kingdom (1.72 per cent), China (2.19 per cent), Switzerland (3.37 per cent), South Korea (4.81 Per cent), and Israel (4.95 per cent).¹⁸ As per a 2013 study of US Universities by Brookings, it was found that for most universities the royalty returns are very low and not sufficient to meet even their research expenditure. In fact most universities were losing money in the licence deals; 84 per cent of the universities having technology transfer agreements were in the red.¹⁹ In the US, the Bayh Dole Act which gave universities who were receiving federal funding to opt to pursue ownership of an invention and to earn royalty from the same, has been in existence 1980. Further, the innovations that were earning well were limited to the fields of health care and pharmaceuticals including biotechnology mostly. If this is the case with the US, proceeding under an assumption that research institutions would be able to fund their research from the commercialisation of their results may not be verywise.

Open source research, be it in the field of pharmaceuticals like the Open Source Drug Discovery project of the Council of Scientific and Industrial Research or in software is not for money-making, *per se*. The policy recommendations on commercialisation therefore will have to be tempered with other recommendations in the Policy. A question not much taken up in the Policy is about the justifiability from a moral point of view of public funded research results getting fenced with patents. This creates a situation where the public pays twice, first as a taxpayer for the research and later to use the end results of the research as a consumer. The Policy seems to have followed the current US practice in this.

¹⁸ World Bank data accessed at <https://data.worldbank.org/indicator/GB.XPD.RSDV.GD.ZS> on 10 July 2020.

¹⁹ Valdivia, Walter D., 2013. *University Start-ups Critical for Improving Technology Transfer*. Centre for Technology Innovation at Brookings, November 2013.

Informal innovations and utility model developments are areas where countries at early or middle stage industrialisation excel. India is quite good at it as can be seen in our Micro, Small and Medium sector. The rural areas, many a time out of necessity, generate such minor innovations, but at present India does not have any separate legislation for granting any rights to them or recognition to the innovators. Liberalising the patentability criteria of the Patents Act will not be advisable. Utility model protection systems generally provide for lower level of inventiveness and shorter period of protection than for patents. The procedures are also much simpler than for patents. In many jurisdictions applications are not examined before grant but are taken up for examination only when objections are raised. The rights also cannot be considered as equal to patent rights. The inventors but get the satisfaction of attribution of inventorship like authorship, i.e., recognition of their creativity and innovativeness. It is a kind of poor man's patent who generally do not seek such rights outside of their country. Utility Model protection is supplementary to standard IP system and encourages and protects domestic IP innovators (Kardam:2007). WIPO website provides a long list of countries with Utility Model law which include Albania, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Belarus, Belize, Botswana, Brazil, Bulgaria, Chile, China, Costa Rica, Croatia, Czech Republic, Denmark, Dominica, Dominican Republic, Egypt, El Salvador, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Honduras, Hungary, Indonesia, Ireland, Italy, Japan, Kazakhstan, Kenya, Kyrgyzstan, Lao People's Democratic Republic, Malaysia, Mexico, Mongolia, Mozambique, Oman, Namibia, Nicaragua, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Swaziland, Tanzania, Thailand, Tonga, Trinidad and Tobago, Turkey, Uganda, Ukraine, United Arab Emirates, Uruguay, Uzbekistan, Viet Nam, ARIPO, OAPI and Andean Community.²⁰ India should take a cue from the fact that a good number of countries have such a law.

India also does not have a comprehensive legislation on trade secrets and is dependent on common law as well as contract law or sometimes copyright law to extend protection to them. Equity principle as well as breach of confidence has also been used by the courts to extend protection to commercial information of a confidential nature.²¹ While most Commonwealth

²⁰ https://www.wipo.int/patents/en/topics/utility_models. Accessed on 7 July, 2020.

²¹ Few cases involving trade secret disputes are *Niranjan Shankar Golikari vs. Century Spinning* (AIR 1967 SC 1098), *John Richard Brady vs. Chemical Process Equipments Private Ltd.* (Del. 1987) , *Zee Telefilms Ltd. Vs. Sundial Communications Private Ltd.* (Bom. 2003), *Emergent Genetics India Pvt. Ltd. Vs. Shailendra Shivam* (Del. 2004), *American Express Bank Ltd. Vs. Priya Puri* (Del. 2006), *Bombay Dyeing and Manufacturing Co. Ltd. Vs. Mehar Karan Singh* (Bom. 2010), and *Homag India Private Ltd. Vs. Ulfath Aikhan* (Kar. 2010).

countries have followed the common law path of equitable right and adopt torts, European Union has in 2016 issued a *Directive on Protection of Trade Secrets*.²² In the United States, though it is a matter of state legislation, most states follow the *Uniform Trade Secrets Act (UTSA)* drafted by the Commissioners of Uniform State Laws in 1979 (later amended in 1985), in their state enactments.²³ In the interest of legal certainty and clarity, a *sui generis* legislation on trade secrets could be considered. Such a step would be industry friendly. Since the focus of the policy is on promoting economic development, legal certainty on protection of commercial information is a must to ensure fair functioning of the market.

The Policy repeatedly refers to commitment to protect India's rich Traditional Knowledge and Culture including Traditional Medicine. There are many defensive and affirmative protection mechanisms for TK associated with biological diversity in the current legislations including the Biological Diversity Act and Patents Act.²⁴ However, the Traditional Cultural Expressions have not received appropriate legislative protection. *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* refers to community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity and that the right holders are empowered to ensure preservation from any form of destructive practices affecting their cultural heritage. IP legislations like copyright extend some protection to original expressions, but traditional cultural expressions and folklore need specific legal protection. Otherwise, the chances of the preservers and holders of such expressions and folklore losing their rights over the same and unscrupulous elements commercially exploiting them without adequate benefit sharing are high. While names of traditional cultural goods with geographical attribution, like *Hyderabadi Haleem*, can get protection under the Geographical Indications of Goods (Registration and Protection) Act, 1999, but cultural practices, expressions, etc do not enjoy appropriate protection. India also does not have the kind of protection that the European system of Traditional Specialities Guaranteed (TSG) provides. Based on the suggestions made in the Policy, government can initiate steps to draft such a law.

The Policy has made a strong pitch for bringing all IPRs under one Ministry. It has also recommended renaming the present Office of the Controller General of Patents, Designs and Trade Marks as Office of Controller General of Intellectual Property Rights. The Government can also consider consolidating all IP legislations into one common code. This would help in

²² Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/>. Accessed on 8 July 2020.

²³ Available at <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile>. Accessed on 8 July 2020.

²⁴ *The Patents Act* in Section 3(k) prohibits grant of patents to "an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components."

more harmonisation than now of the various IP legislations.

VIII. CONCLUSION

In Indian jurisprudence, policy statements are not justiciable. What comes before the courts are laws, rules and regulations. Policies help governance in that harmonised approaches to issues can be taken. Based on the policies, Parliament can enact legislations.

The Policy statement, along with India's membership of large number of IP treaties, apart from the Berne, Paris and WIPO Conventions mentioned above, namely, Madrid Protocol on trademark, Marrakesh Treaty on copyright, Nairobi Treaty on the Protection of Olympic Symbol, Nice Agreement on Classification of Goods and Services, Patent Cooperation Treaty, Phonograms Convention, Vienna Agreement on Classification of Visual Marks, Washington Treaty on Layout Designs, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty makes it an important player in international IP arena. What it should do now is to take more active role in international IP agenda-setting. It should stand with confidence that it has robust IP legislations and policy which are in full compliance with its obligations under various IP treaties. Based on the experience so far with the first policy statement on IP, the country should also revise the policy to adapt to new challenges, as had been indicated by Late Shri Jaitley while announcing the Policy. To paraphrase from the Mission statement of Hamilton project, long term prosperity is best achieved by fostering economic growth and broad participation in that growth, and for both growth and participation, IP policies will have to give equal weightage to private and public rights (Queslette and Williams: 2020). IP should serve economic and social goals of the country in the current challenging times. Two statements in the Annual Report of the Department for Promotion of Industry and Internal Trade 2019-2020 augur well for this attitude. It says that the policy space allowed by the TRIPS Agreement is a *sine qua non* for sustainable development of the country and that TRIPS Agreement does not and should not prevent a member country from taking measures for public health, as per the Doha Declaration on Public Health. If policies and programmes in IP follow these principles, we would always have a balanced IP regime.

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