India's New IP Policy: A Bare Act?

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Abstract *Amidst much fanfare, the Indian government unleashed an Intellectual Property Rights ("IPR") policy around two years ago. This paper aims at the first ever comprehensive assessment of this policy, its purported rationale and implications. It argues that the policy is a shoddily drafted and poorly conceptualised document, which is resting on empirically unproven intellectual property ("IP") assumptions. It is more faith-based than fact-based and endorses a fairly formalistic view of IP, taking it to be an end in itself.*

The paper goes on to demonstrate through the Carol Bacchi frame of "*What's the problem represented to be*" ("*WPR*") that the very rationale for the policy itself is unclear.

I. Introduction

In Hans Christian Anderson's classic, "The Emperors' New Clothes", a vain emperor is promised the finest of robes by two treacherous tailors. They convince the emperor that the material is so fine that it can barely be seen. Thereafter, the emperor struts around naked, believing that he'd been donned with finest of robes. Whilst all of the adult kingdom and the royal retinue play along, a little child yells: but the emperor is naked!

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One couldn't have found a more fitting frame for India's new Intellectual Property Rights Policy,[1] announced around two years ago.[2] It is a policy that is long on seductive slogans and short on substance; containing nothing more than a mouth of multitudinous platitudes and trite solutions. Paradoxical perhaps, given that the policy itself exhorts Indians to be "creative" and "inventive".

To be fair, the policy does contain some laudable suggestions, though few and far between. But, even those that merit consideration are short on specific details.

II. History of the IP Policy

The history of the policy itself is embroiled in some controversy for the government had initially constituted a committee of academics to help frame the policy. This "first" think tank, comprising one of the authors of this paper and two other IP academics, Yogesh Pai and Prabuddh Ganguly, was constituted by the Department of Industrial Policy and Promotion ("*DIPP*") vide a letter dated July 24, 2014 for preparation of a base document for a National IPR Policy.[3]

The think tank submitted a baseline draft[4] of the policy ("*First Think Tank Draft*") to the DIPP on October 21, 2014.[5] However, rather than responding to this policy or acknowledging its receipt, the DIPP announced on the very next day (i.e. October 22, 2014) the constitution of a new six

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1 National Intellectual Property Rights Policy, May 12, 2016, *available at* http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/National_IPR_Policy_08.08.2016.pdf (last visited on February 14, 2017).

2 *Cabinet Approves National Intellectual Property Rights Policy*, Press Information Bureau, May 13, 2016, *available at* http://pib.nic.in/newsite/erelease.aspx?relid=145338 (last visited on February 14, 2017).

3 Government of India, Meeting Notice, July 24, 2014, *available at* http://spicyip.com/wp-content/uploads/2014/11/letter-constituting-committee.pdf (last visited on February 13, 2017).

4 Shamnad Basheer & Yogesh Pai, *Indian Intellectual Property Policy: A Baseline Draft*, *available at* https://spicyip.com/wp-content/uploads/2014/11/National-IP-Policy-final-1E.pdf (last visited on February 13, 2017).

5 Swaraj Paul Barooah, *The Draft IP Policy That's MIA, & More on the Think Tank*, SpicyIP, *available at* https://spicyip.com/2014/12/the-draft-ip-policy-thats-mia-more-on-the-think-tank.html (last visited on February 13, 2017).

member think tank[6] tasked with the very same mandate; namely, the evolution of an IP policy.[7]

The second think tank then came up with another draft IP policy document; one that was made public by the DIPP on December 24, 2014.[8] Pursuant to a number of critical comments from academics, civil society organizations etc.,[9] the policy draft was revised and resubmitted to the DIPP. The final version was then approved by the Union Cabinet on May 12, 2016.

III. Broad Features of the Policy

The policy sets forth seven objectives, as below:

i) IPR Awareness: Outreach and Promotion

ii) Generation of IPRs

iii) Legal and Legislative Framework

iv) Administration and Management

v) Commercialization of IPR

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[6] This committee was chaired by a former Chairman of the Intellectual Property Appellate Board (IPAB), Prabha Sridevan. Other members of the committee included: Ms. Prathiba Singh, a Senior Advocate of the Delhi High Court, Ms. Punita Bhargava, an advocate at Inventure IP, Dr. Unnat Pandit of Cadila Pharmaceuticals, Mr. Rajeev Srinivasan, Director of Asian School of Business and Mr. Narendra Sabharwal, retired DDG of WIPO.

[7] Government of India, Press Release, October 22, 2014, *available at* http://dipp.nic.in/English/acts_rules/Press_Release/ipr_PressRelease_24October2014.pdf (last visited on February 13, 2017); *See also* Letter to the DIPP (October 24, 2014), *available at* https://spicyip.com/wp-content/uploads/2014/12/ipr-think-tank.pdf (last visited on February 13, 2017); Letter to the Prime Minister, *available at* https://spicyip.com/wp-content/uploads/2014/11/Dear-Prime-Minister-Modi.pdf (last visited on February 13, 2017).

[8] National IPR Policy (First Draft), *available at* http://dipp.nic.in/English/Schemes/Intellectual_Property_Rights/IPR_Policy_24December2014.pdf (last visited on February 13, 2017).

[9] Raghul Sudheesh, *Academics Submits Critical Comments to DIPP on Draft National IPR Policy by IP Think Tank*, SpicyIP (February 9, 2015), *available at* https://spicyip.com/2015/02/guest-post-academics-submits-critical-comments-to-dipp-on-draft-national-ipr-policy-by-ip-think-tank.html (last visited on February 13, 2017); Anubha Sinha, *Academia and Civil Society Submit Critical Comments to DIPP on Draft National IPR Policy [Part I]*, SpicyIP (February 16, 2015), *available at* https://spicyip.com/2015/02/academics-and-civil-society-submits-critical-comments-to-dipp-on-draft-national-ipr-policy-by-ip-think-tank-part-i.html (last visited on February 13, 2017); Anubha Sinha, *Academia and Civil Society Submit Comments to DIPP on Draft National IPR Policy [Part II]*, SpicyIP (February 28, 2015), *available at* https://spicyip.com/2015/02/academia-and-civil-society-submit-comments-to-dipp-on-draft-national-ipr-policy-part-ii.html (last visited on February 13, 2017); Swaraj Paul Barooah, *More Submissions on the Draft IP Policy*, SpicyIP (March 9, 2015), *available at* https://spicyip.com/2015/03/more-submissions-on-the-draft-ip-policy.html (last visited on February 13, 2017).

vi) Enforcement and Adjudication

vii) Human Capital Development.

The policy then goes on to suggest ways to achieve those objectives, including the below:

A. IPR Awareness: Outreach and Promotion

The policy exhorts a nation-wide 'Creative India, Innovative India' campaign. In particular, it recommends the introduction of IPRs in schools and other educational institutions and the institution of awards for those that create new IP.

B. Generation of IPRs

The policy exhorts the acquisition of IPRs by public funded research institutions, and suggests that such IP registrations be used as a key performance indicator at such institutions, linking it with the researchers' funding and promotion. The policy also recommends the setting up of IPR facilitation centres, and the creation of incentives for IPR filings by Micro, Small & Medium Enterprises ("*MSMEs*"), grass-root innovators and start-ups.

C. Legal and Legislative Framework

The policy recommends the institution of a stronger and more effective legal IPR framework. In particular, it recommends the criminalization of cinema piracy and the creation of a legal framework for addressing the issue of licensing of standard-essential patents ("*SEPs*") on fair, reasonable and non-discriminatory ("*FRAND*") terms. It also suggests that statutory protection be accorded to newer categories such as traditional knowledge and trade secrets.

D. Administration and Management

The policy recommends modernizing of IP offices, increasing manpower, providing training to IPR officials, fixing timelines for disposal of applications, and instituting a Cell for IPR Promotion and Management ("*CIPAM*") under the aegis of DIPP for facilitating the promotion, creation and commercialization of IP assets.

E. Commercialization of IPR

In order to encourage the commercialization of IPRs, the policy proposes the establishment of facilitative mechanisms for MSMEs, academic institutions and individual inventors, connecting owners with investors for financing, conducting sensitization on licensing arrangements, and creating a public platform that allows owners to connect with potential buyers, funders and users.

F. Enforcement and Adjudication

In order to strengthen IP enforcement and adjudication, the policy recommends building respect for IPRs among the general public. It also suggests sensitization of IP owners on protection and enforcement measures, building capacity of enforcement agencies, undertaking anti-piracy and anti-counterfeiting measures, conducting regular IP workshops for judges and multi-disciplinary courses for other stakeholders, setting up specialized commercial courts of adjudication of IP disputes, exploring alternate dispute resolution mechanisms, etc.

G. Human Capital Development

Lastly, the policy aims at enhancing human and institutional capacity for policy research, training, teaching and skill building in IP. In order to attain this objective, it advocates measures such as introducing IP teaching in educational institutions and skill development centres, developing distance learning and online IP courses for users, strengthening IP chairs in higher education institutes, empowering the Rajiv Gandhi National Institute of Intellectual Property Management, Nagpur for providing training to IPR administrators and other stakeholders, etc.

IV. Problems with the Policy

As noted earlier, the policy makes all the right noises and is long on its list of recommendations, but short of any real inventive solution or insightful measure as befits a national level IP policy of this stature. Most of its suggested solutions are rather trite at best, and regressive at worst. While the problems with the IP policy are many, we highlight the most egregious ones below:

A. Conflation of IP and Innovation

The greatest flaw of the policy lies in blindly exhorting a rapid "generation of IPRs".[10] This reflects the policy's one-sided view of IP as an end in itself, rather than as a means to an end, namely creativity and innovation.

Indeed, the first think tank (that had been disbanded) cautioned thus:

> "*Intellectual property laws are meant to foster innovation and creativity. To this extent, they are not an "end", but merely a means to an end. As such, they require careful calibration, balancing out the interests of the innovator/creator on the one hand, and the public on the other... In short, a holistic approach will be adopted so as to situate intellectual property in its proper context, and not as an end in itself.*"

The second think tank (whose policy was finally adopted by the government)[11] however leans in favour of a rather formalistic and reductionist view of IP, failing to situate it within the larger context of the innovation ecosystem, refusing to acknowledge that while IP could accelerate innovation in certain technology sectors, it could block innovation in others.[12]

This is a truth touted not only by those labeled as left-liberal ideologues, but also by powerful industry giants facing the brunt of a promiscuous patent regime — renowned giants such as Tesla's Elon Musk who castigated the present patent situation thus:

> "*When I started out with my first company, Zip2, I thought patents were a good thing and worked hard to obtain them. And maybe they were good long ago, but too often these days they serve merely to stifle progress, entrench the positions of giant corporations and enrich those in the legal profession, rather than the actual inventors.*"[13]

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[10] *Supra* note 1, at 7-9.

[11] For the sake of convenience, the earlier disbanded think tank is referred to throughout as "*First Think Tank*" and the new think tank whose policy was finally adopted by the government is referred to as the "*Second Think Tank*".

[12] *See* Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research,* 280 (5364) Science 698-701 (1998); Jeremy de Beer, *Evidence-Based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions*, 19 Journal of World Intellectual Property 150, 169 (2016) ("*Having more IP outputs may increase a country's ranking but, as both theory and evidence clearly show, more IP does not mean more innovation and could, in fact, lead to less.*").

[13] Elon Musk, *All Our Patent Are Belong to You*, Tesla (June 24, 2017), *available at* https://www.tesla.com/en_AU/blog/all-our-patent-are-belong-you (last visited on February 13, 2017) ("*Tesla Motors was created to accelerate the advent of sustainable transport. If*

In fact, the entire edifice of the present IP policy is built on the highly tenuous claim that more IP means more innovation. The policy assumes that innovation and creativity can be fostered only through increased IP protection, and fails to acknowledge the more significant role played by non-IP factors such as education, infrastructure, culture, financing, etc. as identified by the first think tank.[14]

The policy sounds almost militant when it exhorts Indians to convert all conceivable knowledge to IP. It notes that commercialising knowledge has historically been an anathema to the Indian culture. However, now that we are in the knowledge economy, the time has come to break with this past tradition and convert all knowledge into IP assets and "zealously protected IPRs".[15]

Apart from the obvious pitfalls in the above suggestion to monetise knowledge indiscriminately, the policy conveniently glosses over a historical fact: that specialized knowledge (particularly knowledge pertaining to religion, medicine etc.) was severely protected along class lines in ancient India,[16] and those that transgressed this were severely punished including having their ears filled with molten lead.[17] A strong form of trade secrecy, if ever there was one!

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we clear a path to the creation of compelling electric vehicles, but then lay intellectual property landmines behind us to inhibit others, we are acting in a manner contrary to that goal. Tesla will not initiate patent lawsuits against anyone who, in good faith, wants to use our technology…").

[14] *First Think Tank Draft*, Part III ("*Further, intellectual property will not be considered in isolation but in relation to other elements of an innovation ecosystem, namely financing, venture capital, education, infrastructure etc. In short, a holistic approach will be adopted so as to situate intellectual property in its proper context, and not as an end in itself.*").

[15] *Supra* note 1, at 5.

[16] S.N. Sadasivan, A Social History of India 286-87 (2000); Dorothy M. Figueria, Aryans, Jews, Brahmins: Theorizing Authority Through Myths of Identity 149 (State University of New York Press, Albany, 2002) ("*Moreover, Brahmins conspired to keep the shudras in ignorance by denying them access to true knowledge and controlling them with "unholy" law treatises.*").

[17] Shrirama, *Untouchability and Stratification in Indian Civilization*, *in* Dalits in Modern India: Vision and Values 67 (S.M. Micheal ed., 2007); Abraham Eraly, The First Spring: The Golden Age of India 308 (2011); Dr. B.R. Ambedkar, Who were the Shudras (2014); Dr. B.R. Ambedkar, 1 Annihilation of caste (2014); Mark W. Muesse, The Hindu Traditions: A Concise Tradition 43 (2011) ("*Only the Brahmins, by virtue of their training and purity, were competent enough to recite the Vedas effectively without grave danger. An old Hindu law even stated that if a Shudra – that is, a low-caste person – was to hear the Vedas, his ears should be filled with molten lead.*").

This ill-conceived assumption that higher levels of IP protection result in more innovation results in a number of problematic assertions in the text of the policy, as highlighted below:

i. Public Funded Research and IP

The policy recommends that all publicly funded scientists and researchers take steps to protect their inventions as IP assets, even before publishing them in reputed science journals. It even suggests that their promotions and funding prospects be predicated on how quickly and frequently they convert their ideas into IP assets.[18] There are multiple problems with this recommendation, as highlighted below:

i) The policy assumes that scientists fail to register their putative IP out of ignorance. However, history tells us that a number of visionary scientists consciously eschewed IP protection. Illustratively, Benjamin Franklin once famously said: "*...as we enjoy great advantages from the inventions of others, we should be glad of an opportunity to serve others by any invention of ours, and this we should do freely and generously.*"[19] Closer home, legendary scientist J.C. Bose was averse to profiteering from patents and caustically remarked: "*The spirit of our national culture demands that we should for ever be free from the desecration of utilising knowledge for personal gain.*"[20]

ii) The policy fails to appreciate that rather than a one size fits all model, a plurality of approaches makes for a more optimal policy. Some scientists may wish to patent their wares and enjoy the consequent exclusivity, while others may wish to promote a culture of open access, where new scientific discoveries are free of IP entanglements. There is no gainsaying the fact that IP registration, for the mere sake of registration, is non-sensical. A realization that has now dawned on India's largest public sector patentee CSIR, which issued a directive

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[18] *Supra* note 1, at 6, 8.

[19] The Autobiography of Benjamin Franklin 178 (2008) ("*Governor Thomas was so pleased with the construction of this stove, as described in it, that he offered to give me a patent for the sole vending of them for a term of years; but I declined it from a principle which has ever weighed with me on such occasions, viz., That, as we enjoy great advantages from the inventions of others, we should be glad of an opportunity to serve others by any invention of ours, and this we should do freely and generously.*"); Hal Marcovitz, Benjamin Franklin 62, 69 (2006).

[20] Sir Jagadis Chunder Bose, The Life and Times of Sir Jagadis Chunder Bose (Prabhat Prakashan). *See also* Shamnad Basheer, *JC Bose, Wireless Technology and Patents*, SpicyIP (July 7, 2007), *available at* https://spicyip.com/2007/07/jc-bose-wireless-technology-and-patents.html (last visited on February 14, 2017).

that patenting will have to be more circumspect.[21] In this context, it bears noting that, on an empirical cost-benefit analysis, most U.S. universities have a negative balance sheet, when one compares the costs of IP registrations and licensing, as against the revenues through IP royalties![22]

iii) An undue focus on IP registration as a key performance indicator is likely to skew research priorities at scientific establishments, moving research away from basic into more applied streams that are more patentable and palatable to industry collaborators.[23]

iv) Lastly, profiteering from publicly funded patents means that the tax payer pays twice. First, by funding the public research through their tax contributions. And later, through an IP tax on the consumer good/service generated from the publicly funded R&D.[24]

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[21] Rahul Bajaj, *CSIR Admonishes Laboratories for Promiscuous Patenting; Urges Them to Follow More Circumspect Approach*, SpicyIP (October 21, 2017), *available at* https://spicyip.com/2016/10/csir-admonishes-laboratories-for-promiscuous-patenting-urges-them-to-follow-more-circumspect-approach.html (last visited on February 16, 2017).

[22] Walter Valdivia, Center for Technology Innovation at Brookings, *University Start-Ups: Critical for Improving Technology Transfer* 6-11 (November, 2013), *available at* https://www.brookings.edu/wp-content/uploads/2016/06/Valdivia_Tech-Transfer_v29_No-Embargo.pdf (last visited February 16, 2017) ("*Using information of TTO* [Technology Transfer Offices] *expenses, I calculated a rough estimate of net operating income (NOI) and found that of the 155 universities reporting to the AUTM survey, 130 did not generate enough licensing income in 2012 to cover the wages of their technology transfer staff and the legal costs for the patents they file.*"); *See also* Jacob P. Koshy, *CSIR Considers Freedom for its Scientists to Float Own Ventures*, Live Mint (March 20, 2008), *available at* http://www.livemint.com/Politics/T0EvLdxZRw4Rb1wPfkCQcK/CSIR-considers-freedom-for-its-scientists-to-float-own-ventu.html (last visited on February 16, 2017) ("*Though a prolific patentee, CSIR doesn't generate much revenue from its patents. In 2004-05, the latest period for which data is available, CSIR filed 50 patents and generated Rs 4 crore in royalties and licensing. However, it also spent Rs 10 crore in filing for the new patents and in maintaining existing ones.*"); Shamnad Basheer & Shouvik Guha, *Outsourcing Bayh-Dole to India, Lost in Transplantation*, 23(2) Columbia Journal of Asian Law 281-82 (2010).

[23] *See also* Basheer & Guha, *id.,* at 307 ("*An incentive mechanism can succeed only if there are objective and transparent criteria for measuring the performance of scientists. These criteria should not be limited to the number of patents or other forms of IP registered. To achieve a more holistic evaluation, the criteria should also include other factors demonstrating that the scientist or institution has contributed to knowledge transfer—for example the number of peer-reviewed articles written by the scientist.*").

[24] *See* S. Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5(1) Journal of Economic Perspectives 29, 40 (1991) ("*Permitting patents on government sponsored research rewards successful innovators twice, once through government funding and again through patents.*").

The policy could have done better by encouraging a plurality of approaches for appropriating the value of publicly funded research, and vested more autonomy in the hands of scientists and researchers in this regard.[25]

ii. Patent Trolls

India's IP policy favours a rather one-sided perspective on IP, aimed mainly at capturing its "financial value".[26] While IP is meant to appropriate the value of new technical knowledge and generate some income, a uni-dimensional focus on this aspect, at the cost of all else may lead to skewed regimes, where entities that answer to the term of patent trolls may hijack the innovation ecosystem and leave it worse off. Trolls are those that hoard their patents solely to extract excessive rents from legitimate third party inventors who incidentally tread on these patents, whilst developing one or more innovative products.[27] Aggressive patent assertion by trolls impairs the innovation ecosystem and creates market inefficiencies.[28] A classic example of a patent troll in India is that of S. Ramkumar who deployed his dual SIM patent[29] to extort excessive sums of money from leading telecom companies such as Samsung, Mirc Electronics and Spice Mobile.[30] He sought and obtained ex-parte injunctions to restrain them from manufacturing, importing and selling dual SIM handsets.[31] This was despite the fact that the claimed tech-

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[25] See Basheer & Guha, *supra* note 22, at 295-308.

[26] *Supra* note 1, at 14.

[27] D. McCurdy, *Patent Trolls Erode the Foundation of the US Patent System,* Science Progress (January 12, 2009); G.N. Magliocca, *Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 Notre Dame L. Rev. 1809, 1810 (2007).

[28] *See* C. Cotropia et al., *Unpacking Patent Assertion Entities (PAEs)*, 99 Minn. L. Rev. 649 (2014) ('There are numerous theories on the role of PAEs in the patent system. As mentioned in the introduction, many people (including President Obama's economic team) contend that PAEs "*significantly retard innovation in the United States and result in economic 'dead weight loss' in the form of reduced innovation, income, and jobs for the American economy*". They assert that PAEs hold up legitimate innovators by demanding undeserved rents').

[29] Patent Application (Ref. 161/MAS/2002) filed on March 4, 2002, titled 'Mobile phone with a plurality of sim cards allocated to different communication networks' ('Dual SIM switching technology'). The patent converted to a grant (Patent No. IN214388) on February 11, 2008. *See* C.H. Unnikrishnan, *Dual SIM Dispute Highlights Flaws in India's Patent Process*, Mint (July 20, 2009, *available at* http://www.livemint.com/Companies/64vk1wINDEaDtxkjlKpuJK/Dual-SIM-dispute-highlights-flaws-in-India8217s-patent-pr.html (last visited on August 24, 2016); Shamnad Basheer, *Customs Seizures in India: Patently Unconstitutional?*, SpicyIP (March 13, 2009), *available at* http://spicyip.com/2009/03/customs-seizures-in-india-patently.html (last visited on August 24, 2016).

[30] Shamnad Basheer, *Ramkumar vs Cell Importers: India's Biggest IP Case Yet?*, SpicyIP (August 9, 2009), *available at* http://spicyip.com/2009/08/ramkumar-vs-cell-importers-in-dias.html (last visited on August 24, 2016).

[31] Ex parte injunctions were obtained, for instance, against Samsung and Spice. S. Dama, *Interrogating Interim Injunctions: Ramkumar's Dual-SIM Patent*, SpicyIP (June 23,

nology was already known at the time of the patent application, and the application merely claimed the new technical features without disclosing them adequately.

By the time the patent was finally revoked by the IPAB on June 1, 2012, a number of technology companies had paid out huge sums of money to him.[32] Ramkumar's sole aim of registering the patent was to extort money from technology majors who happened to deploy the patent in one or more of their products.

A progressive IP policy might have taken account of trolls and proposed remedial measures to guard against their growing influence.

iii. IP Teaching and Respect

The policy advocates that IP be taught in schools and colleges.[33] Leading one to ask: wouldn't a course designed to make children more creative be better for fostering creativity than bogging them down with an additional course on intellectual property? Even if schools lack the resources to impart specific courses on creativity, they could at least ensure that they don't stand in the way of what might otherwise have been a natural flowering of creativity in children.[34] A truth tellingly captured by Mark Twain's sentiment: "*I have never let my schooling interfere with my education*", and one that is now being controversially tested by Peter Thiel (PayPal's legendary founder) who pays college students to drop out of college and run risky ventures.[35]

2015), *available at* http://spicyip.com/2015/06/interrogating-interim-injunctions-ramkumars-dual-sim-patent.html (last visited on August 24, 2016).

[32] Prashant Reddy, *IPAB Revokes Patents Belonging to Debutant Indian "Patent Trolls"*, SpicyIP (July 5, 2012), *available at* http://spicyip.com/2012/07/ipab-revokes-patents-belonging-to.html (last visited on August 24, 2016). *See* R. Sivaraman, *Intellectual Property Board Revokes Patent for Dual SIM Phones*, The Hindu (June 10, 2012).

[33] *Supra* note 1, at 6, 8, 9 18; *See* Amiti Sen, *Catching Them Young: DIPP Reaches Out to School Kids to Spread Awareness on Intellectual Property*, Business Line (January 3, 2017), *available at* http://www.thehindubusinessline.com/news/education/catching-them-young-dipp-reaches-out-to-school-kids-to-spread-awareness-on-intellectual-property/article9457516.ece (last visited on February 14, 2017) ("*The idea is to make children curious about IP and also teach them to respect it. We are starting with Delhi and will spread the initiative throughout the country eventually," an official in the DIPP told BusinessLine.*").

[34] *See* Shamnad Basheer, *Break In India*, Seminar (November, 2016), *available at* http://www.india-seminar.com/2016/687/687_shamnad_basheer.htm (last visited on February 14, 2017) (citing an example of a class 11 student whose answer on the 'dark ages' was marked low, since he critiqued the standard theory that there was no advancement of science or arts during the dark ages).

[35] *About*, The Thiel Fellowship, *available at* http://thielfellowship.org/about/ (last visited on February 14, 2017).

A strenuous course on a legal regime whose alleged impact on innovation and creativity is highly contested is hardly the right recipe for a blossoming of creativity in schools.

Interestingly, the policy speaks about creating "respect" for IP as one of the steps for strengthening 'Enforcement and Adjudication'.[36] Why "respect"? Given that intellectual property has had a chequered history (with many viewing it as an inequitable tool of economic exploitation),[37] "respect" is hardly the appropriate term.

In order to create this respect for IP, the policy, among other things, recommends "*educating the general public, especially the youth and students, on ills of counterfeit and pirated products*".[38] It also speaks about undertaking studies to assess the extent and reasons for piracy as well as the measures for combating it.[39]

The policy also proposes a long list of measures for spreading awareness of the benefit of IPRs,[40] but none for making people aware of the various public interest exceptions inbuilt in the IP laws in order to ensure that the very purpose of creating these private rights is not defeated.

B. Other Problems with the Policy

Other problems with the policy are highlighted below:

i. Excessive Enforcement of IP and Criminalisation

The policy suggests a host of steps for strengthening of enforcement mechanisms for greater protection of IPRs,[41] but none for balancing the enforcement, especially, criminal enforcement, that often compromises the civil liberties of defendants. The need for the latter was emphasized upon in the *First Think Tank Draft* in the light of the rather excessive grant of *ex parte*

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[36] *Supra* note 1, at 5; *See also* Sen, *supra* note 33.

[37] M. Perelman, *Introduction: How Intellectual Property Rights Enrich the Few While Undermining Liberty, Science and Society* in Steal This Idea: The Corporate Confiscation of Creativity (2002), *available at* http://www.leftbusinessobserver.com/MPonIP.pdf (last visited August 9, 2017) ("*Besides the damage that intellectual property rights impose on the scientific process, intellectual property rights concentrate wealth in the hands of the few.*"). *See also* Peter Drahos (with John Braithwaite), Information Feudalism (2002), *available at* https://www.anu.edu.au/fellows/pdrahos/books/Information%20Feudalism.pdf (last visited on August 16, 2017).

[38] *Supra* note 1, at 16.

[39] *Id*., at 17.

[40] *Id*., at 5, 6.

[41] *Supra* note 1, at 17.

injunctions in patent cases. Unfortunately, the present policy fails to pay any heed to this need for balance.[42]

Most problematically, the policy proposes an amendment of the Cinematography Act, 1952 to criminalize unauthorized copying of movies.[43] Undoubtedly, Bollywood requires some protection from the pirates, but criminalizing what is essentially a civil wrong (much like defamation) is tantamount to killing an ant with an elephant gun,[44] not to mention the potential for abuse at the hands of our police.[45]

Also, many a time piracy is one of the best ways to ensure access to notoriously priced IP goods.[46] Importantly, a certain level of piracy has in the past proven to be beneficial to the IP owner in that it encourages adoption of the IP good by the consumer at a cheaper pirated cost, and later at a higher IP price when the consumer can so afford.[47]

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[42] *First Think Tank Draft*, Part IV.13 ("*Currently, India has unilaterally ratcheted up its IP enforcement standards in many areas well beyond the minimum obligations under the TRIPS Agreement, often at the cost of the civil liberties of defendants. The rapid proliferation of ex parte injunctions in patent cases is a case in point. The Government will review such trends (after appropriate data collection in this regard) and explore the idea of legislation that would help balance IP enforcement against civil liberties, particularly criminal enforcement.*").

[43] *Supra* note 1, at 10.

[44] Spadika Jayaraj, *On Girish Karnad and the Criminalisation of Copyright Infringement*, SpicyIP (September 24, 2017), *available at* https://spicyip.com/2014/09/on-girish-karnad-and-the-criminalisation-of-copyright-infringement.html; Balaji Subramaniam, *Subramanian Swamy and the Constitutionality of Copyright Criminalisation – Part II*, SpicyIP (June 18, 2016), *available at* https://spicyip.com/2016/06/subramanian-swamy-and-the-constitutionality-of-copyright-criminalisation-part-ii.html.

[45] *See e.g.* Sai Vinod, *Kerala Loses its Sense of Proportionality, Takes Extreme Steps to Fight Online Piracy*, SpicyIP (November 2, 2012), *available at* https://spicyip.com/2012/11/kerala-loses-its-sense-of.html.

[46] *See* Prashant Reddy, *Bollywood and Online Piracy*, SpicyIP (January 26, 2008), *available at* https://spicyip.com/2008/01/bollywood-and-online-piracy.html; Shamnad Basheer, *Moser Baer's Pricing Strategy: The New Anti-Piracy Model?*, SpicyIP (December 24, 2007), *available at* https://spicyip.com/2007/12/moser-baers-pricing-strategy-new-anti.html; Mrinalini Kochupillai, *Living in Glass Houses… (Cont.)*, SpicyIP (September 30, 2017), *available at* https://spicyip.com/2007/09/living-in-glass-houses-cont_13.html.

[47] Charles Piller, *How Piracy Opens Doors for Windows*, Los Angeles Times (April 9, 2006) ("*The proliferation of pirated copies nevertheless establishes Microsoft products -- particularly Windows and Office -- as the software standard. As economies mature and flourish and people and companies begin buying legitimate versions, they usually buy Microsoft because most others already use it. It's called the network effect.*"); Tim O'Reilly, *14 Years Later, "Piracy is Progressive Taxation" Still Rings True*, LinkedIn (May 3, 2016), *available at* https://www.linkedin.com/pulse/14-years-later-piracy-progressive-taxation-still-rings-tim-o-reilly ("*Estimates of "lost" revenue assume that illicit copies would have been paid for; meanwhile, there is no credit on the other side of the ledger for copies that are sold because of "upgrades" from familiarity bred by illicit copies.*").

The proposition that piracy always reduces incentives to create is not empirically born out. Quite the contrary! Illustratively, notwithstanding the allegedly high rates of design piracy in the fashion industry, the creation of new designs continues to take place at a frenetic pace.[48] Paradoxically, one might argue that piracy fosters more creativity in this industry at least.[49]

Further, the effect of piracy may not be homogenous across every industry.[50] In other words, piracy may not reduce the legitimate sales of all goods in an industry. This was amply demonstrated by a study on the effect of the shutdown of Megaupload, a website that facilitated pirated content, on the box office revenues.[51] The study concluded that the shutdown benefitted only those movies that premiered in a relatively large number of theaters and not those which had smaller audiences.

Similarly, a recent study on the impact of piracy in the comic books industry in Japan concluded that:

> "*piracy decreased the legitimate sales of ongoing comics but stimulated legitimate sales of completed comics…displacement effect was dominant for ongoing content, and advertisement effect was dominant for completed content. Since completed comics series have already ended, and publishers no longer do any promotion for them, consumers almost forget completed comics. We can interpret that piracy reminds consumers of past comics and stimulates sales*".[52]

The policy, however, does not take any of the above nuances into consideration. Rather, it proceeds on the simplistic assumption that piracy

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[48] Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation And Intellectual Property In Fashion Design*, 92(8) Virginia Law Review (2006).

[49] *Id.*, at 1722 *("We argue that fashion's low-IP regime is paradoxically advantageous for the industry…. If copying were illegal, the fashion cycle would occur very slowly. Instead, the absence of protection for creative designs and the regime of free design appropriation speeds diffusion and induces more rapid obsolescence of fashion designs. Designers in turn respond to this obsolescence with new designs. In short, piracy paradoxically benefits designers by inducing more rapid turnover and additional sales.*").

[50] Tatsuo Tanaka, *The Effects of Internet Book Piracy: The Case of Japanese Comics,* Keio-Discussion Paper Series (December 29, 2016), *available at* https://ies.keio.ac.jp/upload/pdf/en/DP2016-027.pdf; David Blackburn, *The Heterogenous Effects of Copying: The Case of Recorded Music*, Working Paper, Harvard University, Cambridge (2007); Sudip Bhattacharjee, Ram Gopal, Kaveepan Lertwachara, James Marsden & Rahul Telang, *The Effect of Digital Sharing Technologies on Music Markets: A Survival Analysis of Albums on Ranking Charts*, 53(9) Management Science 1359-1374 (2007).

[51] Christian Peukert, Jorg Claussen & Tobias Kretschmer, *Piracy and Box Office Movie Revenues: Evidence from Megaupload*, 52 International Journal of Industrial Organization 188-215 (2017).

[52] Tanaka, *supra* note 50.

necessarily deters creativity and therefore recommends an ultra muscular mode of IP enforcement.

ii. IPR: Whither Balance?

The policy tends to treat IP as a "marketable financial asset" and an "economic tool",[53] and recommends a strict enforcement of IP rights. While it does mention the importance of "*balanc[ing] the rights of the public in a manner conducive to social and economic welfare and to prevent misuse or abuse of IP rights*",[54] it fails to include any specific proposal or recommendation that might help effectuate this balance.

By way of contrast, the *First Think Tank Draft* had noted the importance of IPR duties and various measures such as compulsory licensing and price control to effectuate a better balance between private IP rights and the larger public interest.[55] It had also suggested that IP exceptions be seen not just as exceptions, but as user rights;[56] a concept propounded by Prof. David Vaver[57] and endorsed by Canadian courts some years ago.[58] More recently, the notion of user rights was implicitly adopted by the Delhi High Court

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[53] *Supra* note 1, at 3.

[54] *Supra* note 1, at 16.

[55] *First Think Tank Draft*, Part III.5.

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

[57] David Vaver, *Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties*, 57 Cas. W. Res. L. Rev. 731 (2007) ("*The WIPO treaties persist in the rhetoric that what users may do in relation to protected items are exceptions to or limitations on the control rights of owners. This style of language certainly suits copyright owners but its effects are pernicious. It treats what owners can do as rights (with all that word connotes), and what everyone else can do as indulgences, aberrations from some preordained norm, activities to be narrowly construed and not extended. The metaphor language of balance cannot sensibly work from such a starting point: how can rights be balanced against exceptions? The scales already start weighted on one side.*").

[58] *See* CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC OnLine Can SC 13 : 2004 SCC 13 ("*The fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, supra, has explained, at p. 171: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.*""); Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC OnLine Can SC 36 : 2012 SCC 36; Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright), 2012 SCC 37.

in the Delhi University photocopy case,[59] wherein the court refused to construe the educational exception under Section 52(1)(i) of the Copyright Act narrowly: rather it treated the traditionally viewed defence as a "right" and interpreted it purposively to cover the creation and distribution of course packs (compilation of photocopies of the relevant portions of different books prescribed in the syllabus) by universities.[60]

iii. Whither Transparency?

The policy fails to make any mention of the need to foster transparency in the intellectual property and innovation ecosystem. As noted earlier, the law not only grants rights, but also imposes certain duties on IPR holders in order that they might serve the interests of the public.[61] For instance, the Patents Act, 1970 mandates all patentees to regularly submit data pertaining to the working of their patented inventions in India.[62] This information is critical to understanding how patents have been used to serve the larger public interest and could, *inter-alia*, be used to trigger compulsory licences[63] or even patent revocations.[64] However, as a writ petition filed by one of the authors of this piece demonstrates, patentees routinely fail to submit this data; and the government hardly enforces this statutory mandate against errant patentees.[65] The think tank could have taken note of these lapses and recommended a stronger enforcement mechanism with respect to these important IP duties too: one that would have helped foster greater transparency within the innovation ecosystem.

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[59] University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 6229. *See* Shamnad Basheer, *Publishers vs Pupils: Delhi High Court has Struck a Blow for the Right to Copy Copyrighted Material*, Scroll.In (December 13, 2016), *available at* https://scroll.in/article/823996/publishers-vs-pupils-delhi-high-court-has-struck-a-blow-for-the-right-to-copy-copyrighted-material (last visited on November 25, 2017).

[60] University of Oxford v. Rameshwari Photocopy Services, 2016 SCC OnLine Del 5128, ¶¶41 & 72 ("*…the rights of persons mentioned in Section 52 are to be interpreted following the same rules as the rights of a copyright owner and are not to be read narrowly or strictly or so as not to reduce the ambit of Section 51, as is the rule of interpretation of statutes in relation to provisos or exceptions*.")

[61] *See* David Vaver, *Intellectual Property: 'Bargain' or Not?*, 89 U. of Detroit Mercy L. Rev. 381, 388 (2012).

[62] The Patents Act, 1970, section 146(2).

[63] *Id*., section 84(c).

[64] *Id*., section 85.

[65] Written Submissions on behalf of the Petitioner, Shamnad Basheer v. Union of India, 2018 SCC OnLine Del 6841, ¶¶22-25, *available at* http://spicyip.com/wp-content/uploads/2015/05/FORM-27-WP-1R-copy.pdf (last visited on February 15, 2017).

iv. Shoddy Drafting and Research

The policy also suffers from extremely shoddy drafting and research, as evident from the following:

i) The policy speaks of the need for commercial IP courts,[66] when only a few months prior to the unleashing of the policy, the government had steered a legislation creating specialized "commercial courts" to success.[67] Further, the policy speaks about housing all of the IP agencies within DIPP,[68] when again, this was done a month prior to the release of this present policy.[69] The government should at least have been up to date on its own initiatives, when formulating the IP policy.

ii) The policy exhorts multinational corporations (MNCs) to have IP policies.[70] One wonders why the government is going out of its way to do so, when MNCs are known to be very savvy IP players in the market. It is the MSMEs and individual inventors who require encouragement and guidance to help access a regime that is terribly expensive and unduly complex.

iii) The policy mentions 'open innovation' and 'open source based research' in the section titled "Generation of IPRs".[71] Clause 2.10 states thus: "*Encourage R&D including open source based research such as Open Source Drug Discovery (OSDD) by the Council of Science and Industrial Research (CSIR) for new inventions for prevention, diagnosis and treatment of diseases, especially those that are life threatening and those that have high incidence in India*."

iv) The policy speaks about "drug regulation",[72] when this is hardly an IP issue. A conflation of these two issues at the international level saw a recent push to include even trademark violations ("counterfeiting") as a potential drug quality issue (where drugs that violate trademarks earn the moniker of "spuriousness"), a prospect that could have hurt

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66 *Supra* note 1, at 17.

67 The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, *available at* http://www.indiacode.nic.in/acts-in-pdf/2016/201604.pdf (last visited on November 1, 2017).

68 *Supra* note 1, at 2.

69 Government of India, Order, May 30, 2016, *available at* http://copyright.gov.in/Documents/NOTIFICATION%20AND%20ORDER%20REPORTING%20TO%20TRANSFER%20OF%20WORK%20RELATING%20TO%20COPYRIGHT%20.pdf (last visited August 9, 2017).

70 *Supra* note 1, at 6.

71 *Supra* note 1, at 8.

72 *Id.*, at 16.

the interests of the Indian generic industry.[73] India should be careful to not give into this treacherous trap, carefully foisted by multinational pharmaceutical drug majors and their supporters.

The policy proposes periodic review and revision of existing Patent Office guidelines for reflecting 'legislative provisions', instead of reflecting 'judicial decisions'.[74] This can be seen in Clause 4.126.13 which states as follows: "*Existing guidelines published by the Patent Office shall be reviewed periodically and revised to reflect legislative provisions.*"

V. A Few Commendable Proposals

To be fair, the policy does contain some commendable recommendations. We highlight the main ones below and draw attention to some of their shortcomings, where relevant:

1. The policy encourages openness in innovation, specifically noting the desirability of the free and open source paradigm in domains such as software and even pharmaceuticals.[75]

Unfortunately, the inclusion of these proposals in the section on "IPR generation" renders the commitment towards openness a bit suspect. While open source strategies do not necessarily preclude the registration of IPRs, such registrations are not with a view towards securing heavy-handed IP enforcement, in order to control the market for the innovative good and guard its exclusivity zealously. Rather, they are to ensure "openness", such that no third party is able to appropriate large chunks of the inventive concept and build on it, without in turn openly sharing such improvements/derivatives.[76]

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[73] *See* Shamnad Basheer, *The "Spuriousness" of Indian Law: Delinking IP from Drug Regulation*, SpicyIP (September 25, 2009), *available at* https://spicyip.com/2009/09/spuriousness-of-indian-law-delinking-ip.html (last visited August 9, 2017).

[74] *Supra* note 1, at 13.

[75] *See* Clause 2.10 of the policy which states: "*Encourage R&D including open source based research such as Open Source Drug Discovery (OSDD) by the Council of Science and Industrial Research (CSIR) for new inventions for prevention, diagnosis and treatment of diseases, especially those that are life threatening and those that have high incidence in India.*" *Id.*, at 8, 15.

[76] *See* Sonia Baldia, *The Transaction Cost Problem in International Intellectual Property Exchange and Innovation Markets*, 34 Nw. J. Int'l L. & Bus. 1 (2013), *available at* http://scholarlycommons.law.northwestern.edu/njilb/vol34/iss1/1 ("*The overarching purpose of open access schemes is not to simply relinquish the work or invention into the public domain but rather to either preempt the work from being privatized by others or leverage the exclusive IP rights (namely, copyrights and patents) to guarantee and maintain public accessibility of works and inventions.*"); Sara Boettiger & Dan L. Burk, *Open Source*

2. The policy stresses on the importance of preventing the misappropriation of traditional knowledge. While this is a standard theme in most bio-piracy debates, the policy takes the laudable step of proposing that the Traditional Knowledge Digital Library (TKDL)[77] be opened up and made available to institutions other than foreign patent offices.[78] In particular, the policy notes the need to open this up to public research institutions for further R&D and also suggests that it be opened up to the private sector as well, with due safeguards for preventing any misappropriation.[79]

Patenting, 1 Journal of International Biotechnology Law (2004) ("*As in open source software development, abandonment of the invention to the public domain would not necessarily make the invention publicly available. Technology made freely available might be "captured" in proprietary embodiments and so effectively removed from the public domain. Much as copyright has been deployed to maintain the accessibility of open source software, patents might be deployed to maintain the accessibility of biological discoveries…. The purpose of open source licensing is not to generally prohibit use of the licensed innovation, but rather to encourage its use under specified conditions.*"), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=645182 (last visited August 12, 2017).

77 The Traditional Knowledge Digital Library (TKDL) was established by the Department of AYUSH in collaboration with CSIR in the year 2001 for comprehensively documenting ancient Indian traditional medicinal knowledge, in order to ensure against their misappropriation by unscrupulous patentees. By capturing this ancient medicinal knowledge (contained in several ancient texts pertaining to traditional Indian medicinal systems i.e. Ayurveda, Siddha, Unani and Yoga) in five international languages, the TKDL has made prior art searches at the patent office more effective, and significantly reduced the prospects of wrongful patent grants. *See* Mangala Hirwade, *Protecting Traditional Knowledge Digitally: A Case Study of TKDL,* 2010, In National Workshop on Digitization Initiatives & Applications in Indian Context, DNC, Nagpur, (January 3, 2010), *available at* http://eprints.rclis.org/14020/1/TKDL_paper.pdf (last visited on May 30, 2017); *About TKDL,* Traditional Law and Digital Library, *available at* http://tkdl.res.in/tkdl/LangDefault/Common/Abouttkdl.asp?GL=Eng (last visited on August 14, 2017); *Traditional Knowledge Digital Library (TKDL),* Ministry of AYUSH, *available at* http://www.ayush.gov.in/sites/default/files/tkdl.pdf (last visited on August 14, 2017); V.K. Gupta, *Protecting Indian Traditional Knowledge from Biopiracy*, WIPO, *available at* http://www.wipo.int/export/sites/www/meetings/en/2011/wipo_tkdl_del_11/pdf/tkdl_gupta.pdf (last visited on August 14, 2017).

78 Till date, the access to TKDL has been available only to twelve patent offices, namely European Patent Office, United State Patent & Trademark Office, Japan Patent Office, United Kingdom Patent Office, Canadian Intellectual Property Office, German Patent Office, Intellectual Property Australia, Indian Patent Office, Chile Patent Office, Intellectual Property Corporation of Malaysia, Rospatent (Russia) and Peru Patent Office. *Measures Taken by Government to Protect Ancient and Traditional Knowledge of Indigenous Medicinal Systems*, Press Information Bureau (July 18, 2017), *available at* http://pib.nic.in/newsite/erelcontent.aspx?relid=168552 (last visited on November 25, 2016).

79 *Supra* note 1, at 7, 8 ("*The ambit of Traditional Knowledge Digital Library (TKDL) should also be expanded, while the possibility of using it for further R&D shall be explored. The steps to be taken towards attaining this objective are outlined below: … 2.20. Public research institutions should be allowed access to TKDL for further R&D, while the possibility of using TKDL for further R&D by private sector may also be explored, provided necessary safeguards are in place to prevent misappropriation*").

3. The policy deserves appreciation for recognising the need to provide special support to MSMEs, start-ups, grassroot innovators, individual inventors in developing, and protecting as well as commercializing IP. Unfortunately however, the mechanisms to be undertaken for the same are not clearly spelt out.[80]

4. The policy needs to be commended for taking note of our "informal" (rural) workforce and the need to ensure that they too have access to our IP regime.[81] Unfortunately, far from understanding the drivers of creativity and the modes of appropriation/sharing in this "shadow" economy,[82] the policy proceeds on the implicit assumption that the superimposition of a formal IP regime will leave it better off.[83]

5. The policy, speaks of "expedited examination", but does not spell out as to how we might achieve this.[84] It merely states that steps shall be taken to "*explore the possibility of expedited examination of patent applications to promote manufacturing in India*." Unfortunately, it does not elaborate on how this objective is to be attained.

6. The policy proposes the creation of a 'Cell for IPR Promotion and Management' ("*CIPAM*") under the charge of DIPP for facilitation of promotion, creation and commercialization of IP assets.[85] This cell was in fact set up soon after the launch of the policy and was tasked with the formulation and implementation of a strategy for achievement of each of the seven objectives of the policy.[86] Thus far, CIPAM has done the following:[87]

    i) Conducted IPR awareness programmes in schools, along with industry associations.

    ii) Held training programmes on enforcement of IPRs for police officials.[88]

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[80] *Supra* note 1, at 8, 12, 13, 15.

[81] *Id*., at 12, 15.

[82] To get a sense of the prolific creativity in India's informal/grassroots economy, *see* National Innovation Foundation-India, India Innovates (2013), *available at* http://nif.org.in/dwn_files/india-innovates-2013.pdf (last visited on February 16, 2017).

[83] *See First Think Tank Draft*, Part IV.1, wherein the need for undertaking data driven studies for locating the role of incentives for innovation and creativity in this sector and exploring alternate regimes was emphasized upon.

[84] *Supra* note 1, at 12.

[85] *Id*., at 12, 14.

[86] *CIPAM*, Cell for IPR Promotion and Management (CIPAM), *available at* http://cipam.gov.in/cipam/#1500363604246-b53407ff-4858 (last visited on November 8, 2017).

[87] *Id*.

[88] *Workshop on Enforcement of Intellectual Property Rights for Police Officials in Collaboration With Telangana Police*, Press Information Bureau, Government of India,

iii) Launched an IPR enforcement toolkit for the police.[89] The kit is meant to act as a ready reckoner for police officials in dealing with IP crimes, particularly, counterfeiting and piracy.

iv) Collaborated with national and state judicial academies for convening training programmes for the sensitization of the judiciary on IPR issues.

v) Set up a Task Force on Innovation for helping improve India's ranking in the Global Innovation Index.

The policy notes that this cell will, *inter-alia*, study the feasibility of an IP exchange.[90] However, the policy does not detail out the architecture or attributes of such an exchange. Ideally, the government's focus should be on facilitating the creation of a platform maintained by private players rather than creating and maintaining this itself. Most exchanges the world over are private exchanges, such as: Ocean Tomo, IP Nexus, TechTransferOnline, Tynax, Intellectual Property Exchange, Yet2, etc.[91] Even in India, there exists an IP exchange set up by FISME (Federation of Indian Micro and Small & Medium Enterprises) with the support of the British High Commission.[92]

Ministry of Commerce & Industry (July 12, 2017), *available at* http://pib.nic.in/newsite/PrintRelease.aspx?relid=167358 (last visited on November 30, 2017).

[89] IPR Enforcement Toolkit for Police, Department of Industrial Policy and Promotion, Ministry of Commerce, Government of India, *available at* http://dipp.nic.in/sites/default/files/IPR_EnforcementToolkit_06January2017_0.pdf (last visited on November 30, 2017).

[90] *Id*., at 14 ("*5.1.2 Undertake a study to examine the feasibility of an IPR exchange*"). *See also* clause 5.11.2 which states: "*Facilitating investments in IP driven industries and services through the proposed IP Exchange for bringing investors/ funding agencies and IP owners/users together*", *id*., at 15. This exchange has been in-principle approved by the Ministry of Science and Technology but is yet to become operational. *See* Jyotika Sood & Priyanka Mittal, *Indian May Get Intellectual Property Exchange Soon,* LiveMint (July 5, 2017), *available at* http://www.livemint.com/Technology/q5KSoAyOpBqLZQX8AH9VPN/India-may-get-Intellectual-Property-Exchange-soon.html (last visited on November 25, 2017).

[91] Ocean Tomo, http://www.oceantomo.com; Intellectual Property Exchange, https://www.ipexchange.global/; IP Nexus, https://www.ipnexus.com/; Global IP Exchange, http://www.glipx.com/about; Tech Transfer Online, http://www.techtransferonline.com/; yet2.com, http://www.yet2.com/; Tynax, http://www.tynax.com.

[92] This exchange, named 'IPR Exchange', was established by the Federation of Indian Micro and Small & Medium Enterprises ("*FISME*") with the support of the British High Commission in March 2013. It is the first exchange in India that facilitates commercial exchange of IP assets online. *See FISME launches IPR Exchange, A Book on Intellectual Property and Honours Winner*, Federation of Indian Micro and Small & Medium Enterprises (April 4, 2017), *available at* http://www.fisme.org.in/pastevents_details.php?event_id=153 (last visited on November 25, 2017); *About Us*, IPR Exchange, *available at* http://www.iprexchange.in/about_us.php (last visited on November 25, 2017).

7. The policy contains a promising proposal to encourage Corporate Social Responsibility ("*CSR*") funds into open innovation.[93] However, this depends entirely on corporate largesse and interest, and the government cannot mandate this.

8. The policy speaks about alternatives to the current IP regime such as the institution of awards or prizes.[94] Unfortunately, this appears to have been recommended not as alternative to IP, but as an incentive for creation of IP itself.[95]

9. Similarly, the policy contains a commendable proposal for setting up of a national 'Hall of Fame'.[96]

VI. An Uncreative Policy

While the policy boasts commendable proposals as above mentioned, for the most part, the policy is severely flawed and devoid of creative ideas/ suggestions.

Many decades ago, a two-member committee (headed by Justice N.R. Ayyangar) conceptualised a patent policy that formed the blueprint of the present patent regime.[97] By most accounts, this far-sighted policy triggered the remarkable growth of India's pharmaceutical industry, earning it the moniker "pharmacy of the world". It was a policy that was thoroughly researched, empirically validated and elegantly written in a little over a year. Compare and contrast that with the present policy that took more than two years and two separate think tanks to come to fruition. One beset with banality, dogged by dogma, rife with ridiculous assertions, lacking in any credible empirical support, and written in language that, at best, mimics a masterful memo from one bureaucrat to another. Surely we could have done better!

While proudly proclaiming the slogan "Creative India, Innovative India",[98] the policy states that "*[t]here is an abundance of creative and*

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[93] *Supra* note 1, at 8.

[94] *Id*., at 6.

[95] *See* clause 1.4.4 under the IPR Awareness: Outreach and Promotion head that recommends: "*Instituting prizes and awards to encourage 'IP creation' activity in specific sectors*", *supra* note 1, at 6.

[96] *Id*.

[97] Shri Justice Rajagopala Ayyangar, Report on the Revision of the Patents Law (September, 1959), *available at* https://spicyip.com/wp-content/uploads/2013/10/ayyangar_committee_report.pdf (last visited on November 1, 2017).

[98] *Supra* note 1, at 1.

innovative energies flowing in India".[99] It is a sheer pity that none of that abundant creative energy made it to this policy document, rendering it rather dull and dreary.

VII. What's the Problem Represented to Be?

Even apart from the various flaws in the text of the policy, one needs to revisit the rationale: What precisely is the point of this policy? Or to interrogate a bit deeper using Carol Bacchi's frame, "*What's the problem represented to be?*"[100]

This approach, known as the WPR approach, was developed by Bacchi, a professor at the University of Adelaide, and aims to critically scrutinize the implicit representation of the problem in any given policy. Specifically, it posits the following questions:

i) What is the problem represented to be in a specific policy?

ii) What presuppositions or assumptions underlie this representation of the problem?

iii) How has this representation of the problem come about?

iv) What is left unproblematic in this problem representation? Where are the silences? Can the problem be thought about differently?

v) What effects are produced by this representation of the problem?

vi) How/where has this representation of the problem been produced, disseminated and defended? How could it be questioned, disrupted and replaced?

Bacchi's thesis is that governments, and indeed all of us, *give a particular shape* to social 'problems' in the ways in which we speak about them and in the proposals we advance to 'address' them.[101]

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[99] *Id*., at 3.

[100] *See* Carol Bacchi, *Introducing the 'What's the Problem Represented to Be' Approach?*, *in* Engaging with Carol Bacchi: Strategic Interventions and Exchanges 21-24 (Angelique Bletsas & Chris Beasley ed., 2012).

[101] *See* Carol Bacchi, *What's the Problem Represented To Be? An Introduction* (October, 2007), *available at* http://www.flinders.edu.au/medicine/fms/sites/southgate_old/documents/theory%20club/2007-oct/IntroducingWP_Bacchi.pdf) ("*Governments in this understanding are active in the creation of particular ways of understanding issues. I call competing understandings of social issues 'problem representations' and argue that it is crucially important to identify competing problem representations because they constitute a form of political intervention with a range of effects*.").

Applying her frame, one might possibly suggest the following "representations" of the problem, as gleaned from the various statements made by the government.

i) In a statement accompanying the text of the policy, Nirmala Sitharaman, the Minister for Commerce and Industry stated: "*The National Intellectual Property Rights (IPR) Policy, recently approved by the Union Cabinet, is a giant leap by the Government of India to spur creativity and stimulate innovation.*"[102]

ii) Responding to a question raised in the Rajya Sabha earlier this year, Sitharaman stated: "*[The policy] aims to stimulate a dynamic, vibrant and balanced intellectual property rights system in India to foster creativity and innovation and thereby, promote entrepreneurship and enhance socio-economic and cultural development.*"[103]

iii) In a message accompanying the text of the policy, Ramesh Abhishek, Secretary of DIPP stated: "*The National Intellectual Property Rights (IPR) Policy of India is set to establish an ecosystem in the country conducive to innovation and creativity not only in terms of IP awareness and creation, but also commercialization and enforcement.*"[104]

From the above, it would appear that the policy appears to have stemmed out of a sincere belief that India lacks in creativity and innovation; and that a strengthening of IP protection would help enhance the rate and range of creativity and innovation. The assumption therefore (that underpins this implicit representation of the 'problem') is that IPRs necessarily 'enhance' creativity and innovation and also play a strong role in the same. Granted, India is lagging on several technological counts. When compared with its glorious past boasting pioneering innovations from the likes of Sushruta[105] (the father of modern surgery) and Nagarjuna[106] (metallurgy), India has hardly had any noticeable technological marvels in its recent history.

But is it the country's IP regime that is problematic? Or does the malaise lie elsewhere? Could it be cultural, where parents put undue pressure on their children to take up secure salaried jobs, as opposed to risky entrepreneurial

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[102] *Supra* note 1.

[103] Answer to Rajya Sabha Unstarred Question No. 3039, *available at* http://dipp.nic.in/sites/default/files/ru3039.pdf (last visited on August 16, 2017).

[104] *Supra* note 1.

[105] M. Tewari & H.S. Shukla, *Sushruta: 'The Father of Indian Surgery'*, 67(4) Indian J. Surg. (2004), *available at* https://tspace.library.utoronto.ca/bitstream/1807/6342/1/is05075.pdf.

[106] Arun Kumar Biswas, *Primacy of India in Ancient Brass and Zinc Metallurgy*, 28(4) Indian Journal of History of Science 317-18 (1993).

ventures? Such factors are absent from the "problem representation" of the policy, and therein lies its biggest flaw. IP policy making should be driven by facts, and not faith.[107] It must be based on empirical studies and stakeholder surveys and not on intuitions and assumptions; a point stressed by the *First Think Tank Draft* in the following words:

> "*Unfortunately, a number of IP debates and norms turn on rhetoric, emotion and untested assumptions. One needs to move away from such faith based IP towards fact based IP. Future norms for India will be predicated on data driven evidence as far as possible. The government will encourage empirical studies and surveys from a wide variety of stakeholders. Different ministries responsible for specific sectors viz., Ministry of Micro, Small and Medium Enterprises, Ministry of Agriculture, Department of Science and Technology, Department of Biotechnology etc…will be required to generate and share innovation related data and that can inform effective IP policy making.*"[108]

VIII. A Policy or Strategy?

The policy states that: "*The rationale for the National IPR Policy lies in the need to create awareness about the importance of intellectual property rights (IPRs) as a marketable financial asset and economic tool.*"[109] If this be so, then it is a fairly limited mandate; and one does not need to formulate an extensive IP policy for this. A mere strategy document to create more awareness would have sufficed. In fact, some years ago, the government did come up with an IPR strategy document.[110] It is not clear as to whether this policy document was also meant to be a strategy document.

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[107] Shamnad Basheer, *World IP Day: From "Faith" Based IP to "Fact" Based IP*, SpicyIP (April 26, 2008), *available at* https://spicyip.com/2008/04/world-ip-day-from-faith-based-ip-to.html (last visited on February 15, 2017); Mark Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. Rev. 1328 (2015) ("*Part of the faith people place in IP regardless of the evidence seems to come from a faith in the status quo—a feeling that IP must be a good thing because we always did it that way and it worked. The status quo is not a good in and of itself, to be protected no matter what evidence accumulates that it is rotten… Faith-based IP is at its base a religion and not a science because it does not admit the prospect of being proven wrong.*").

[108] *First Think Tank Draft*, Part IV.5.

[109] *Supra* note 1, at 1.

[110] Draft National IPR Strategy, September 6, 2012, *available at* http://dipp.gov.in/English/Discuss_paper/draftNational_IPR_Strategy_26Sep2012.pdf (last visited on February 14, 2017).

Fortunately, this policy document does not have the force of law and means nothing, unless actively translated. Till then, it is, in the Bard's memorable language, nothing more than mere "sound and fury, signifying nothing"![111]

IX. Conclusion

The Indian IP policy will go down in the annals of history as a wasted opportunity: an opportunity where we might have fashioned a progressive policy in a country that has thus far bucked mainstream pressure to conform to a developed country driven IP script. Instead, what we have is a dull and dreary document that contains soporific platitudes at best, and an aggressive one sided ratcheting of IP norms up at worst.

The policy lacks empirical rigour and appears more faith-based than fact-based. It endorses a very formalistic and reductionist view of IP, taking it to be an end in itself. It ignores other factors such as education and cultural aversion to risk, which are likely to play a far greater role in triggering creativity.

To this end, the policy misses the larger macro frame where IP is but one tool in the overall innovation ecosystem; a more holistic approach might have made for a more progressive policy. In the end, one needs to ask: was there a need for such a policy at all? What purpose did it serve? Alas: Carol Bacchi's thoughtful question remains unanswered!

[111] William Shakespeare, Macbeth, Act V Scene V.