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Comments on India's Draft National IPR Policy

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We are pleased to submit the enclosed comments on the Draft IP policy National IPR Policy published by the IPR Think Tank. We write as experts on international trade and intellectual property law. We have engaged publicly on global intellectual property policy issues, including in relation to India's intellectual property policies in various U. S. trade forums.

GENERAL CONCERNS

1.

At the threshold, it is important to define what this report is. It is labeled a "Draft IP Policy" – but it is written by a committee of general experts who are not empowered to set the policies of government. It would be better to attach a more accurate label to the report, and also to focus (as we describe more fully below) not on intellectual property's means but rather its ends. E.g. the report could be re-titled and refocused as "Views on the Future of Creativity and Innovation in India."

2.

Our overarching concern is that the entire draft policy does not closely adhere to the guiding norms that the paper rightly defines in its first two sections introducing the report and describing India's IP system. In those first sections, the paper (on the whole) appropriately describes intellectual property in India as seeking a just balance of rights and obligations (protections and limitations and exceptions) as a means to serve Constitutionally recognized ends of developing scientific and creative capacities of the Indian people. The paper could also cite to the ends described in Article 27 of the Universal Declaration of Human Rights. Properly conceived, the norms governing the policy should reflect:

- First, intellectual property systems are means to the greater ends of society, not ends in themselves.
- Second, the ends that IP is meant to serve include to promote both *production of* and *access to* fruits of science and creativity.
- Third, in order to achieve the production and access promoting ends of there is a need for context-specific tailoring of protections and exceptions and limitations to achieve a proper balance of rights and obligations.

We see these views reflected in, for example, the leading paragraph of the introduction describing the ends of the law in Constitutional terms (p.1), the description of “balance” and “flexibility” as critical objectives of Indian intellectual property law and policy – including as reflected in India’s policy of resisting “TRIPS-plus” agreements in the international sphere (p.2), and the support of India’s current legal system as “effective and balanced” (p.3-4).

Unfortunately from our view, these themes do not permeate the entire report. Much of the report, particularly in the suggestions of policy proposals the draft considers, intellectual property protection is treated as an end in itself, rather than a means to higher social goals and functions. This leads to the report failing to articulate policies to promote policies and awareness of both sides of the intellectual property system, and failing to consider non-IP policies to promote creation and innovation all together.

This logical conflation of means and ends begins on the first page of the report, which describes “patents” and “copyrights” as “intellectual creations,” which they are not. Patents and copyrights are legal privileges granted to promote the production of and access to intellectual creations, and they are limited by those ends. If intellectual property protection were ends in themselves, there would be no need for balancing features like compulsory licenses for patents, fair dealing rights with respect to copyright and the like.

Later, the report presents a “vision” of “intellectual property led growth in creativity and innovation” (p. 5), as if creativity and innovation promoted by intellectual property is superior to creativity and innovation promoted by other policy tools, or as if there are no such other policy tools.

Section 1.2 states a goal of creating “a systematic campaign for promotion of India’s IP strengths.” Isn’t what needed a campaign to promote India’s creativity and innovation strengths?

Section 1.2.3 calls for case studies of “successful use of IPRs” but not of limitations and exceptions to intellectual property rights, of open access tools like

Creative Commons licensing or of any other knowledge governance policies.

Section 1.3.1 calls for awareness of programs to “protect” intellectual property, but not to promote awareness of limitations and exceptions from protection or of tools to release knowledge creations to the public, e.g. through Creative Commons licenses and other means.

Section 1.3.3 calls for development of joint “IPR programs,” when what is really needed is likely programs to promote research and development or creation and innovation, of which IP policy might be a part but should not be the whole.

These are but a few quick examples from the first pages of the report. The logical flaw of equating intellectual property protection (excluding limitations and exceptions and excluding other aspects of knowledge governance) with the end of India’s public policy instead of a means to achieve ultimate social ends pervades the policy recommendations and degrades the utility of the report as a whole. The document would be vastly improved, and its logical flaws more evident, if it removed nearly every reference to “IP” and substituted it with a more concrete and accurate term.

- “IP” should be replaced with a term like “knowledge governance” whenever the report is discussing means of promoting creativity and innovation. At minimum, every such description of IP “protection” as a means must be linked to limitations and exceptions from such protection as a correlative means to the same end.
- “IP” should be replaced with “creativity and innovation” where the report uses “IP” as an end in itself. One such example is in the heading of Objective 2 on p.8 where it states a goal to “stimulate the creation and growth of intellectual property.” It is creativity and innovation that India should seek to stimulate, not intellectual property for its own sake.
- In many other places the term “IP” should be deleted as a useless qualifier, such as throughout section 1.4 proposing an “Innovation, Creativity and IPR Museum” and a “Hall of Fame” to celebrate “IP innovators and creators” (but not other innovators and creators?).

Perhaps more importantly, at each place where “IP” is used, the recommendations must be critically evaluated to consider the full range of knowledge governance policies and programs that can best promote the ends (increased production of and access to the fruits of creativity and innovation). Development experts are in broad agreement that in a country like India (and indeed any country) intellectual property is often not the only or best tool for this ultimate purpose.

3.

Another consistent and related problem throughout the report is the scant attention to the important developmental role of limitations and exceptions. The problems that exclusive rights might present in terms of affordable access to essential public goods such as medicines and other health technologies, educational and scientific resources, agricultural inputs and outputs, and green/climate-mitigation technologies are not addressed at all. India has a history of careful and intentional use of limitations and exceptions to intellectual property rights as a key and successful element of social and economic policy over the last half century and more that should be described and defended. Similarly, the possibility of exploring other supports and incentives for innovation and creativity that create less distortion and less consumer and public fiscal harm will be undermined by a Policy suggesting that the IP alone is a key to promote creativity and innovation.

India has already instituted multiple IP amendments since the adoption of the WTO TRIPS Agreement in patent, copyright, trademark and design law, but those amendments have largely been executed not only to ensure baseline compliance with TRIPS's mandate but also to make full use of its flexibilities, especially in the patent arena. An IPR Policy articulated now, must not revert to suggesting the IPRs are the sole or even the best policy instrument for catalyzing innovation and creativity or for energizing an acceleration of India's technological, industrial, and human development where the suggestion might be that this would entail the dismantling of the balance currently achieved.

The available economic and policy literature on the impact of stronger and broader IP on development, foreign direct investment, technology transfer, and even innovation is highly contested, with the majority of the evidence indicating that IP promises are grossly overemphasized particularly with respect to low- and lower-middle income countries. The draft should review and report on this literature.

Intellectual property policy must be balanced with other economic, environmental, and developmental needs and with human rights, access to essential public goods, and public service delivery. Intellectual property needs to be balanced with and informed by agricultural policy, which bears a direct bearing on food security and rural livelihood. Furthermore, it is a policy that has to be balanced with other capacity building, technology transfer, and investment strategies. Most importantly, it needs to be balanced with the realization that virtually every IP system in India, except for trademarks and perhaps industrial designs, is dominated by foreign entities and where those foreign entities might be especially ruthless in enforcing their exclusive rights. The bounds of intellectual property needed to

accommodate the future trajectory of antitrust (e.g. in relation to India's policy on eligibility thresholds), health-care, environment, and energy laws should be considered.

The flexibilities are what make India's intellectual property laws Constitutional. These flexibilities permeate all areas of intellectual property rights – they act as the filter sieving out those innovations for which access is critical in areas such as public health from those that can be a privilege for a select segment of the society. The IP policy must be the document that establishes the breadth of the flexibilities to cover a gamut of inherent limitations of intellectual property rights including the digital divide, access to medications, anti-competitiveness and more.

We encourage the report to detail the history of Indian law and policy from the time of the Ayyangar Report of 1959, up through its modern leadership of developing countries in bargaining for flexibilities in trade negotiations. India's international standing on IP, especially in the trade context, has been to effectively deploy diplomatic, political and trade capital to negotiate flexibilities within the agreements permitting and requiring limitations and exceptions to rights to serve locally determined social and economic ends. That position continues to be challenged today by certain wealthy countries and intellectual property intensive multinational industries. The position needs to be constantly rationalized and defended within India's policies. Other than stating that India will use flexibilities, the policy does not elaborate on the role and importance of the flexibilities.

The recent compulsory licenses for unaffordable pharmaceutical products provide prime case studies that should be described and justified in the policy. For hundreds of years intellectual property policies all over the world have contained duties and flexibilities to ensure the reasonable pricing of protected products. Use of compulsory licenses in such circumstances ensures that the end of access to the products of science is not sacrificed by narrow minded policies to protect intellectual property with only the production-incentive goal in mind. Further, use of compulsory licenses and similar flexibilities can themselves promote innovation, including the production of downstream innovations often blocked by rigid definition of intellectual property rights. These policies are now under attack and need defending.

4.

At a technical level, the Draft Policy fails to consider and define core doctrinal and policy considerations at the center of IP policy debates and IP's role trade relations. India's laws and policies are not perfect, as no country's are. Contributing to the task of promoting research and policies to ensure that intellectual property law serves its ultimate ends of promoting production of and access to the fruits of

science and creativity is a worthy goal. For instance, India has no “fair use” provision that permits the use of copyrighted material based on a balance of considerations that can be applied to future technologies and uses not yet envisioned in legislation. Such an exception has been one of the key elements of how U.S. copyright law permits and promotes technological innovation and is a key reason so many of today’s digital businesses locate in the U.S. India’s law could improve here and in other places. A list of such core considerations in the IP as well as the trade regime are presented at the end of this document as Appendix A.

5.

We are concerned that the committee drafting this report is not fully representative of the breadth and accomplishment of India’s intellectual property scholarship and expert communities. We do not see any representatives of India’s vast scholarship communities, no experts on India’s generic pharmaceutical Industry – the largest in the world – no expert son the digital economy, and so forth. To address the technical and policy issues that are most important for a truly overarching creativity and innovation policy, those with the most direct knowledge about the operation of the present system should be included. We encourage the committee to be broadened for its next round of work so that the full scope of its objectives can be furthered.

SPECIFIC CONCERNS

The concerns we raise above are over-arching and of serious importance. To address them, the entire report needs to be reconceived, the emphasis shifted dramatically and the personnel guiding the report remade to fit the purpose. We include the following specific concerns as to some of the larger points of error and omission in the report. But fixing just these points in fine detail will not remedy the report’s overall weaknesses. We advise a much more wholesale reconsideration of the document.

1.

One of the objectives to be achieved from intellectual property “promotion” outlined in 1.1 of the policy is to promote India as “Creative India.” The section wrongly focuses exclusively on promoting intellectual property rights. A national policy that suggesting that ambassadors should “spread the importance of intellectual property rights” seems over anxious when a Government should instead focus its effort to carefully calibrate standards of intellectual property rights and promote instead the ultimate ends of increasing production of and access to the fruits of creativity and innovation.

2.

We encourage a much deeper consideration of whether India should promote trade secret legislation and how. Any such examination should consider jurisdictions like the United States, which is also a common law jurisdiction like India, and has a strong trade secret protection system without a legislated law. Any policy in this area must also consider how the protection of traditional knowledge will be reconciled with the trade secret legislation.

3.

The document highlights the need to “Review existing IP laws, where necessary, to update and improve them or to remove anomalies and inconsistencies.” Similarly, section 3.2 emphasizes the need for more laws and for modernization of existing infrastructure. While we agree that legislation should be constantly analyzed to ensure it promotes its ultimate purposes, the goal of any reform must not be to simply add more protections to the legislative mix. Indeed, as we note above in relation to the lack of a fair use exception in India’s copyright law, it is often the limitations and exceptions to intellectual property most in need of modernization to serve the law’s ultimate ends.

4.

Section 3.3 emphasizes the need for India to become more active in international trade negotiations. This advice must be closely related to the policy of India noted at p.2 to oppose TRIPS-plus intellectual agreements at the multilateral level.

5.

Section 3.6 emphasizes the need for more study – a policy recommendation we support although the mission of that study should be explicitly directed toward users interests, balance, and alternatives to IP for incentivizing socially desirable innovation and creativity. Importantly, such a study should include inputs from experts in this area.

6.

Section 5, titled Commercialization of IP, proposes the establishment of a nodal agency for facilitating the commercialization of IPRs. This recommendation should be considered much more critically. The role of the government should be to identify market failures in order to promote production of and access to the fruits of creativity and innovation, including through non-IP policy tools, not to subsidize already existing markets. Government policies should also install appropriate filters and regulations to ensure that exclusive rights and commercialization does not unduly limit essential access to important intellectual property protected products

such as medication. This is one section where a mention of flexibilities would have been most appropriate.

7.

Section 6.3 recommends the setting up of more IPAB regional hubs and other suggestions for improving IP prosecution and enforcement for IP holders. The policy does not address the question of why there is a need for this special treatment for IP adjudication in a country where the poor are unable to access quick resolution for equally, if not, more important, civil and criminal law questions.

APPENDIX A

The report would be more useful to India's policy deliberations in the future if it opined on some of the core intellectual property debates that are critical to chart India's future course:

a) clarifying patent eligibility threshold on controversial subject matters which should include deliberating on whether India will focus on a narrow eligibility like in Europe or broad like in United States;

b) establishing standards for determining the presence of an inventive-step for patentability, especially for biotechnology inventions, and also clarifying the role at the regulatory levels. E.g. Should the test for inventive step be based on a bright-line rule or on a rule of reason test?

c) reexamining the policy on exhaustion of IP rights, which could allow importation of products lawfully put on the market elsewhere, including clarifying if the exhaustion rule should be the same or similar in all areas of IP;

d) calibrating and defining the impact of competition law on the exercise of IP exclusive rights (see UNDP, *Using competition law to promote access to health technologies: A guidebook for low and middle income countries*);

e) deciding whether India will continue to improve the compulsory and government use licensing regime to broaden permissible grounds for such licenses;

f) delineating government policy on simplified procedures for seeking or granting compulsory or government use licenses, including licenses on pending patents;

g) clarifying and broadening standards for fair use and affordable access to copyright protected works and translation of the same, especially with respect to educational and scientific resources;

h) deciding policies to encourage the adaptation of existing technologies to the

needs and circumstances of India

i) broadening use of liability rules to compensate right holders for socially desirable access to IP-related products; and

j) developing policies for focusing innovation into areas that are essential to India's development needs, including identifying such areas in particular medical, agricultural, and environmental technologies;

k) considering where expansions of copyright limitations and exceptions, including consideration of a fair use exception, would encourage innovation in digital economies.

l) Identifying and studying India's development needs and how India proposes to effectively use IP and the trade regime to address those concerns;

m) Articulating India's position on counter IP overreach of other countries on IP and trade such as USTR's unilateral Special 301 Watch List and US International Trade Commission investigations and Europe's confiscation of legal generic drugs in transit.

n) Increasing collaboration with developing countries to take a coordinated stand on common IP and trade issues or will it instead work towards strengthening its standing amidst developed nations – how will its choice affect IP and its citizens.

o) Identifying the role of IP, trade and agriculture needs careful consideration and hence, the policy should address whether India will lead the debate with respect to the Agreement of Agriculture or will the new IP policy shift towards more liberalization.