Chapter 4 – Intellectual Property Management: Legal and Policy Analysis

4.1 Introduction

To give force to any systems, procedures and processes it is crucial to have some legal and policy framework in place. Such a framework helps bring structure and provides the much-needed direction to take any process/system forward. At the State/Government level a policy provides the basis for which the Government can decide what it intends to do, a legislation gives force to that policy. The United Nations Food and Agriculture Organization (FAO) defines policy “as a set of decisions which are oriented towards a long-term purpose or to a particular problem”\footnote{FAO Corporatde Document Respository, Definition of policy, http://www.fao.org/wairdocs/ILRI/x5499E/x5499e03.htm (Last accessed on 20/02/2018).}

Once a purpose or problem is identified the decisions that help in solving that problem or attaining the purpose can be elaborated by way of policy, these policy documents are in a sense “a ‘commandment’ for decision making”\footnote{Community Group Resources, Importance of Policies, http://www.nzindians.org.nz/asp/pdf/ConCom/FS/No%205%20Importance%20of%20policies.pdf (Last accessed on 20/02/2018).}. Their importance to an organisation is critical for setting the direction and the manner in which the business is to function. Implementation of the policy is equally crucial and requires the involvement of all stakeholders to understand and adhere to those policies.

Legislation from the Government’s perspective, on the other hand, can help make its policy workable and implement what the Government so desires. As in the case of policy implementation within an organisation, a Government policy can act as a precursor to the law that helps in bringing forth the policy for the society at large or for any specific purpose.

A sound policy document can help the government enact quality legislation by adhering to the principles enshrined in the policy, needless to say, subject to the policy in itself having been
well thought out. While policy can be of a broad-based understanding, legislation aims to hone in on the specifics to help enact the policy.\textsuperscript{329}

Organisations implement various policies for many different purposes and requirements. The number and types of policies could differ from company to company, each addressing a unique need and meeting its own specific requirements. However, all such policies should, and would necessarily have to, adhere to and be in compliance with, the law of the land, i.e. laws enacted by the legislature.

Furthermore, it is imperative with both, an organisation as also the government, that any policy document while being drafted take into consideration the ideas, inputs and opinions from all stakeholders to whom the policy is likely to impact and affect. While the Government more often than not invites public opinion on various policies and legislations\textsuperscript{330} it proposes, it is not necessarily the case in companies and other such private bodies / organisations, where policy making is seen as an activity which is the exclusive domain of senior management.

Some policies in organisations could also come about given that legislation requires the society at large to address specific issues. For instance, in India, The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 requires mechanisms and procedures to be established to address harassment of women at the workplace. In such, cases companies would be compelled to draft policy that meets the Acts requirements.

Policies in organisations are important tools for the employers and employees in helping them understand how the company chooses to function with regards to particular issues in its day to day functioning.\textsuperscript{331} These documents also enable the organisation in ensuring uniformity and conformity with respect to the vision and goals of the organisation. Absent a quality policy


document, a company could lose critical focus and vision and potentially veer in a direction to its own detriment. This is one such reason why it is important to also engage with employees while creating any policy. Once an employee is part of the creation process, a sense of belonging and ownership to the policy ensures compliance and adherence. Having said that, given the ease with which employees leave their employment, this task of engagement may not always be feasible.

As noted above, legislation helps in translating policies of the government to achieve its intended purpose. It is therefore important that all legislation be of a quality nature that enables to government to bring forth the reform intended through that particular policy.332

This chapter, in the first half, will focus on the legislative and policy initiatives of the Government of India that can have an impact on Intellectual Property Management. Specifically, this part of the study will review provisions in light of IP Management concerns within ‘The Protection and Utilisation of Public Funded Intellectual Property (PFIP) Bill, 2008’, the draft ‘National Innovation Act of 2008’, the ‘Science, Technology & Innovation Policy 2013’, and the ‘National Intellectual Property Rights Policy, 2016’ and certain other legislations that focused on establishment of world class places and institutes of research and innovation.

These legislations i.e. PFIP bill and National Innovation act, the former having been withdrawn as of December 2014333 and the latter still in the draft stage, can nevertheless provide the much-needed impetus to the development of IP Management systems and processes. The National IPR Policy, on the other hand, while listing out broad-based objectives has provided a blue print of sorts with regards to IP development in the country.


This chapter will then go on to highlight the various provisions within a policy, with specific regard to companies / non-governmental agencies, that would enable an organisation to address issues pertaining to IP Management. Legislation that may have a direct impact on such IP Management policies for organisations shall also be addressed. The aim of this part of the study is not to get into issues and details regarding policy drafting and the detailed procedures within a policy, rather it is to provide a framework for how an effective IP Management policy should address the various elements of a holistic policy.

As stated above, while not outlining an IP policy in itself, the study will consider the critical components of a policy that form the basis of a holistic approach to Intellectual Property Management. This section will draw from this author’s own experience in having drafted policies as also through available literature on this subject.

4.2 Legal and Policy Perspectives

The historical development of Intellectual Property related legislation and regulations has been covered in Chapter 2 earlier. As nations started trading and interacting more and more, the need for international cooperation in the IP domain was felt and as outlined earlier many international instruments on intellectual property issues were formulated. Furthermore, as countries progress and economies develop, the focus policy and legislation with regards to innovation and its related rights start to come under greater scrutiny.334

Different countries identify their own unique requirements vis-à-vis IP, depending on their stage of economic and social development. Author Susan Sell notes that an economy as “a technological leader will prefer strong protection of its innovations, whereas a follower will favor access over protection”335. While preference of the nature of protection or access to IP can be based on economic or social indicators, the TRIPS agreement mandated certain minimum standards to be adopted.


This section of the study does not intend to go into the merits or demerits of the TRIPS agreement, but rather will consider how India has undertaken initiatives on IP related legislation to try and become a nation that seeks to encourage innovation. Besides legislation specifically, policy and other such initiatives by the Government and the Executive also help in bringing forth mechanisms to consider innovation as a focal point in the country’s discourse.

On 4th of June 2009, the then President of India Smt. Pratibha Patil in her address to the Members of the Parliament of India ended her speech by stating that the “next ten years would be dedicated as a Decade of Innovation”336. Thereafter, in his inaugural address at the 97th Indian Science Congress, the then Prime Minister of India Dr. Manmohan Singh stated that the “Government has declared 2010-2020 as the Decade of Innovations”337.

By having legislation as also government actions that encourages innovation and creativity it becomes equally important to consider issues of managing that innovation. While it may not be the direct purpose or intention of innovation encouraging legislation to provide for management of IP, any law that helps and facilitates the growth of intellectual property also brings into focus the need for systems and processes that would be critical to IP Management.

On 15th December 2008 proposed by the Ministry of Science and Technology, The Protection and Utilisation of Public Funded Intellectual Property (PFIP) Bill, 2008 was introduced in the Rajya Sabha. The genesis of this piece of legislation338 can perhaps to be traced to India’s Science and Technology Policy, 2003.339


339 The S&T Policy of 2003 is no longer available on the website of the Department of Science and Technology, Government of India and has been sourced from the National Science & Technology Management Information System (NSTMIS) website http://www.nstmis-dst.org/StPPolicy2003.aspx (Last accessed on 20/02/2018).
The Legislative Brief\textsuperscript{340} on the bill while addressing the context and highlights of the bill had made a comparison on the percentage of India’s Gross Domestic Product (GDP) spending on research and development with respect to other developed countries. As per the brief it has been stated that India spends only about 0.88 per cent as opposed to 2 per cent in most developed nations.

However, as per data available from the World Bank in 2008 the percentage of GDP spend on research in India stood at 0.84 per cent only.\textsuperscript{341} Even the latest 2017 budget has not increased government spending on research and development.\textsuperscript{342}

The primary objectives of the Bill were to “encourage innovation and promote collaboration between the Government, private enterprises and non-government organisations”\textsuperscript{343}, however the bill seemed to lack the provisions to attain those objectives. The Bill, also termed as the Indian Bayh-Dole Act\textsuperscript{344} in reference to the US 1980\textsuperscript{345} legislation on similar lines, went through a substantial revision in 2010. Following criticism of the bill in its original form where experts suggested that it was not fit for a developing country, the Government then formed a committee under the Chairmanship of Dr. T. Subbarami Reddy.

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\textsuperscript{343} Supra note 340.


\textsuperscript{345} The Bayh-Dole Act 1980, (35 U.S. Code Chapter 18) enabled organisations that were funded by the federal government to commercialise their inventions. https://www.law.cornell.edu/uscode/text/35/part-II/chapter-18 (Last accessed on 20/02/2018).
\end{flushright}
The Standing Committee on Science & Technology, Environment & Forests thereafter presented the Two Hundred and Eleventh (211th) report to the Rajya Sabha in August 2010.\textsuperscript{346}

The original draft had over 50 amendments made with the Committee having taken inputs from all stakeholders involved, within and outside the government.

The bill in its revised form simply stated as its purpose and objective that it was a bill:

“to provide for the protection and utilisation of intellectual property originating from public funded research and for matters connected therewith or incidental thereto”.

The long title of the now withdrawn bill made it clear that it would have been the intention of the legislature to encourage innovation and provide grants and fund research activities keeping the objectives of the Science and Technology Policy, 2003 in mind.

With respect to the aspect of Intellectual Property Management, Section 10 of the Bill was of particular relevance. That specific provision of the bill stated:

10. (1) Every recipient shall, within one hundred and eighty days of the receipt of the funds under section 3, constitute an intellectual property management committee within its organisation.

(2) The intellectual property management committee constituted under subsection

(1) shall, —

(a) identify, assess, document and protect public funded intellectual property having commercial potential;

(b) perform market research and market such public funded intellectual property;

(c) create an intellectual property management fund;

(d) monitor the process of licensing and assignment;

(e) manage revenues from licensed public funded intellectual properties for the organisation;

(f) within one hundred and eighty days of its constitution, establish mechanism to promote the culture of innovation and public funded intellectual property generation within the organisation;

(g) create mechanisms to govern the relations between the recipient and the creator of public funded intellectual property.

Similar to the function of a Technology Transfer Office (TTO)\textsuperscript{347}, an Intellectual Property Management Committee (IPMC) was to be formed as per the provisions of the Act, where funding was obtained for research purposes from the government. It is important to note that this was perhaps the first such IP oriented legislation that mentioned the term Intellectual Property Management.

The role of the IPMC was significant from the point of view of an IP Management system and process. The task of:

a) identification and assessment of potential IP,

b) documenting and protecting,

c) monitoring and marketing,

d) managing revenues and

e) creating awareness and encouraging innovation, are all critical components of a sound IP Management system.

As seen in chapter 3 earlier, the various aspects of IP Management that enable a sound process and system incorporate all the elements as listed in Section 10 of the bill. Each of these components listed above would tie-in well with the overall concept of a comprehensive IP Management system.

Needless to say, how an organisation undertakes these numerous tasks (through various IP Management tools such as IP audits, intangible asset accounting, training programs etc.) is a function best defined by that particular organisation and as stipulated earlier, a one size fits all system would not be necessarily productive.

The US Bayh-Dole Act, had a significant impact on the research and development ecosystem with the technology transfers from the Universities and other Government funded research bolstering the “U.S. Gross Domestic Product (GDP) by up to $518 billion”\(^\text{348}\).

The proposed bill in India was a step in the right direction to give force to the idea of IP Management systems whilst encouraging and promoting innovation. Perhaps it was premature\(^\text{349}\) for its time and the country not adequately prepared for such a legislation.


\(^{349}\) *Supra* note 338, at 30.
The reasons for the bill having been withdrawn in December 2014 was that the bill had been introduced a long time ago and the government seeks to reconsider the proposed legislation in due course of time.350

As of March 2018, the decision on review of the legislation pertaining to protection of public funded intellectual property was however still pending.

Yet another attempt to foster and encourage innovation while also seeking to provide legislation that would help protect trade secrets was outlined by the Government of India in 2008. The Department of Science and Technology, which is a division under the Ministry of Science and Technology, had put forth for public comments a draft National Innovation Act351 in 2008. The preamble stated that it was

“An Act to facilitate public, private or public-private partnership initiatives for building an Innovation support system to encourage Innovation, evolve a National Integrated Science and Technology Plan and codify and consolidate the law of confidentiality in aid of protecting Confidential Information, trade secrets and Innovation.”

Chapter III of the draft act called for the formulation of an annual National Annual Integrated Science and Technology Plan that would inter alia help in collating information pertaining to the identification of

“ways and means for catalyzing industry academia collaborations for development, application and flow of technologies, new processes and methods for achieving cost, efficiencies or market expansion from the lab to the market


place and for the industry and services to invest more in strengthening the science and technology infrastructure,”

This particular provision under Section 3 of the draft act augurs well for the term ‘innovation’ as has been seen and defined in Chapter 2 earlier.

With specific regards to measure pertaining to innovation, Chapter IV of the draft act looked “to consider the needs of millions of poor people by providing [...] special measures for low cost technologies”.

To attain the aforesaid objective waiver of fees and other fiscal incentives were to be offered, nevertheless this would have given a boost to grass roots innovations as also provided the much-needed impetus to promote innovation in the country. In addition, the act under Section 6 also sought to facilitate innovation through the setting up of Special Innovation Zones. Section 2(10) defined these zones as those

“.notified by the Government of India in the Ministry of Science and Technology established for the purposes of clustering enterprises engaged in scientific, mathematical, technological or engineering research or services, for the purpose of innovation”.

Furthermore, Section 7 of the draft act addresses the setting up an ‘Exchange or market place for trading in Innovation’. The provisions of the section inter alia require the Central Government to

“facilitate the establishment of an electronic exchange or a physical market place for commercialization of information on or the results of Innovation, including any statutory or non-statutory rights in intellectual property arising in connection with or as a consequence of Innovation”.

352 3(h) of the National Innovation Act of 2008.

353 Olga V. Ustyuzhantseva, From policy statements to real policy, 106 (11) Current Science, 1472 (June 2014).

354 7(1) of the National Innovation Act of 2008.
Albeit not a result of any specific legislation, an Intellectual Property Exchange is already in place which is an initiative of the Federation of Indian Micro & Small & Medium Enterprises (FISME)\(^{355}\), and the Government of India has also taken the right step towards the creation and setting up a National IP Exchange\(^{356}\) which bodes well for innovative companies\(^{357}\) as also gives the essential impetus for serious consideration of Intellectual Property Management systems.

Another piece of legislation by the Ministry of Human Resource Development, Government of India in 2012 that would have been seen as India’s commitment to promote innovation at the higher learning level was The Universities for Research and Innovation Bill, 2012.\(^{358}\)

The long title of the bill stated that it was:

“A Bill to provide for the establishment and incorporation of Universities for Research and Innovation and for enabling them to emerge as centres for ecosystems to develop as hubs of education, research and innovation and to promote research and innovation in learning and design, development and delivery of solutions and for matters connected therewith and incidental thereto.”

Section 5(2)(n) of the bill called for building links with other research institutions as also the industry “…in order to synergise research and innovation efforts and to create innovation clusters for maximum gains” as part of the objectives of a University set up under this

\(^{355}\) About us, http://www.iprexchange.in/about_us.php (Last accessed on 20/02/2018).


legislation. This bill however lapsed given that the Lok Sabha saw its worst performance since Indian independence.\(^{359}\)

Given below are some other legislative initiatives of the previous and current government that seek to encourage and promote innovation through institutes of learning that can have a positive impact on the creation of intellectual property in India.

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Title of the Act</th>
<th>Status / Act No.</th>
<th>Long Title / Purpose of the Legislation</th>
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<tbody>
<tr>
<td>1</td>
<td>The Science and Engineering Research Board Act, 2008(^{360})</td>
<td>In force- Act No. 9 of 2009</td>
<td><em>An Act to provide for the constitution of a Board for promoting basic research in Science and Engineering and to provide financial assistance to persons engaged in such research, academic institutions, research and development laboratories, industrial concerns and other agencies for such research and for matters connected therewith or incidental thereto.</em></td>
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<tr>
<td>2</td>
<td>The Academy of Scientific and Innovative Research Act, 2010</td>
<td>In force- Act No. 13 of 2012</td>
<td><em>An Act to establish an Academy for furtherance of the advancement of learning and prosecution of research in the field of science and technology in association with Council of Scientific and</em></td>
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<th></th>
<th>Innovative Research Act, 2011&lt;sup&gt;361&lt;/sup&gt;</th>
<th>Industrial Research and to declare the institution known as the Academy of Scientific and Innovative Research, to be an institution of national importance to provide for its incorporation and matters connected therewith or incidental thereto.</th>
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<td>3</td>
<td>The Indian Institutes of Information Technology Act, 2014&lt;sup&gt;362&lt;/sup&gt;</td>
<td>An Act to declare certain institutions of information technology to be institutions of national importance, with a view to develop new knowledge in information technology and to provide manpower of global standards for the information technology industry and to provide for certain other matters connected with such institutions or incidental thereto.</td>
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<tr>
<td>4</td>
<td>The National Institute of Design Act, 2014&lt;sup&gt;363&lt;/sup&gt;</td>
<td>An Act to declare the institution known as the National Institute of Design, Ahmedabad, to be an institution of national importance for the promotion</td>
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of quality and excellence in education, research and training in all disciplines relating to Design and for matters connected therewith or incidental thereto.

5 The Regional Centre For Biotechnology Act, 2016\(^{364}\) In force-Act No. 36 of 2016

An Act to provide for the establishment of an institution of national importance to be known as Regional Centre for Biotechnology and to provide for matters connected therewith or incidental thereto.

These specific legislations as stated above which enable the setting up of various innovation driven institutes as also specialized and focused learning centers are encouraging signs that creativity, research and development and a scientific temperament is being promoted and encouraged to a great extent in India.

All these universities and institutes are sure to see exceptional research and innovation resulting in a greater need to address intellectual property issues. The management of IP in such a scenario is as critical as its creation and dissemination. With the added focus on industry and other research partnerships, IP Management would be a critical system and process that would need to be adopted by the universities and places of higher education in order to stay competitive and produce world class, and perhaps disruptive, technologies and innovations.

At the 100th Indian Science Congress held at Kolkata in January 2013, the then Prime Minister of India Dr. Manmohan Singh released the country’s Science, Technology and Innovation (STI) Policy 2013. At the unveiling of the STI Policy Dr. Singh stated that the policy “aspires to position India among the top five global scientific powers by 2020”.

The STI Policy sought to bring about “significant paradigmatic shifts to achieve innovations at all levels”.

With regards to the aspects on intellectual property rights, the policy states that it shall focus on “modifying IPR policy to provide for marching rights for social good when supported by public funds and for co-sharing IPRs generated under Public-Private Partnerships (PPP)”.

This provision within the policy seems to be vague and ambiguous and the “objective is couched in abstract terms”.

In the Union Budget speech on February 28th 2015 the Finance Minister of India stated that the Government intended to establish the Atal Innovation Mission (AIM) under a think tank that replaced the 65-year-old Planning Commission earlier that year, the NITI Aayog (National Institution for Transforming India). A budget of Rs. 150 Crore initially had been

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369 Supra note 366, at 11.

earmarked for AIM which was to be an Innovation Promotion Platform that would “foster a culture of innovation, R&D and scientific research in India”\textsuperscript{371}.

Furthermore, the Government also decided to set aside Rs. 1000 Crore towards the establishment of SETU (Self-Employment and Talent Utilisation), “a Techno-Financial, Incubation and Facilitation Programme to support all aspects of start-up businesses, and other self-employment activities, particularly in technology-driven areas”\textsuperscript{372}.

Subsequent to the budget announcement, NITI Aayog constituted an Expert Committee on Innovation and Entrepreneurship under the Chairmanship of Prof. Tarun Khanna\textsuperscript{373} in April 2015 and the terms of reference\textsuperscript{374} for the Committee were:

\begin{itemize}
  \item[i.] To review the existing initiatives aimed at promoting innovation and entrepreneurship in India, especially those efforts that result in widespread job growth and the creation of globally competitive enterprises;
  \item[ii.] To make short and medium-term recommendations for actionable policy initiatives aimed at creating an innovation and entrepreneur-friendly eco-system such elements as creation of world-class innovation hubs and digital SMEs, and innovation driven entrepreneurship in such sectors as education and health;
  \item[iii.] To address any other related issues.
\end{itemize}

The Committee submitted its report in August 2015 and made numerous recommendations as per the terms of reference. Amongst the various recommendations, the Committee found that


\textsuperscript{372} \textit{Id.} at Para 50.

\textsuperscript{373} PTI, \textit{NITI Aayog sets up expert panel on promoting innovation}, Mint (24\textsuperscript{th} July, 2015), http://www.livemint.com/Politics/xpJK8PZY3qdResVSWQXOTJ/NITI-Aayog-sets-up-expert-panel-on-promoting-innovation.html (Last accessed on 20/02/2018).

there was a need to “foster a culture of innovation at the national level and a need to strengthen the intellectual property rights regime”\(^{375}\). The report inter alia called for setting up a national knowledge infrastructure and enhanced enforcement of intellectual property laws in the country. In February 2016, the Union Cabinet approved the establishment of AIM and SETU in the NITI Aayog.\(^ {376}\)

Thereafter the Government of India on 12\(^{th}\) May 2016 released the National Intellectual Property Rights Policy, 2016.\(^ {377}\) The Mission Statement\(^ {378}\) of the policy reads:

\[
\text{Stimulate a dynamic, vibrant and balanced intellectual property rights system in India to:}
\]

- foster creativity and innovation and thereby, promote entrepreneurship and enhance socioeconomic and cultural development, and
- focus on enhancing access to healthcare, food security and environmental protection, among other sectors of vital social, economic and technological importance.

The policy has listed out Seven (7) broad objectives\(^ {379}\):

i. **IPR Awareness: Outreach and Promotion** - To create public awareness about the economic, social and cultural benefits of IPRs among all sections of society.

ii. **Generation of IPRs** - To stimulate the generation of IPRs.

\(^{375}\) Id. at 25.


\(^{379}\) Id. at 1-2.
iii. **Legal and Legislative Framework** - To have strong and effective IPR laws, which balance the interests of rights owners with larger public interest.

iv. **Administration and Management** - To modernize and strengthen service-oriented IPR administration.

v. **Commercialization of IPRs** - Get value for IPRs through commercialization.

vi. **Enforcement and Adjudication** - To strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements.

vii. **Human Capital Development** - To strengthen and expand human resources, institutions and capacities for teaching, training, research and skill building in IPRs.

There are about 170 actionable points\(^\text{380}\) in the policy and the overall implementation of the policy is the responsibility of The Department of Industrial Policy and Promotion (DIPP) which has been designated as “the nodal point to coordinate, guide and oversee implementation and future development of IPRs in India”\(^\text{381}\). However actual implementation of the plans still remains with the relevant Ministries.

Amongst the other objectives of the policy, clause 4.8 is of particular importance, as it calls for the collaboration of “various R&D Institutions, Universities, Funding Agencies, Chambers of Industry and Commerce in providing advisory services to improve IP creation, management and utilization”\(^\text{382}\).


\(^\text{381}\) Supra note 378, at 19.

\(^\text{382}\) Id. at 11.
The policy has come in for criticism from some quarters as having a “flawed foundation equating more IP with more innovation”\textsuperscript{383} with a focus on formalizing IP at all levels and lacking any “conceptual clarity”\textsuperscript{384}.

Another argument critcising the National IP policy is that it is vague and does not address “how the rights of IP owners will be implemented in a manner conducive to social and economic welfare that will prevent the misuse or abuse of IP rights”\textsuperscript{385}.

Given that it has been just over a year since its release, only time will tell the impact the policy would have on IP development, innovation and thereby IP Management systems.

The Governments ‘Make in India’\textsuperscript{386} and ‘Startup India’\textsuperscript{387} campaigns are in keeping with the various policy initiatives that are geared towards innovation and encourage / promote intellectual property development. It would therefore now be a good time as any for the Government of India to consider revisiting those legislative initiatives that have since lapsed or policy tools not applied and introduce the laws and ensure strict implementation of the policies for the benefit of the nation.

\textsuperscript{383}~Shamnad Basheer, \textit{An IP policy with no innovation}, The Hindu, (17\textsuperscript{th} May, 2016), http://www.thehindu.com/opinion/op-ed/intellectual-property-an-ip-policy-with-no-innovation/article8607910.ece (Last accessed on 20/02/2018).

\textsuperscript{384}~Srividhya Ragavan & K. Subramanian, \textit{National intellectual property policy suffers from a lack of conceptual clarity}, The Indian Express, (11\textsuperscript{th} July, 2016).


\textsuperscript{386}~Campaign launched in September 2014 to encourage manufacturing in India.
http://www.makeinindia.com/about (Last accessed on 20/02/2018).

\textsuperscript{387}~Campaign launched in January 2016 to promote entrepreneurship and encourage start-ups
4.3 Need for a Policy Framework

Among the various policy initiatives envisaged by the Government of India that have had an IP and innovation focus, the Public Funded Intellectual Property bill as discussed above came closest to addressing aspects of intellectual property management directly. Unfortunately, the bill lapsed in transition to the new government in 2014 although there still may be hope of its revival. Nevertheless, the bill did bring into attention IP Management as an important system and process.

The National IPR Policy, 2016 could perhaps have made provisions regarding IP Management or at least outlined measures that could have addressed that aspect, considering that formalising IP was an objective of the policy. While the policy has provided for fiscal incentives on R&D and innovation such as tax benefits and loan schemes amongst others, it could have also sought to encourage organisation to look at the management of IP from a holistic perspective and provided specific incentives to those organisations that had some system put in place.

While framing the National IPR Policy, the Government of India could have perhaps also taken a cue from the Chinese State Intellectual Property Office (SIPO) which had developed the Enterprise Intellectual Property Management Standards (GB/T 29490-2013) that came into force in March 2013. The standard applicable in China “is a recommended, non-mandatory standard” which “aims to improve the way businesses manage their IP”. Organisations doing business in China may also seek certification under the standards provided they meet the assessment criteria as enumerated in the standards. Standardisation of IP management can go a long way in ensuring that companies look at implementing these systems across the organisation. However, any such process of creating standards needs to be


well thought out and the Government of India could perhaps start the dialogue going given their thrust of intellectual property related initiatives in the country.

Having said that it is to be seen whether the objective of the National IPR policy regarding creating awareness would have organisations seriously consider IP management as tool to meet that particular objective.

While it may be argued that more IP does not necessarily translate to more innovation\textsuperscript{390}, it can also be said that an organisation that looks at holistically managing its IP would be more innovative than its counterparts who do not have such a focus. The Government of India through the Ministry of Micro, Small & Medium Enterprises had launched the National Manufacturing Competitiveness Programme (NMCP), which conceptualized 10 (Ten) components to increase manufacturing competitiveness amongst of Micro, Small & Medium Enterprises (MSME).\textsuperscript{391}

The NMCP, inter alia, included a scheme for building awareness on Intellectual Property Rights, for which the revised guidelines had been issued by the MSME Ministry in 2014.\textsuperscript{392} Such schemes by the Government combined with its policy outlook on IPR’s can help contribute significantly to the discussion and development of IP Management systems. For instance, under the NMCP funding and grants are provided for awareness and sensitization programmes on intellectual property. This objective under the scheme inter alia provides for developing “\textit{a broad understanding of the need to integrate IP in their innovation strategies business planning}”\textsuperscript{393}. By utilizing the measures under these schemes, such programmes could


\textsuperscript{393} Id. at 10.
help lay a strong foundation for MSME’s who would like to consider implementing an IP Management process.

4.4 A Stakeholder Approach to IP Management Policies

As noted earlier in this chapter, from an organizational perspective, policies are important documents that enable the employees to better understand their roles, the direction that the company is working towards and bringing clarity to a business process or system, thereby enabling the organisation to function smoothly. Policy documents also help in clarifying how an organisation tends to deal with problems, procedures, systems and processes.

In a sense, a policy document in an organisation performs the task not very different from that of the Constitution of a country. While the Constitution is the supreme document which outlines how a country is to be governed and matters incidental thereto, a policy document can perform a similar function for a company / organisation. This is not to say that the Constitution and a policy document are the same, but merely to draw an analogy vis-à-vis their functions.

Just like legislation of a country have to conform to the principles enshrined in the Constitution, so too must procedures conform to the guiding principles of a policy document. Seen in this context a policy becomes the supreme document within an organisation that can outline how a company may address certain issues related to its functioning.

Drafting a policy is a process that should be undertaken after careful and methodical planning of what the company seeks to obtain through such an exercise. Traditionally policy making is in companies is a top-down exercise where senior management do most of the agenda setting, and perhaps rightly so.

However, involving employees and other stakeholders in its planning, agenda setting and thereafter drafting could potentially see better implementation and adherence in the long run.
Although, this is not necessarily gospel and different companies can look at the aspect of formulating policies in different perspectives depending on their own method of functioning.\textsuperscript{394}

Given the plethora of information available on the world wide web, organisations should not be quick to take any policy on the internet and try to adopt the same for their organisations. This would merely result in a pointless exercise of policy making which will fail to provide any sustainable actions.

Any organisation looking to take care of its innovation and any resultant intellectual property should necessarily put in place a policy that can address all its IP concerns.

A holistic outlook to IP Management therefore warrants that an organisation contemplate a policy that takes into consideration all aspects that can help it determine how the system can be incorporated. Addressing the rights and responsibilities, outlining the legal and administrative parameters and generally addressing issues pertaining to IP from the idea stage through to commercialization and exploitation should be clearly outlined in its IP policy.

This section will outline the contours of a suitable IP policy that organisations may consider while incorporating or implementing IP management systems.

As noted before no policy is a one size fits all and the model IP policy outlined is for the purpose of highlighting the various elements that are to be found in IP Management systems.

It would also be pertinent to note that different entities would have very specific requirements, including nomenclature and terminology, and the model policy aims to provide guidance on the general elements that must find mention in a comprehensive IP Management oriented policy.

4.5 Guidelines on a Model IP Policy

1. **Preamble:**
   The preamble is an introductory statement on the organisation itself and why the need for the IP policy was felt by the enterprise. The preamble may provide a brief introduction as to the purpose or intent behind implementing the policy. Since it is important to have innovation and intellectual property linked to an organisation's business goals the preamble can highlight how the policy would enable the achievement of such goals.

   The preamble may also include the purpose the policy shall serve, for instance, how the organisation will tackle IP related concerns based on the policy alone. In some cases, organisations may also consider having a separate clause for the purpose alone. In these situations, the clause may detail the principles behind implementing the policy with respect to whose interests need to be met i.e. employees, vendors, the company’s customers, the public at large or the company alone.

   The intention behind the policy and its need, and how the roles and responsibilities for the various stakeholders may be outlined in the clause.

   Furthermore, the preamble can also be followed by the ‘aims’ and ‘objectives’ of the policy. While seemingly inter-connected these additional provisions can bring about greater clarity right at the beginning of the document itself. The aim of the policy can be highlighted as to the general direction the organisation wishes to take while the objectives would be a little more detailed as to the direction in itself.

2. **Adoption and Effective Date:**
   This clause usually provides for how and by whom the policy has been adopted i.e. through a Board resolution, by the Chairman / Managing Director or some other Body within the organisation appointed for this purpose. The date on which the policy comes into force is also stated in this clause, just as in the case of legislation.
The clause may also stipulate as to how the current policy would supersede any prior policies regarding intellectual property that the organisation may have adopted at an earlier date. This provision within the policy is important so that any ambiguity as to the applicability of the policy is removed. For instance, any IP related actions before the commencement of the policy would be exempt from the provisions of the policy.

3. **Definitions:**
   An essential component of any policy document, the definitions clause brings clarity to terms that are used in the policy. It would not be sufficient to merely define terms such as ‘innovation’, ‘intellectual assets’, and ‘intellectual property’ in an IP policy but the organisation should get into as much detail as possible with respect to other terms, such as ‘creation’, ‘protection’ and, ‘commercialisation’ and so forth. The more clarity with respect to terminology, the greater the absence of ambiguity.

   Additionally, a definition clause helps in reducing the length of the policy document on the whole and avoids repetition within the document. It is also prudent to ensure that terms that are not going to be used more than once or are generic in nature not be defined, this is to ensure that the reader does not needlessly keep referring to the definition clause all the time.

4. **Elements / Rationale / Policy Principles:**
   This clause would outline the fundamental nature of the IP policy and the actions that would likely govern each aspect of the components of the policy. While the general need and purpose would be stipulated in earlier clauses, this provision within the document would seek to bring some more structure and provide certain guidelines vis-à-vis the elements that are to be achieved.

   Each aspect that is to be further detailed in the document later should ideally be mentioned in this clause of the document. For instance, if one of the key elements is collaboration and cooperation in research this clause should provide a statement to that effect. Besides, the principles can also provide basic guidance on how IP resulting from collaborative research is to be treated. In such a situation, the policy helps navigate those looking to collaborate, to be in a position to negotiate outcomes accordingly.
5. **Scope and Applicability:**

This section usually states as to what aspects of IP does the policy apply to and what could be exempted from its reach. From a holistic perspective, it would be ideal to ensure that all forms of IP and other intangible assets are within the scope of this policy. Additionally, the applicability provision details the people and other third parties that the policy is applicable to and enforceable against.

More often than not it includes only employees and collaborators, however organisations are free to determine the extent to which the policy can be applied. Should a company seek to extend the provision of its policy to its vendors and clients, those entities need to be educated and made aware of the policy.

In certain cases, it may also be prudent to exempt some forms of IP and intangible assets from the policy such as previous already signed agreements or those forms of IP already in the development stage.

Here care must also be taken to ensure that IP or intangible assets that have been created prior to the adoption date is excluded from specific aspects of the policy such as those that have third party rights associated with them. Nevertheless, the company can ensure and include any IP agreements that come up for renewal to be in conformity with the guiding principles of the policy.

6. **Management and Policy Administration:**

A critical component of the IP policy, this section should outline the which body/department of the organisation shall be responsible for the administration and management of the policy, including its execution and implementation. Since corporate and organisation structures differ from one entity to another, this clause can detail whether a separate body is to be established or an existing department is to be given that responsibility. Some organisations prefer setting up a dedicated IP division, which in turn is a part of the legal department of a company. However, there need not be a thumb rule and organisations are free to determine the structure as per their requirements.
It is nevertheless advisable that the IP related functions be performed by a separate department or division and ideally one which has cross-functional representation from the various other divisions of the company.

While specifying the members who would be a part of the committee it should be kept in mind that positions within the company rather than specific individuals be nominated to be on the IP committee. This exercise would help in continuity as an individual leaving would not hamper the functioning as the replacement would be the person who fills that position in the organisation. The term of the committee may also be specified in this clause and if warranted the term can be of a limited duration.

Given that an IP Management policy has wider implications for the business as a whole, senior management should ideally form part of any IP committee that a company looks to set up.

7. **Roles and Responsibilities:**

The clause on roles and responsibilities needs to be as detailed as possible as this provision would enable the management, any specific IP body established, and the employees from understanding how they would need to function to give force to the policy. Depending on the hierarchy outlined in the clause relating to Management and Administration of the policy, this clause would have to ensure that all functions required to be undertaken as per the policy are adequately covered. There should remain no ambiguity as to the roles of each department and division within the organisation, especially for any division specifically established to give force to the policy.

Whether the function is of an advisory, supervisory, deterministic or task-oriented nature, each such role and responsibility needs to be clearly identified and stated in an unambiguous manner. To ensure that the policy filters down and is being adhered to by all employees, it is also imperative that the roles and responsibilities of employees be outlined and detailed.
If an employee feels that they have an idea for the development of potential IP, this section should enable them to understand how they would need to proceed to take the idea to its development stage if necessary.

One important element that should be considered as part of responsibilities is the documenting of all information related to the creation of IP or other intangible assets. Documentation helps in matters where litigation and ownership come into question as also prevents repetition regarding the same task vis-a-vis IP development. In certain cases, such as collaborative works, third party responsibilities should also be listed in this clause.

8. **Ownership and Assignment:**

On aspects related to ownership of IP the employees and any third-party collaborators should be absolutely clear as to how the policy will treat IP that is created in the course of employment / collaboration. The criteria and conditions under which ownership is determined when IP is created as employment obligations should be clearly spelt out. It is for the organisation to determine how ownership rights will be decided. In some cases, the company may want complete ownership and in some the organisation may be willing to consider joint ownership with the creator. The conditions where the employee may own IP created, such as when the work was undertaken outside office hours and without using company resources, should also be ideally detailed in this section.

The organisations Human Resource (HR) policies should be vetted in detail prior to drafting this particular clause, so that no conflict arises. Where incentives have been provided for when employees create or innovate, the same may be mentioned by way of reference to any HR policy that stipulates such incentive mechanisms. If sharing royalties is a policy within the organisation it should be well documented in this section.

The assignment section should detail the provisions and procedures as to how the employees / third parties would assign ownership to the organisation of IP created.
Depending on the ownership provisions, if an organisation wishes to assign IP to its employees or other third parties, the procedures should also cater to such contingencies. Relevant documentation to this effect, which forms a part of the policy, would necessarily have to be created to ensure all documentation is in place.

9. **Third party IP and obligations:**

It is absolutely critical for a company to ensure that at no time will it be held liable for infringement of third party intellectual property. To this end the clause on how third-party IP is to be dealt with should be well drafted. In situations where third party IP is brought to the company for any utilisation in the course of its activities, the same shall have the necessary licensing agreements as also other documentation showing ownership, where employees bring such third-party IP for use in the business. It is equally important that while the company seeks to utilise any third-party IP for its own use a thorough due diligence is undertaken prior to negotiating any license-in agreement.

Even in cases of joint development and collaborative works, or when external funding has been sought for research all the necessary agreements should be vetted prior to use of any external IP. This clause should strictly outline issues of ownership and utilisation of such IP to keep the company free from any liability that may arise in future.

In addition, the rights of third parties in the utilisation of company owned intellectual property or other intangible assets should also be stated in this clause of the policy.

10. **Provisions pertaining to Intellectual Property Management:**

The components relating to the management of intellectual property from a holistic perspective need to be outlined and detailed in this section. Each component adds to the implementation of a comprehensive IP Management system (as has been seen in earlier chapters) and plays a crucial role for its successful implementation. This section would have to consider each element and detail how those functions need to be undertaken and performed.
a. **Creating IP awareness across the organisation:**

A critical component and perhaps the starting point for any organisation is to ensure that all its employees are made aware of the numerous issues surrounding IP and its relevance for business and functioning. Depending on the nature of the organisation training and awareness programmes can be specified on limited elements. However, it is advisable to ensure that all aspects of IP are addressed. Conducting training programmes are generally within the domain of the HR department and responsibility may be assigned to them to ensure the awareness programmes are conducted regularly. Besides the basic level training and upon identification of the requirements advanced level of IP training should also be imparted. Since IP has an impact on all departments and divisions of an organisation, training and awareness programmes should be conducted across the board.

b. **IP identification and capturing ideas:**

Once employees are made aware of the significance of IP and innovation in an organisation, they would be required to ensure that they have the sufficient knowledge and tools to be able to identify what constitutes IP. It is important that any idea given by an employee is well documented and presented to the IP or another committee formed, so that decisions on its development or any further action may be undertaken. Capturing ideas and its documentation are essential to avoid any repetitive work being undertaken by the employees at a later date.

It is equally important that any idea by an employee is not developed prior to ensuring that no third-party IP is likely to be infringed. Conducting searches on similar potential IP therefore is a critical aspect of IP identification. Having employees conduct searches regularly also helps in identifying what IP a company’s competitors are working upon. In such situations, defensive publications can become a tool to get an advantage over rival businesses.
c. **Auditing, Evaluation and Valuation of Intellectual Property:**

The audit of IP and other intangible assets is an important task that needs to be undertaken in a methodical manner. An audit helps in creating an inventory of IP and intangible assets owned by a company and thereby create an IP portfolio. Evaluation of IP whether created or under process becomes an easier task once the audit process has been completed. Assessing and evaluating the risks and rewards vis-à-vis IP under the ownership of the company is important as it enables an organisation to identify what IP could be retained and what, if any, discarded.

Additionally, once the audit process has been completed the company may consider reflecting its IP portfolio as part of its balance sheet, which in turn helps with its valuations. Assigning a monetary value is beneficial to the bottom line of the company on the whole. An IP inventory also helps the organisation when it seeks to obtain finance and use its IP as collateral and while negotiating any IP related agreements or even in the case of acquisitions. This section of the policy should provide for the methodology of conducting the audit, manner of evaluation and method for valuation, as also state which departments within the company are responsible for undertaking those tasks. Checklists and other procedures for audits can be stipulated as part of this clause.

d. **Development, Protection and Commercialisation of IP:**

Decisions on further development, protection and commercialisation of intellectual property and the procedures therein should find mention under this clause. Once the audit and evaluation tasks have been completed, the steps to be taken for further development of IP or not need to be outlined. Development, protection and commercialisation of IP requires capital and the evaluation process can help determine whether the company wishes to pursue it or not.

During the development stage, the company needs to ensure secrecy and should provide guidelines and relevant documentation to be executed under this clause.
The decision regarding protection is an important step as the company may outline procedures regarding registration of the IP or keeping it as a trade secret. If the decision on protection warrants registration the company should list out procedures with respect to engagement of outside agency to assist in the process. It is imperative that registration procedures be adhered to strictly and specialists may be engaged for such a purpose.

On considering commercialisation the sales and marketing departments may be involved to ensure the products success in the market. Appropriate markings on all company’s products ensuring that buyers / users are made that IP rights have been asserted should be made. Licensing agreements and other such documentation should be maintained and record keeping ensured at all times.

e. Monitoring and Enforcement of Intellectual Property:

After decisions on protection have been taken, to ensure that no infringement of IP is taking place enforcement and assertion of rights is important. Procedures in this regard may be laid down in this section of the policy as to how the organisation will enforce its IP rights. Where required an enforcement strategy with the help of external consultants and IP specialists may be prescribed.

Constant monitoring of company owned IP helps in ensuring enforcement success. Here a system may be established as to how IP monitoring is to take place and which body / department in the company is responsible for the same. Furthermore, monitoring of intellectual property and innovation in similar fields as that of the company also helps in keeping employees up to date on IP and innovations relevant to the business on the whole.

The organisation should endeavour to provide the necessary tools and facilities such as IP search software to enable employees to conduct monitoring activities as well.
f. **Intellectual Property Reporting:**

An organisation should consider incorporating provisions regarding reporting of IP related activities to the Management of the company. Such reports help in building the culture of innovation within the organisation as also enable the Management to take strategic decisions regarding the business. In addition, the Management may consider making IP related information a part of the annual reports of the business or to their shareholders.

11. **IP Forms and Documentation:**

Detailing the various components requires that procedures and forms be laid down to help implement the policy constructively. While the IP forms and other types of IP documentation relevant to the policy can be annexed to the policy, this section can help in easy identification of the relevant forms and documents which are to be made a part of the policy. Some relevant forms and document templates that should be a part of the policy include:

   i. IP Disclosure Forms
   ii. Assignment Agreement
   iii. Collaboration Agreement
   iv. Confidentiality and Non-disclosure agreements
   v. Exit Interview Forms

Besides the above-mentioned documentation there could be a numerous other forms and tools that help in the procedural aspects of the policy. However, any such documentation would have to be created depending on how the policy is eventually drafted. Each organisation that considers implementing an IP policy and looking at a holistic nature of managing their IP should necessarily incorporate all the necessary forms and documents as part of the policy.

12. **General Provisions:**

The general provisions in a policy document would be similar to those found in contracts and are essential for the purpose of creating a well-rounded document. The clauses under this heading would generally include the following:

   a. **Modification and Amendments to the Policy:**
The procedure to change or modify the policy should be specified in this clause. The powers of modification usually vest with the management of the company and the same should be categorically stated here. If thought fit, the company can also outline the reasons or situations under which the policy may be modified. It should be kept in mind that any change to the policy should also be reflected in the adoption date and ideally the policy should avoid any retrospective action. Provisions may also be made for modification and/or amendment of the policy in the event of inconsistencies that may arise or are found at a later date. Any amendment or modification to the policy should be easily identifiable by way of a revision number and date of such change/amendment.

b. Confidentiality Obligations:
While employee contracts and external agreements generally provide for provisions with regards to confidentiality, the policy should specifically address this issue. Here the policy may also outline what information of the organisation constitutes confidential information and how such information needs to be kept protected, including any visible markings and notations on the information/document desired to be kept confidential.

The mode and manner in which confidential information needs to be handled and shared should also be detailed in this clause. Additionally, secrecy during the development of IP and while dealing with third party collaborators should also form part of the obligations of confidentiality and stated in this section of the document. Under this clause the policy may also state what information is permitted to be disclosed and under what circumstances such disclosure is acceptable.

c. Policy waiver:
In certain exceptional circumstances, the management may need to waive the provisions of the policy given certain business needs. In such cases, any document that comes across as being set in stone would be detrimental in the long run.
This section of the policy should therefore provide for instances where the management may waive the provisions of the policy in their larger business interests. However, it is not only in cases of business interests but even in situations where employees wish to exempt themselves from the provisions of the policy procedures regarding that should be outlined. The powers of waiver or granting exemptions should ideally vest with the management or with the body established for the purpose of implementing the policy.

d. **Breach of the Policy, Dispute Resolution and Appeals:**
This clause should highlight what constitutes a breach of the policy as also what actions should result in the event of a breach. With regards to dispute resolution this section should elucidate how disputes are to resolved and the procedure one needs to follow to air their grievances with regards to the policy. The procedure to resolve disputes should be time bound and the same should reflect under this clause.

The provision for appeals in the event the dispute has not been resolved should also be catered for in the policy. The procedure for appeals and the final appellate authority under the policy should be explicitly stated.

e. **Policy Notification and Review:**
Notifying employees or members of an organisation regarding the policy is critical to ensure everyone is made aware of its adoption. Additionally, all other stakeholders of the company including third parties should be notified of the policy and its provisions.

The section should clarify the manner and time frame within which information regarding the policy adoption is disseminated. Provisions as to the review of the policy and at what intervals it needs to be undertaken should also find mention in this clause.
f. **Governing Laws:**

This clause should state the applicable legislation and regulations under which the policy needs to be interpreted. For organisations which have a presence in more than one jurisdiction, the laws of a particular state where the headquarters are situated may ideally prevail, with the stipulation that applicable law of a completely different jurisdiction may apply in certain cases.

The guidelines for the model policy above has been referenced from various sources as also has inputs from the researchers own experience in drafting policies. It is intended to be a guide to policy creation, intricacies and specifics of a policy should be determined based on an organisations unique requirement and ideally conforming to already established procedures within an enterprise.

The next chapter shall outline the some of the existing regulatory and legislative measures that companies may consider that would provide a legal basis in order for them to consider an intellectual property management system.

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8) SIU IP Policy, On File with IP Cell (2018), Symbiosis Law School, Pune India.