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Dated: ……

Swadeshi Jagaran Manch Suggestion/Comments on the Draft Report of IPR Think Tank

Swadeshi Jagran Manch (SJM) offers a few comments on the opinion expressed by the 6-membered IPR Think Tank, put on public domain from December 24, 2014. Providing a selfless and tireless service to the nation by promoting 'Swadeshi' cause for the long term benefit of not only economy but also a cumulative betterment of socio-cultural atmosphere for decades, made us to both promote as well as object some of the findings of the IPR Think Tank.

The policy seems to be anchored on a basic assumption that intellectual property based innovation is the model without any adverse implication for socio-economic development. This is reflected in the vision of the document. the statement like IP led growth in creativity and innovation is encouraged for the benefit of all and knowledge owned is transformed into knowledge shared etc. are not rooted in reality. Therefore, there is a need to rework the vision of the document.

The whole approach of the policy, we are told, is to maximise IP creation and enforcement. For instance, it states: "The idea of being a creator and innovator must capture the imagination of our people to maximize the generation of all genres of IP rights". This approach has resulted in wrong objectives and wrong policy recommendations. The draft policy should be based on the development needs and fundamental rights guaranteed under the constitution such as right to health, right to food, right to education etc

Again, any policy making should be based on evidence. The reading of the policy clearly shows that it is largely based on assumptions and lacks the evidence to support the policy objectives and policy recommendations. For instance, the draft policy states: "Piracy and counterfeiting discourage creativity and innovation apart from having a deleterious effect on the economy and consumers, and the same shall be firmly dealt with". These kinds of assertions have no empirical evidence to support and may lead to wrong priorities.

The recommendation like introduction of utility model is example of IP maximalist agenda. We understand that the study commissioned by DIPP a few years ago recommended against the introduction of utility model after examining the working of the system in many countries. This has the potential to create further IP barriers.

There should be efforts to discuss the policy widely and structured consultations and studies are required. Think tank drew up the policy, it looks like, without any such measures except limited interactions with departments without any concept paper and based on submissions open to all stakeholders.

The draft IPR Policy needs a major change in its approach and change its orientation form its current IP Maximalist approach to a development oriented IP approach to facilitate India's technological and industrial catching up, technological needs in agriculture, access to food, knowledge and health products.

We once again request Think Tank not to rush with the finalisation of the policy. At the same time the

summation of our findings is enlisted objective wise with the details in enclosed Annexure.

Objective 1: Awareness and Promotion

a. the last three (3) words of 1.3.1 i.e. "even before publishing.." should be by default, perhaps not worth mentioning.
b. b) "Special support mechanisms" for MSME should also be discussed; however, later on we may focus on it.

Objective 2: Creation of IP

a) 2.4 suggest to "include IP creation as a key performance metric.."
Analysis is required whether this would work as a double edged sword. Upon successful implementation of this policy, it would create an avenue for job creation by opening up a sector for evaluation. On the contrary, few Organizations/ Institutions may merely file the IP application and would ask for a hike in performance matrix.
b) 2.10 talks about introduction of "a new law on utility models" for "small inventions"
Since utility model doesn't emphasize much on 'inventive step', there is, a scope of dilution of the much debated Section 3(d) of Indian Patent Act, enacted as a consequence of TRIPS Agreement. With no particular sector mentioned, this may become a way to bypass the provision of Sec. 3(d) and promote 'ever greening' of patents in particular in Pharma sector. Hence SJM proposes that Pharmaceutical sector should be certainly excluded from this utility model.
c) 2.12 talks about tax benefits linked to IP creation. However, as IP is a property which incentivize the inventor, a discussion on taxing the IP might also be an option. The tax benefit should be intended to help the MSMEs not the established players. Again, the service tax is applicable at standard rate when the technology is ready for commercialization. Question remains whether that also should be waived.
d) 2.15 speak about encouraging innovations in agriculture sector through application of IP. PPV & FRA already provides exemption of fees, extended time to protect a particular registration. Therefore, this suggestion might be another indication of either diluting the ambit of Sec. 3 or a forthcoming amendment of Patent law.

Objective 3: Legal and Legislative Framework

3.2 talks about "IP created from public funded research"

1 Publicly funded Institutes/ Organizations utilize public money to fund R&D. An application for patent only for the territory of India would not be enough as that would only restricts the taxpayers or the Indians residing within the political border of the Republic of India, whereas making the usage of that particular invention free to the rest of the world.
2 SJM strongly suggest immediate adaptation of International mechanisms to protect the fruits of the researches internationally and thereby incentivize the nation as a whole. Patents which are not fit for International protection and have few potential for generation of revenues, should be discouraged.

Objective 4: IP Administration and Management

4.10.14 suggests a waiver of first time fee, which is not above criticism.

1 Fees should remain
2 Upon acceptance and grant of the IP to the MSME member, the entire amount accepted earlier as official fees, could be transferred to the current account of that MSME with a definite pre-fixed rate of interest.
3 The 'Direct Transfer' initiative adopted by GoI should be replicated followed by proper tuning as per the demand.
4 State provides legal aids to the needy by positioning young lawyers as state brief. Similarly, states can provide an 'Agent service' for those who require legal assistance.
5 State should create a Corpus Fund like those exist in Korea, Taiwan and few other countries,

for acquisition of IP rights on Lifesaving medicines and the likes apart from the system of Compulsory Licensing. The money for acquisition should compensate the IP holder for the cost associated along with providing ample amount of reward. This will boost research in essential healthcare sector and prevent the transfer of private funds to cosmetic research.

Objective 5: Commercialization of IP

SJM supports the idea of an IP-Exchange as this would be a pioneer movement from any Government in the world. The planning and promotion of this indigenous idea is discussed in detail in the Annexure enclosed. Several steps must be completed prior launching an IP-exchange:

1. Creation of course on IP evaluation at University level
2. Formation of prescribed guidelines for IP evaluation
3. Promotion of IP analysis with existing literature and/ or specification from undergraduate level
4. Encouragement of review mechanism on IP
5. Setting up specific panels for dispute resolution, arbitration, and vigilance especially for the IP-Exchange
6. Maintenance of prescribed standards on trading and clearing
7. Mechanism to identify and make separate provisions for Non Playing Entities (NPEs), interested in acquiring IP
8. Possible mechanism analogous to the 'Copyright Society' to distribute incentives of inventions besides IP-Exchange

Objective 6: Enforcement and Adjudication

1. The need of the hour is to extend the specialized bench to all the HCs instead of only those four (4) mentioned, with at least two (2) specialized benches in those 4 HCs i.e. Bombay, Calcutta, Delhi and Madras.
2. Expedite system should be established in order to clear the backlogs both in Patent and Trade Mark. 'Special Adalats' to dispose of all the pending cases may be the need of the hour. That 'Special Adalat' should seat atleast once in a week and help in facilitation of clearing the backlogs.

Conclusion

The draft 'efficiently' avoided any emphasis on a particular industrial sector. The Pharmaceutical sector, which is the apple of discord regarding IP matters, is not mentioned, perhaps deliberately along with all other sectors. Introduction of Utility model with a set of new law may bring an avenue to bypass the provision of Sec. 3(d), under the ambit of which several pharma patent protection including that of 'Glivec' from Novartis or hepatitis treatment 'Sovaldi' from Gilead, are denied. SJM shall strongly object for national interest to any such move promoting corporate hegemony.

However, it is also important to patronize clinical research for life saving medicine. Therefore SJM strongly advocate creation of a national fund to buy exclusive right from the inventor compensating the cost associated and reward thereof, for the patent on life saving drugs.

ANNEXURE

Despite repeated effort to globalize and harmonize the law of the land related to IPR, each individual country has its own patent regime; which is accepted even under the PCT as the national phase is strictly under the discretion of the existing laws of individual country. The developed world constituting mainly of USA, Canada, European Union (EU), Australia and Japan also differs from one another when it comes to patent laws and practices thereof. Even, the individual members of EU are only united to the extent of filing a European patent (EP), which is automatically valid for the 27 European Patent Convention (EPC) countries, however, yet to amalgamate their individuality of patent regime.

India, being a late starter to globalize its economy has made many amendments to tally with the TRIPS agreement, and eventually came up with a mix bag of laws taking bits and pieces of relevant

portions from the developed world to draw a tradeoff between globalization and public interest. With the increasing demand from International bodies, India finally decided to come up with establishing a 6-member IPR Think Tank led by Justice Prabha Sridevan. On December 24, 2014, the team has submitted the 30-page draft National Policy seeking comments from common people, and even holding a stakeholder meet on February 05, 2015, for valuable remarks across the board.

The draft as submitted is very clear in its objectives and the corresponding policy suggestion thereof. Following are the remarks per objective based on the understanding of the writer.

Objective 1: Awareness and Promotion

a) the last three (3) words of 1.3.1 i.e. "even before publishing.." should be by default, perhaps not worth mentioning.
b) "Special support mechanisms" for MSME should also be discussed; however, later on we may focus on it.

Objective 2: Creation of IP

a) 2.4 suggest to "include IP creation as a key performance metric.."
However, there is a basic problem in accommodating of this particular principle as in most of the cases, basic research does not generate a much of IP whereas the chunk of IP is delivered by translational research. This system may promote research on finding remedy of unnecessary yet high demand cosmetic solutions of human body such as 'male pattern boldness' or 'body toning' and the likes, and simultaneously discouraging in a way research on finding a cure for cancer or the likes. The provision of compulsory licensing of pharmaceuticals for the 'essential' drugs would further de-motivate a researcher working on life saving medicines or apparatus. Furthermore, this would complicate the whole mechanism as to fix a parameter for due evaluation.

b) 2.10 talks about introduction of "a new law on utility models" for "small inventions"
Utility patents are 'Petty Patents' valid for generally 5-10 years, granted after verification of novelty and applicability without putting much emphasis on the 'non-obviousness', thereby making a 'little or no inventive step' acceptable, contrary to that of 20-year valid patents where this criterion is essential. With rapid development, more interest is in filing of these kinds of patents as 20 years down the line most of the inventions generally go obsolete. In USA, lionshare of the patents filed are actually utility patents. Currently 55 countries including developing countries such as China and Brazil already adopted the utility model, sometime with different names like that in Australia, where it is termed as 'Innovation Patent' with validity of 8 years. DIPP already put a paper for discussing this model in India few years ago. The study commissioned by DIPP a few years ago recommended against its introduction.

   Since utility model doesn't emphasize much on 'inventive step', there is perhaps, a scope of dilution of the much debated Section 3(d) of Indian Patent Act, enacted as a consequence of TRIPS Agreement. With no particular sector mentioned, this may be a way to bypass the provision of Sec. 3(d) and promote 'ever greening' of patents in particular in Pharma sector. Hence SJM proposes that Pharmaceutical sector should be excluded from this utility model.

c) 2.12 talks about tax benefits linked to IP creation. However, as IP is a property which incentivize the inventor, a discussion on taxing the IP might also be an option. The tax benefit should be intended to help the MSMEs not the established players. Again, the service tax is applicable at standard rate when the technology is ready for commercialization. Question remains whether that also should be waived.
d) 2.15 speak about encouraging innovations in agriculture sector through application of IP. PPV & FRA already provides exemption of fees, extended time to protect a particular registration. Therefore, this suggestion might be another indication of either diluting the ambit of Sec. 3 or a

forthcoming amendment of Patent law.

Objective 3: Legal and Legislative Framework

a) Point 3.2 suggests the introduction of 'Utility Models', the discussion on which is already done under the Objective 2.
b) Point 3.2 talks about "IP created from public funded research"

There is a pertinent question regarding the research product and the IP protection thereof. Publicly funded outputs of R&D would be in the public domain 18 months after the patent filing, creating the opportunity for the entire world to look into and implement the invention. An Indian patent application in this case, would only protect the merit of this invention in the territory of India, whereas even in the territory of Nepal or Bangladesh or Pakistan or elsewhere in the World, it would be like a free candy offered. Thus, the federal fund which fuels the research, the painstaking effort of the inventor group who runs the R&D, might all go unrewarded in absence of an International protection involving huge official and attorney expense in filing and maintenance. As of now, all the public Institutions who are applying for patents only in the territory of India, are restricting only Indians residing in the territory of India whose money finally drives the R&D, whereas opening up a great chance for people from abroad to use that invention for their own benefit without infringing any right of the IP holder. In order to create a justified reward mechanism regarding 3.2, a trade-off should be designed or some new policy should be framed.

Objective 4: IP Administration and Management

Applaudable suggestions regarding the autonomy of IPOs and cross-linking with other offices, coordination between the NBA and the IPOs, modernization of PPV & FRA, lack of interest in Semiconductor Integrated Circuits Layout Design etc.

a) 4.10.14 suggests an waiver of first time fee, which is not above criticism. Filing could be done for a range of thing claimed as invention. The suggestion is not to exempt fee, rather upon acceptance and grant of the IP to the MSME member, the entire amount accepted earlier as official fees, could be transferred to the current account of that MSME with a definite pre-fixed rate of interest. The 'Direct Transfer' initiative adopted by GoI should be replicated followed by proper tuning as per the demand.

Besides, in criminal cases, State provides legal aids to the needy by positioning young lawyers as state brief. Similarly, states can provide an 'Agent service' for those who require legal assistance.

Objective 5: Commercialization of IP

This is most important due to addressing issues regarding the formulation of a reward mechanism. The proposal for formulation of IPPDC with regional units of IPPDU is appreciable. The launch of Gujarat State Innovation Portal might be a stepping stone towards remodeling. The most important part is the proposal of formation of an IP Exchange, in my opinion. The authors had this idea of forming a 'Patent Exchange' which so far does NOT exist as per as a privately made search report, except one in the in the territory of USA that too by private initiative. Though, USA and Indian IP regime has a lot of differences, yet an invitation to that person behind the 'Tynax' Patent Exchange could be sent to work with GoI as a consultant in establishing our IP Exchange. This should be a breakthrough with the potential to open up the exchange of intangible properties and generation of revenues.

Steps towards formulation for an IP Exchange

IP or Patent Exchange, if planned wisely, would be a pioneer initiative as no other Government of any country has patronized such an idea! As earlier discussed, only one 'Patent Exchange' has been found so far, that too by private initiative in the territory of USA. In India, the economic benefit of IP could be dispersed even to the people having novice level of knowledge on the patented subject matter, by making them stakeholder through the IP Exchange. This will benefit not only the patentee in case of granted patent or the applicant in case of a patent in a particular phase of application or any other form

of IP holder by granting him/ her an opportunity of reward from the common men, but also will incentivize the overall niche of innovation.

Innovations are performed at several places such as Companies with strong R&D focus or a subsidiary of a company entirely focused on research where the outputs are mostly going to fuel their own need, Research Process Outsourcing (RPO) organizations where no basic research is done and clients mostly from overseas outsource their job strangled with legal clauses as they think fit, Innovation driven R&D organizations mostly start-ups funded through Venture Capitalists or angel investors or funds such as 'Biotechnology Ignition Grant (BIG)' of BIRAC and several others, and Universities or Institutes where more focus is given on publications than that of patenting (in public Institute(s)/ University(ies).

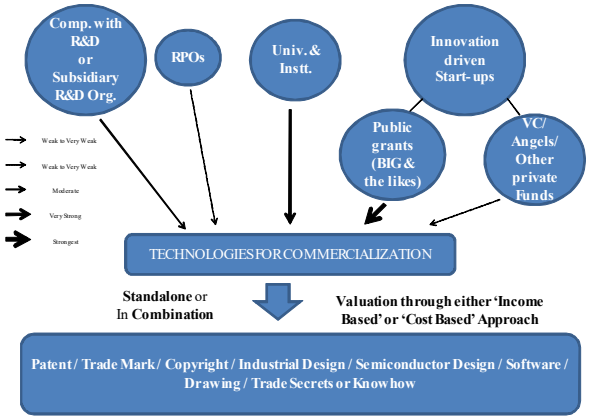

Fig.1: Source of Inventions and steps prior commercialization

Technology of interest thus dispersed from different organizations especially with an R&D focus, could be a Patent or a Trade Mark or Copyright or Software or Semiconductor Design or Industrial Design or Drawing or any Knowhow in the form of Trade Secret, either standalone or in multiple combinations. Upon successful expression of interest, that particular form of technology should be open for valuation by a Competent Authority. In USA, the valuation is done by methods ranging from, 'Income based approaches' such as 'Discounted Cash Flow (DCF)' approach, 'Cost based approach' including 'replication cost approach' or 'replacement cost approach' or 'cost saving approach', and 'market comparable approach'. Analysis of incomes is done arbitrarily in many cases by gross comparison of the revenue generation from similar products. However, considering the nascent phase of technology transfer process we are going through, a 'market comparable approach' seems illogical due to not having enough identical products to compare with, leaving us with either 'income based approach' or 'cost based approach' to deal with. Introduction of course work especially on "IP Evaluation" is the need of the hour along with formulation of a "Prescribed Guideline for IP Evaluation" from GoI.

Generally, it has been found that a combination of IP offers more potential in royalty earnings than that of a standalone product or process or the likes. In the case of technology sector, it has been found that an IP-pack product in the form of patents on each part, semiconductor circuit layout design, gross design of mobiles and tablets, copyrights or patents on software necessary to run those hardwares, Trade Mark on any particular part, and the likes; are licensed for a license fee and a particular royalty rate. On the contrary, sectors like Pharmaceuticals offer much less number of IP on a particular product. Therefore, different treatment mechanism should be formulated in dealing with these two.

Besides, there should be discrimination in handling with granted patents with those having a pending status, with the earlier one should be considered a safer investment which increases its potential with the number of citations in other patents or related literature whereas the later should have more of a futuristic approach may be somewhat identical to the mechanism adapted for the valuation of derivatives. To evaluate the 'applied patents', the 'prior art search' would be an essential part. Upon no scope of infringement, that application could be considered for an investment option with a discounted rate as to having ample scope of litigation upon granting. The valuation of that patent upon

granting would increase with the increasing case of infringement discovered in the market. Since patent is a perishable asset with a life cycle merely of twenty (20) years, much thought is needed to properly value the product or process. If India moves to adopt 'utility model', then the 'inventive step' won't be emphasized. Stakeholder of a patent, based on or around which another utility patent has been filed and granted, should be made a by-default stakeholder of that utility patent as well. However, there are other IPs having an endless potential upon payment of regular renewal fees, seeking a different mode of operation in the exchange.

Standard Royalty Rate could replace the idea of 'Dividend' exists in the stock market. The average royalty rate in USA for nanotechnology and healthcare sector is little more than 4%, and that of clean technology, green energy and environment is a little more than 3%. A calculation of appropriate royalty on the 'face value' calculated through proper evaluation should be done prior enlisting it on the IP-Exchange only to give an assurance to the investor regarding the potential of dividend received.

Scopes for IP reviewers for quality analysis like those exist in the field of 'book review' or 'movie review', and scopes for IP advisors on asset valuation like those existing in the stock and F&O market or real estate or commodity sector and the likes, would be created, unleashing a great career prospective for bright and young analysts. In addition to that, a learned group of individuals having expertise in a particular subject domain and interest in financial transactions, could act as brokers in those deal. The brokerage, in this case, should be higher than that of other arenas as patent trading would offer a comparatively narrower scope than that of similar exchange.

Therefore, the IPPDC should act more like Securities and Exchange Board of India (SEBI) for only facilitation safeguarding the interests of the investors.

Steps to safeguard the Investors' interest; Lesson from NSEL

Formation of an IP-exchange needs lot of careful monitoring without bothering the investors. As this would be a pioneer move from any Government given the GoI adopts the suggestion, plenty of measures should be taken to safeguard the interests of investors from speculation.

The fall of National Spot Exchange *aka* NSEL should be taken as a lesson and steps towards mitigating the scope of loophole formation in financial matters. NSEL violated as many as fifteen (15) provisions of Companies Act including those related to corporate governance as alleged by the Registrar of Companies (RoC). In addition to that, NSEL repeatedly ignored repeated instances of defaults from its members and allowed them to trade and increase their exposure, hampering necessary liquidity. Besides, they did not set up any panel for settling of disputes, arbitration, and vigilance following the prescribed standards on trading and clearing.

Therefore, in order to create a successful exchange, an organized framework is the need of the hour comprising a set of arbitration panel, trade monitoring panel and the likes. A fixed amount could be levied as insurance premium from the members as well as investors.

Possible Backlash

However, this opening up may concurrently unlock some Pandora's Box as Non Practicing Entities (NPEs) *aka* Patent Trolls could invade to rupture the dividend and successively transform the sector unnecessarily litigation driven. These NPEs however, may act as a savior to the MSMEs whereas continuously annoying the big players. Small businesses often fail and the IP assets could be taken over by those NPEs to legally challenge the big fishes over infringement, if any, and manage a mutual dividend. Therefore, a mechanism should exist to identify and make separate provisions for Non Playing Entities (NPEs), interested in acquiring IP.

Other possible mechanism

There is existing mechanism of IP protection while commercializing through the formation of 'Copyright Society' where individuals with a creative mind could be a member and ask for royalty

from the service providers. Same mechanism could somehow be replicated in other segments of IP rights.

Objective 6: Enforcement and Adjudication
The draft also proposes the creation of a centralized **Multi-Agency Task Force** for the coordination between all the various agencies on how to better go about IP enforcement. Added to that, appreciable proposal regarding designation of a specialized patent bench in the HCs of Bombay, Calcutta, Delhi and Madras for speedy disposal of patent cases, increasing power and creation of regional benches of IPAB, are formulated.

However, those steps as suggested won't be enough. Therefore, the need of the hour is to extend the specialized bench to all the HCs instead of only those four (4) mentioned, with at least two (2) specialized benches in those 4 HCs.

In addition to that, expedite system should be established in order to clear the backlogs both in Patent and Trade Mark. 'Special Adalats' to dispose of all the pending cases may be the need of the hour. That 'Special Adalat' should seat atleast once in a week and help in facilitation of clearing the backlogs.

Objective 7: Human Capital Development
Appreciable suggestion in nurturing IP-consciousness

Conclusion:
This draft has made note of the difference in patent filing activity – stating that currently over 75% filing is done by foreign entities, thus there is a need to increase Indian filing. It also emphasized that the future potential for the copyright based sector is huge, and that there is considerable untapped potential when it comes to Traditional Knowledge along with a continued apathy in filing Design applications and Semiconductor Circuit Design. It came up with suggestions for formation of IP Promotion and Development Council (IPPDC) which will open IP Promotion and Development Units, IP exchange, a centralized Multi-Agency Task Force for coordination between all the various agencies on the betterment of IP enforcement. Furthermore, the draft proposes specialized patent benches in the High Courts of Bombay, Calcutta, Delhi and Madras. It also calls for regional benches of the IPAB in the 5 regions where IPOs are located.

The draft efficiently avoided any emphasis on a particular industrial sector. The Pharmaceutical sector, which is the apple of discord regarding IP matters, is not mentioned, perhaps deliberately along with all other sectors. Introduction of Utility model with a set of new law may bring an avenue to bypass the provision of Sec. 3(d), under the ambit of which several pharma patent protection including that of 'Glivec' from Novartis or hepatitis treatment 'Sovaldi' from Gilead, are denied. Only future may suggest the further sectoral remodeling in connection to the IP matters.

However, it is also important to patronize clinical research for life saving medicine. Therefore SJM strongly advocate creation of a national corpus fund to buy exclusive right from the inventor compensating the cost associated and reward thereof, for the patent on life saving drugs. A mechanism of IP acquiring by the Government, already in practice in Taiwan, Korea and few other nations could be adapted with required modification.

Dr. Ashwani Mahajan
National Co-convenor