# COMMENTS ON THE

# FIRST DRAFT OF THE NATIONAL IPR POLICY

# BY THE CENTRE FOR INTERNET AND SOCIETY, INDIA[1]

## I. PRELIMINARY

1. This submission presents comments from the Centre for Internet and Society, India (**"CIS"**)[2] on the proposed National Intellectual Property Rights Policy (**"the Policy"**) to the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India. (**"DIPP"**).
2. This submission is made in response to the requests and suggestions from stakeholders sought by the DIPP in its Press Release.[3]
3. CIS commends the DIPP for this initiative, and appreciates the opportunity to provide comments on the National IPR Policy. CIS' comments are as stated hereafter.

### I.1 About CIS

4. CIS[4] is a non-profit research organization that works on among others, issues of intellectual property law reform,[5] openness,[6] privacy, freedom of speech and expression and internet governance,[7] accessibility for persons with disabilities,[8] and engages in academic research on digital humanities[9] and digital natives.[10]

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1 This comment was prepared by Anubha Sinha, Nehaa Chaudhari, and Pranesh Prakash of the Centre for Internet and Society.

2 www.cis-india.org (last accessed 30 November, 2014).

3 http://www.dipp.nic.in/English/acts_rules/Press_Release/pressRelease_IPR_Policy_30December2014.pdf.

4 *See* http://cis-india.org/ (last accessed 18 January, 2015).

5 *See* http://cis-india.org/a2k (last accessed 18 January, 2015).

6 *See* http://cis-india.org/openness (last accessed 18 January, 2015).

7 *See* http://cis-india.org/internet-governance (last accessed 18 January, 2015).

8 *See* http://cis-india.org/accessibility (last accessed 18 January, 2015).

9 *See* http://cis-india.org/digital-natives (last accessed 18 January, 2015).

10 *See* http://cis-india.org/raw (last accessed 18 January, 2015).

5. CIS is an accredited Observer[11] at the World Intellectual Property Organization ("WIPO"), enabling us to attend formal meetings of member states and participate in debates and consultations on various issues. CIS has been attending meetings of the WIPO Standing Committee on Copyright and Related Rights since 2010. At these sessions, CIS has actively participated through various interventions, emphasizing the adoption of an approach balancing the rights holders' perspective with public interest. CIS has also attended sessions of some other committees at WIPO, made interventions wherever applicable, produced reports of these meetings, and profiled the work of other non-governmental organizations engaging in similar work on intellectual property law and policy reform.[12]
6. CIS undertakes research in other fields of intellectual property, in addition to WIPO-related work. Over the past five years since our inception, some of our key research has included analyses of intellectual property issues of the proposed Indo-EU Free Trade Agreement[13] and other free trade agreements,[14] the US Special 301 Report,[15] the (2010) amendment to the Copyright Act, 1957,[16] the (draft) Science, Technology and Innovation Policy,[17] parallel importation,[18] the (draft) Patent Manual

11 *See* http://www.wipo.int/members/en/admission/observers.html (last accessed 18 January, 2015).

12 *See* http://cis-india.org/a2k/blog/ngo-profile-knowledge-ecology-international (last accessed 18 January, 2015); http://cis-india.org/a2k/blog/ngo-profile-third-world-network (last accessed 18 January, 2015).

13 *See illustratively* http://cis-india.org/a2k/blog/analysis-copyright-expansion-india-eu-fta (last accessed 18 January, 2015); http://cis-india.org/a2k/blog/india-eu-fta-copyright-issues (last accessed 18 January, 2015); http://cis-india.org/a2k/blog/a-guide-to-the-proposed-india-european-union-free-trade-agreement (last accessed 18 January, 2015).

14 *See illustratively* http://cis-india.org/news/inet-bangkok-june-8-2013-governance-in-the-age-of-internet-and-fta (last accessed 18 January, 2015).

15 *See illustratively* http://cis-india.org/a2k/blog/2010-special-301 (last accessed 18 January, 2015).

16 *See illustratively* http://cis-india.org/a2k/blog/analysis-copyright-amendment-bill-2012 (last accessed 18 January, 2015); http://cis-india.org/a2k/blog/sc-report-on-amendments (last accessed 18 January, 2015); http://cis-india.org/a2k/blog/copyright-bill-parliament (last accessed 18 January, 2015); http://cis-india.org/a2k/blog/tpm-copyright-amendment (last accessed 16 January, 2015); http://cis-india.org/a2k/blog/copyright-privacy (last accessed 16 January, 2015); http://cis-india.org/a2k/blog/copyright-bill-analysis (last accessed 18 January, 2015).

17 *See* http://cis-india.org/a2k/blog/comments-on-science-technology-and-innovation-policy-draft (last accessed 18 January, 2015).

18 *See* http://cis-india.org/a2k/blog/exhaustion (last accessed 18 January, 2015); http://cis-india.org/a2k/blog/parallel-importation-of-books (last accessed 18 January, 2015).

and the subsequent Guidelines for Computer Related Inventions,[19] royalty caps,[20] copyright exceptions and limitations for education,[21] and the preparation of the India Report for the Consumers International IP Watch List.[22]

### I.2 Structure of this Submission

7. This submission is divided into 4 parts. The first part gives a preliminary overview of the suggestions submitted by CIS. The second part highlights the principles that should be followed in the formulation of a National IPR Policy, the third part provides detailed comments and recommendations for the National IPR Policy and the last part provides certain concluding remarks.

## II. PRINCIPLES

8. The characterization of intellectual property rights may be two-fold — first, at their core, intellectual property rights, are temporary monopolies granted to *inter alia*, authors and inventors; and *second*, they are a tool to ensure innovation, social, scientific and cultural progress and further access to knowledge. This dual nature and purpose of intellectual property protection is particularly critical in developing economies such as India. Excessive intellectual property protection could result in stunted innovation and negatively impact various stakeholders.[23] It is therefore our submission that the development of the IPR Policy be informed by broader principles of fairness and equity, balancing intellectual property protections with limitations and exceptions/user rights such as those that promote freedom of expression, research, education and access to medicines, cultural rights, data mining, use of governmental works, etc.

## III. DETAILED COMMENTS

19 *See* http://cis-india.org/a2k/blog/cis-submission-draft-patent-manual-2010 (last accessed 18 January, 2015) and http://cis-india.org/a2k/blog/comments-on-draft-guidelines-for-computer-related-inventions (last accessed 18 January, 2015) respectively.

20 *See* http://cis-india.org/a2k/blog/lid-on-royalty-outflows (last accessed 18 January, 2015).

21 *See* http://cis-india.org/a2k/blog/exceptions-and-limitations (last accessed 18 January, 2015).

22 *See illustratively* http://cis-india.org/a2k/consumers-international-ip-watchlist-report-2012 (last accessed 18 January, 2015); http://cis-india.org/a2k/blog/ip-watch-list-2011 (last accessed 18 January, 2015); http://cis-india.org/a2k/blog/consumers-international-ip-watch-list-2009 (last accessed 18 January, 2015).

23 THE WASHINGTON DECLARATION ON INTELLECTUAL PROPERTY AND PUBLIC INTEREST concluded after the GLOBAL CONGRESS ON INTELLECTUAL PROPERTY AND PUBLIC INTEREST in August 2011 attended by over 180 experts from 32 countries articulate this position perfectly. Available at: http://infojustice.org/wp-content/uploads/2011/09/Washington-Declaration.pdf (Last Accessed: 29 November, 2014).

9. This section will detail CIS' submissions on various aspects of the National IPR Policy. Submissions have been categorised thematically.

### III.1 On the Vision

10. It is submitted that the Vision of the National IPR Policy (**"Vision"**) in encouraging growth for the 'benefit of all' and in accepting the philosophy that knowledge owned 'is transformed into knowledge shared'[24] is commendable.
11. However, the vision is at odds with the methods proposed in the document. True advancement in science and technology, arts and culture, protection of traditional knowledge as well as bio-diverse resources and the true sharing of knowledge would be impaired by a system centred only around the development and maximization of intellectual property.
12. An attractive social culture would be one where citizens had access to a cornucopia of ideas and information, thereby fostering an environment of cultural diversity, which would enable individuals to shape themselves. Indeed, this is not just an ideal, but is a right recognized under Article 27(1) of the Universal Declaration of Human Rights, and Article 15 of the .[25] However, an IP maximization approach, which the draft stategy seems to embrace, hinders the growth of such a culture, creating a protectionist environment while preventing access to various resources which may be of use for further innovations.
13. The question of whether IP rights given to innovators are the most effective tools to promote innovation in society has been widely discussed in economics, politics and law, especially in the last four decades.[26] Traditional arguments in favour of temporary monopolies incentivising innovation have been effectively questioned as creating monopolies on innovation, contributing to increasing prices and a distorted allocation of resources, inefficiency and a net loss of welfare.[27] It has also been effectively established that most innovation is incremental and cumulative,

24 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 5.

25 Article 27(1) of the Universal Declaration of Human Rights states: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."

26 Julia Brüggemann, Paolo Crosetto *et al*, *Intellectual Property Rights Hinder Sequential Innovation – Experimental Evidence*, CENTER FOR EUROPEAN, GOVERNANCE AND ECONOMIC DEVELOPMENT RESEARCH, Number 227, January 2015.

27 Joseph E. Stiglitz, *Economic Foundations of Intellectual Property Rights*, DUKE LAW JOURNAL, 57(6): 1693-1724.

necessitating the access to pre-existing data and works.[28] It would be welcome if the huge amount of academic literature on these matter were taken into consideration by the expert group. While intellectual property rights are not *per se* antithetical to innovation, creativity, and cultural development, an IP-maximalist policy and law has been shown to harm those very objectives.

14. CIS therefore submits that the vision of the policy also reflect the commitment to the creation of a holistic and balanced framework of intellectual property rights in the nation with the recognition that an intellectual property-centric system would not necessarily be the best means of promoting creativity, innovation and access, the promotion of which are part of the stated desire of the policy.
15. Further, we believe that the principles of freedom of expression and of due process of law, both of which are constitutionally-recognized rights in India, should be recognized in the vision as principles that any intellectual property rights regime should respectively seek to promote and respect.

### III.2 On the Mission

16. CIS appreciates the commitment to establish a balanced, dynamic and vibrant intellectual property system in India.[29] We recommend that the mission of the policy also include a commitment to *foster access to knowledge* as well as the commitment to creating a *system of intellectual property rights which serve the public interest by strengthening limitations and exceptions to IP regimes, which are aimed to provide a public interest oriented counterbalance to the monopoly rights granted under IPR laws.*
17. We believe that preventing unreasonable and disproportionate remedies to IPR law violations are an important part of ensuring that these laws serve the public interest rather than subvert them for purely private interests. This important principle ought to find reflection in the policy's mission statement.
18. It is suggested that in addition to public health, food security and the environment[30], other areas of socio-economic and cultural importance, including *inter alia,*foundational scientific research, education, disability rights, and access to knowledge, be added as additional areas that warrant special protection , in the

28 Graham M. Dutfield, Uma Suthersanen, *The Innovation Dilemma: Intellectual Property and the Historical Legacy of Cumulative Creativity*, INTELLECTUAL PROPERTY QUARTERLY, 2004 at 379.

29 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 5.

30 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 5.

mission statement,

19. It is submitted that these commitments are essential to the creation and working of a balanced intellectual property framework that the Policy seeks to achieve.

### III.3 On Objective 1: IP Awareness and Promotion

20. The first objective of the Policy lays out a detailed action plan for creating awareness about intellectual property as well as for the promotion of intellectual property. The underlying rationale for this endeavour has been identified on various levels — that there are economic, social and cultural benefits of intellectual property;[31] that intellectual property protection accelerates development, promotes entrepreneurship as well as increases competitiveness;[32] and that the global regime is one of strongly protected intellectual property rights.[33]
21. It is submitted that the identification of this underlying rationale is not backed by sufficient evidence. These justifications, in their pursuit of a favourable intellectual property regime do not present a balanced picture of all the facts.
22. Current existing empirical research does not show an unambiguous nexus between the granting of IP rights and an increase in innovation and productivity, as innovation and productivity cannot not identified with the number of patents awarded.[34] This can be seen in the US economy, where despite an enormous increase in the number of patents, there has been no dramatic acceleration in technological progress.[35] In fact, studies prove the contrary to be true. In the United States, patenting increased drastically over the last few decades, quadrupling from 59,715 patents being issued in 1983, to 244,341 in 2010. However, according to the Bureau of Labour Statistics, annual growth in the total factor productivity reduced from 1.2% in 1970-79 to below 1% in 2000-09,[36] whereas the annual expenditure on research and development saw hardly any change, oscillating in a band of 2.5% of the GDP for over

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31 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 6.

32 *Id.*

33 *Id.*

34 Michele Boldrin and David K. Levine, *The Case Against Patents*, JOURNAL OF ECONOMIC PERSPECTIVES, Vol. 27, No.1 – Winter 2013, 3-22.

35 *Id.*

36 *Id.*

three decades.[37] In relatively new industries such as software and biotechnology, still in their nascent stages of development, patenting has been introduced without any positive contributions to innovation. In fact, in their empirical work described in *Patent Failure* (2008),[38] Bessen and Meurer have argued that increased patenting has resulted in decreased social welfare.

23. Further, no unambiguous connections have been found between innovation and intellectual property rights in academic studies. In a meta-study conducted in 2006,[39] Boldrin and Levine observed that there was weak or no evidence which suggested that strengthening the patent regime led to an increase in innovation. Similarly, it was observed by Jaffe that "despite the significance of policy changes and the wide availability of detailed data relating to patenting, robust conclusions regarding the empirical consequences for technological innovations of changes in patent policy are few. There is widespread unease that the costs of stronger patent protection may exceed the benefits. Both theoretical and, to a lesser extent, empirical research suggest this possibility."[40]
24. In his study of 60 nations over the past 150 years, Josh Lerner concluded that "the impact of patent protection-enhancing on innovation was in fact negative, thereby running counter to assumptions made by economists that incentives affect behavior and that stronger property rights encourage economic growth.[41]
25. Even in those studies, where support is found for a positive correlation between patents and innovation, it is made clear that this correlation is not applicable to developing and least-developed countries. This, for instance, is the conclusion of the United Nations Industrial Development Organization's meta-study titled "The Role of Intellectual Property Rights in Technology Transfer and Economic Growth:

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37 *Id.*

38 James Bessen and Michael J. Meurer, PATENT FAILURE: HOW JUDGES, BUREAUCRATS AND LAWYERS PUT INNOVATION AT RISK, March 2008.

39 Michele Boldrin and David K. Levine *Supra* Note 32.

40 B.J. Jaffe, *The US Patent System in Transition: Innovation and the Innovation Process*, RESEARCH POLICY, 29, 531-557, 2000.

41 Josh Lerner, *The Empirical Impact of Intellectual Property Rights on Innovation: Puzzles and Clues*, INTELLECTUAL PROPERTY RIGHTS AND ECONOMIC GROWTH IN THE LONG-RUN: A DISCOVER MODEL (2009).

Theory and Evidence".[42]

26. It is crucial that all policy be based on evidence, and not ideology.
27. Thus, it is submitted that any program that seeks to create awareness about intellectual property must necessarily be one that presents a balanced view, clearly stating all facts and as many diverse opinions as possible; avoiding the current situation where public interest groups and academics are sidelined in favour of rights-holders groups.
28. CIS submits that the nation-wide program of promotion on the benefits of intellectual property[43] must be based on evidence. Crucially, the importance of the public domain, for which a great deal of evidence exists,[44] must highlighted in any such also equally promote the importance the role of limitations and exceptions and clearly identify the issues with the intellectual property system, including the fact that it has not been proven that there is a nexus between intellectual property and innovation. The nation wide program should convey the role of different stakeholders, including libraries and archives, organizations working with persons with disabilities and educational institutions and the negative effects of a rights centric intellectual property system on such important institutions.
29. It is important that public-funded research organizations should be engaged in neutral — non-industry funded —research, and not campaigns (as identified in the policy).[45] This will help identify the issues of the present intellectual property system as well as the potential for reform, tailored to the Indian context. We have to ensure that campaigns — as with policymaking and pedagogic material — are based on research rather than faith or ideology. It is further submitted that course materials to be created for educational institutions at all levels as well as for online and distance learning programs[46] should include a discussion on the drawbacks of a maximalist intellectual property system, a discussion on limitations and exceptions, alternatives to intellectual property, as well as case studies from different parts of the world

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42 Rod Falvey & Neil Foster, The Role of Intellectual Property Rights in Technology Transfer and Economic Growth: Theory and Evidence (UNIDO Working Paper,

43 ¶1.2 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 6.

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45 ¶1.3 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 7.

46 ¶ 1.5 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 8.

highlighting the use of intellectual property as well as alternatives in a socio-economic and culture specific environment. Particularly in the case of education institutions as well as online and distance learning mechanisms, which are often faced with great challenges as a result of rights-holders centric intellectual property laws, the irony in promoting a system that only acts to their detriment would be great.

### III.4 On Objective 2: Creation of IP

30. The second objective of the Policy seeks to stimulate the creation and growth of intellectual property through measures that encourage IP generation.[47] This objective seeks to encourage IP generation and creation across various sectors, including the introduction of the system of 'utility models' in India. There are several problems with this objective, primarily that it assumes IP generation is necessarily a means to innovation, whereas it is submitted that the emphasis should be on innovation holistically, including by incentive mechanisms other than IP.

#### 3.4.1. On the IP-Innovation/Creativity Nexus

31. It is submitted that similar to the earlier objective relating to the promotion and the creation of awareness about intellectual property, the underlying rationale behind this objective too seems to be the perception that there is a positive correlation between greater amounts of intellectual property and greater innovation, and the belief that intellectual property protection necesarrily promotes innovation. However, there is relatively little research to back this assumption. Illustratively, the following example may be considered. In a study conducted by Heidi L. Williams,[48] the sequencing of the human genome was used to provide an empirical context to showcase the deterioration in development due to the presence of IP. It was concluded by Williams that the presence of IP rights in the sequencing of the human genome resulted in reductions in subsequent scientific research and product

47 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 8.

48 Heidi L. Williams, *Intellectual Property Rights and Innovation: Evidence from the Human Genome*, NATIONAL BUREAU OF ECONOMIC RESEARCH. Working Paper 16213, July 2010.

development by up to 20-30%.[49] Williams further observed that "if more socially valuable technologies are more likely to be held with IP, then the welfare costs for the same could be substantial." The presence of intellectual property rights, it is argued, stifles subsequent product development by restricting access to the data or technology required for further development.[50]

32. Prof. Petra Moser of Stanford has conducted a large volume of research on economic evidence on the linkages between patents and innovation. Her research, which shows that in the 19th century the majority of inventions happened outside the patent system[51] indicates that alternative explanations might explain inventions better, including "the importance of a culture of entrepreneurship,[52] experimentation,[53] the free exchange of knowledge,[54] and science.[55] In a paper titled, "How do Patent Laws Influence Innovation", she concludes that "I find no evidence that patent laws increased levels of innovative activity but strong evidence that patent systems influenced the distribution of innovative activity across industries."

33. Prof. Bryan Mercurio, in a paper written for the World Economic Forum and the International Centre for Trade and Sustainable Development, concludes, "The empirical evidence suggests that increasing levels of patent protection have not resulted in increased innovation. Instead, it has limited competition, and increased the cost of business, to the detriment of the world economy. Innovation has also

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49 *Id.*

50 *Id.*

51 Petra Moser, *Innovations and Patents in* OXFORD HANDBOOK OF ECONOMIC HISTORY (Cain et al., eds., forthcoming), http://ssrn.com/abstract=2503503.

52 *See generally*, DAVID. S. LANDES, THE UNBOUND PROMETHEUS: TECHNOLOGICAL CHANGE AND INDUSTRIAL DEVELOPMENT IN WESTERN EUROPE FROM 1750 TO THE PRESENT (1969).

53 *See generally*, JOEL MOKYR. THE LEVER OF RICHES: TECHNOLOGICAL CREATIVITY AND ECONOMIC PROGRESS (1990).

54 *See generally*, Alessandro Nuvolari *Collective Invention during the British Industrial Revolution: the Case of the Cornish Pumping Engine,* 28 CAMBRIDGE J. ECON. 347 (2004). *See also*, Robert C. Allen, *Collective Invention*, 4 J. ECON. BEHAVIOR & ORG. 1 (1983).

55 A. Arora & N. Rosenberg, *Chemicals: A US Success Story* in CHEMICALS AND LONG-TERM ECONOMIC GROWTH 71 (Arora et al., eds., 1998); see also, DAVID C. MOWERY & NATHAN ROSENBERG, PATHS OF INNOVATION. TECHNOLOGICAL CHANGE IN 20TH-CENTURY AMERICA (1998).

suffered, as increasing protection has inhibited the ability of many firms to innovate." He further recommends that we "conduct further research on the correlation or causal relationship between patents and innovation, including the indirect benefits for innovation that patent protection may provide". Petra Moser notes, "Patent laws that existed in the mid-nineteenth century had been adopted in a relatively ad-hoc manner, dependent more on legal traditions than economic considerations".[56]

34. The empirical data collected by scholars, as provided above is goes to show that innovation is not necessarily benefitted by stronger patent regimes. Further, even the literature that asserts a positive correlation between the two acknowledge that this doesn't apply to developing countries. In addition, whilepatents may provide revenue to patent owners, it also makes further innovation more costly, thereby discouraging competitors from entering the arena due to high prices, and due to the large number of pre-existing patents. This effect, known as the

    35. The Supreme Court of Canada, has for instance, has on multiple occasions recognized the importance of the public domain. In "2002, Justice Binne, writing for the majority in Théberge v. Galerie d'Art du Petit Champlain inc., stated: 'Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole (para.32).' Two years later, in CCH Canadian Ltd. v. Law Society of Upper Canada, Chief Justice McLachlin spoke of the importance that there be 'room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others (para. 23).'"[57]

36. Lastly, there is even evidence that in multiple sectors — including fashion, finance, font design, and software — lesser IP protection in the form of patents, trademarks, and copyright, actual encourages increased innovation.[58]

### 3.4.2. On Utility Models

56 Petra Moser, *How Do Patent Laws Influence Innovation? Evidence from Nineteenth-Century World Fairs*, NBER Working Paper Series 9909, http://www.nber.org/papers/w9909.

57 Meera Nair, *A Short-Lived Celebration*, FAIR DUTY (Jan. 8, 2012), https://fairduty.wordpress.com/2012/01/08/a-short-lived-celebration/

58 See generally, KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY (2012).

37. On the question of introduction of a new on utility models[59] CIS observes that DIPP has previously considered developing a framework for granting Utility Models for 'innovations' and invited suggestions on a discussion paper on the subject.[60] Reports[61] suggest that Small, Medium and Micro Enterprises are in favour of the Utility Model Protection system in India because developing countries such as China and Korea have demonstrated a corresponding economic growth attributable to the introduction of the system. However, there is no evidentiary data to support this hypothesis. Studies suggest that there exist only correlations and not causal links between heightened innovative activity and implementation of utility model protection.[62] Empirical evidence on the role of intellectual property protection in promoting innovation and growth in general remains limited and inconclusive.[63] Reports also suggest that in China, the abundance of Utility Model has led to lowering of quality of innovation.[64] In Australia, an "innovation patent" — the Australian version of utility model protection — was awarded for a "circular transportation facilitation device", i.e., a wheel.[65]

38. It is this submitted that whether the ushering of a 2nd tier of protection model for lower and incremental innovations would have a positive impact on innovation in India is extremely debatable. There have been several criticisms of utility models, *inter alia*, explosion in litigation of poor quality patents and legal uncertainty – which impact small business the maximum in terms of costs[66]; the system may be more

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59 ¶2.10 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 10.

60 *See FICCI Suggestions on Discussion Paper on Utility Model* available at http://www.ficci.com/Sedocument/20179/UM.pdf (last accessed January 28, 2015).

61 *See FICCI Suggestions on Discussion Paper on Utility Model* available at http://www.ficci.com/Sedocument/20179/UM.pdf (last accessed January 28, 2015).

62 *See Utility Model: A Tool for Economic and Technological Development: A Case Study of Japan* available at http://www.ipindia.nic.in/research_studies/finalreport_april2007.pdf (last accessed January 28, 2015).

63 U. Suthersanen, *Utility Models and Innovation in Developing Countries, International Center for Trade and Sustainable Development* (ICTSD), ISSUE PAPER NO. 13 (2006), available at http://www.unctad.org/en/docs/iteipc20066_en.pdf , (last accessed January 28, 2015).

64 *See China's great leap forward in patents*, available at http://www.ipwatchdog.com/2013/04/04/chinas-great-leap-forward-in-patents/id=38625/ (last accessed January 28, 2015).

65 Will Knight, *Wheel Patented in Australia*, NEW SCIENTIST (July 3, 2001), http://www.newscientist.com/article/dn965-wheel-patented-in-australia.html.

66 Keith E. Maskus, *Beyond the Treaties: A Symposium on Compliance with International Intellectual Property* Law, February 6, 2000.

utilised by foreign companies rather than local firms, in which case there is a possibility that this will lead to an increase in a flow of royalties and licensing fees to overseas producers. Utility model rights can be, and have been, used by companies to cordon off entire areas of research.[67]

39. CIS submits that as the policy 'intends to harness the full benefits of creation and innovation in the larger interest of society and citizens'[68] the introduction of a law on utility models would be antithetical to this objective.

### 3.4.3. On Improving IP Output of National Research Laboratories, Universities *et al*

40. The Policy seeks to improve the output of national research laboratories, universities and technical institutions, among others.[69] It is submitted that these institutions are public funded institutions,[70] and in effect, this recommendation of the Policy seeks to therefore promote intellectual property creation in public funded institutions.

41. A significant chunk of research and development occurs at public funded academic and research institutions and, excessive use of IPR as a tool to creating private ownership rights over inventions may preclude use of such innovation by the public. This may also create a barrier to access the best technologies and research- which were funded by taxpayers' money to begin with. CIS supports the principle that IPRs resulting from of publicly funded research should automatically belong to the funder.[71]

42. Further, it is submitted that there exists a danger of public funded research institutions re-orienting their objectives focus only on areas of commercial value. This may lead to neglect of certain research areas. A stringent policy will create an

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67 U. Suthersanen, *Utility Models and Innovation in Developing Countries*, INTERNATIONAL CENTER FOR TRADE AND SUSTAINABLE DEVELOPMENT (ICTSD), ISSUE PAPER NO. 13 (2006), available at http://www.unctad.org/en/docs/iteipc20066_en.pdf , (last accessed January 28, 2015).

68 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 1.

69 ¶2.3 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 10.

70 *See* http://mhrd.gov.in/technical-education-1 (last accessed 30 January, 2015).

71 *See 'Expert Group Report on Role and Strategic Use of IPR (Intellectual Property Rights) in International Research Collaborations'* by EUROPEAN COMMISSION 'available at http://ec.europa.eu/research/era/pdf/ipr-eur-20230_en.pdf (last accessed January 28, 2015).

unfavourable conflict between revenue generation and sharing of public good. The policy must ensure that it is flexible and compensates the inventors whilst permitting public access to research.

43. CIS submits that there should be no encumbrances over public funded research and inventions. The Policy must also ensure that such proposed IP creation does not prevent or interfere with dissemination of public funded research.[72]

44. CIS strongly supports the recent steps by government agencies (including the Department of Science and Technology and the Department of Biotechnology[73] as well as other institutions including the Council of Scientific and Industrial Research[74], Indian Council of Agricultural Research[75] and Institute of Mathematical Sciences[76]) in making scholarly research openly accessible. The benefits of implementing an open access policy with regard to scientific and scholarly works are manifold. Providing open access to scholarly research will ensure percolation of cutting edge research into the society.

45. It is thus submitted that the Policy should adopt a more nuanced, cautious and balanced take on the creation of intellectual property, particularly taking into consideration India's economic status as an emerging economy and our international position. The Policy must recognise that there is no inherent societal merit in the mere creation of intellectual property and that innovation flourishes even in the absence of intellectual property protections.

## 3.5. On Objective 3: Legal and Legislative Framework

38. According to the Policy, the objective sought to be achieved is the creation of strong and effective laws on intellectual property, consistent with national priorities as well as our international obligations, balancing the interest of the rights holders with

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72 *See 'Ministry of Science makes Open Access to Research Mandatory'*, available at http://cis-india.org/news/down-to-earth-july-16-2014-aparajita-singh-ministry-of-science-makes-open-access-to-research-mandatory (last accessed January 28, 2015).

73 DBT AND DST OPEN ACCESS POLICY – POLICY ON OPEN ACCESS TO DBT AND DST FUNDED RESEARCH, Department of Biotechnology and Department of Science and Technology, MINISTRY OF SCIENCE AND TECHNOLOGY, GOVERNMENT OF INDIA.

74 *Id.*

75 *Id.*

76 *Id.*

public interest.[77]

39. CIS fully supports the view that the legislative framework on intellectual property must balance the rights of all stakeholders and be in public interest. CIS is also appreciates the importance of national priorities in the framing of India's legislative framework. CIS also notes with appreciation that the discussion in the Policy reiterates that India's laws are in compliance with the TRIPS Agreement[78] as well as the stance that India will continue to utilize the flexibilities available in international treaties as well as the TRIPS Agreement[79] while creating its legal framework.

40. CIS also supports the acknowledgement of the fact that India's laws need to be updated periodically, depending on various factors.[80] CIS fully supports the process proposed for amendments to the law, including, *inter alia*, the conduction of objective and analytical studies and inputs from various stakeholders.[81] It is submitted however, that equal weightage must be given to the inputs from all stakeholders and measures must be taken to ensure that the interests and demands of rights-holders do not outweigh the interests and demands of other stakeholders, particularly those at the other end of the spectrum, who greatly rely on the existence and guarantee of flexibilities, limitations and exceptions to intellectual property.

### 3.5.1. On Utility Models and Intellectual Property in Public Funded Research

41. The Policy envisages significant changes to India's intellectual property system, including the creation of a law for the protection of utility models as well as introduction of intellectual property in public funded research.

42. CIS recommends that it would not be advisable to introduce intellectual property in public funded research as well as cautions against the introduction of a law on utility patents. A detailed submission on these issues has been made earlier in this document, in Section 3.4.3. at page 7 for intellectual property in public funded research as well as in Section 3.4.2. at page 6 on utility models.

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77 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 11.

78 *Id.*

79 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at pages 10, 11.

80 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 12.

81 *Id.*

### 3.5.2. On the Negotiation of International Treaties and Agreements

43. CIS commends the recommendation of the Policy that the negotiation of international treaties and agreements will be in consultation with various stakeholders. However, CIS cautions against entering into bilateral or plurilateral international agreements which increase India's IPR obligations beyond our current obligations under multilateral agreements. It was only in 2006 that

44. It is submitted that FTAs often levy standards which are beyond those found in the TRIPS Agreement, and have thus been criticized.[82] A central aspect of this criticism is that TRIPS-plus-FTAs reduce policy space for the implementation of TRIPS flexibilities. This also creates the impression that TRIPS only imposes a "minimum level" of protection, which must be available in all national laws of its Member States, without any apparent limitation to a further extension of such protection or intervention which one country may impose on another. The World Health Organization enunciated that "bilateral trade agreements should not seek to incorporate TRIPS-plus protection in ways that may reduce access to medicines in developing countries.[83] Further, WHO members were urged in the Fifty-Seventh World Health Assembly "to take into account in bilateral trade agreements the flexibilities contained in the Agreement on Trade-related Aspects of Intellectual Property Rights and recognized by the Declaration on the TRIPS Agreement and Public Health adopted by the WTO Ministerial Conference."[84]

45. Furthermore, TRIPS-plus initiatives consequent in the dilution into a bilateral forum, as opposed to the plurality provided in multilateral fora, provided by the TRIPS. The imposition of standards by FTAs may ultimately disturb the balance of rights and obligations which are enshrined in the TRIPS Agreement,[85] and also have

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82 THE DOHA DECLARATION ON THE TRIPS AGREEMENT AND PUBLIC HEALTH AND THE CONTRADICTORY TREND IN BILATERAL AND REGIONAL FREE TRADE AGREEMENTS (2004), Available at http://www.quno.org/geneva/pdf/ec onomic/Occasional/TRIPS-Public-Health-FTAs.pdf.

83 World Health Organization, Report of the Commission on Intellectual Property Rights, Innovation and Public Health, Recommendation 4.26 (2006), available at http://www.who.int/intellectualproperty/ documents/thereport/CIPIHReport23032006.pdf [hereinafter WHO].

84 Fifty-Seventh World Health Assembly, May17–22,2004, (May 22, 2004), available at http:// apps.who.int/gb/ebwha/pdf_files/WHA57/A57_R14-en.pdf;

85 Preamble, Articles 7, 8, TRIPS AGREEMENT, 1994.

the potential to constrain the flexibilities provided to Member States in the TRIPS, particularly in areas which are of extreme significance to developing countries, such as transfer of technology, socio-economic development, promotion of innovation, public health and access to knowledge. Furthermore, they also tend to negate decisions which were taken multilaterally such as the Doha Declaration on the TRIPS Agreement and Public Health.

46. It is therefore submitted that the Policy must caution against entering into any international agreement that seeks to enforce TRIPS-plus standards, contrary to India's stance (as noted by the Policy itself) that its laws were compliant with international obligations.

### 3.5.3. On Limitations and Exceptions

47. It is observed that the Policy recommends that laws be enacted to address national needs,[86] but the only mentions limitations and exceptions as an area of study for future policy development.[87]It is submitted that while it is indeed necessary for further research to be undertaken in the area of limitations and exceptions, it is also critical to enact new laws and amend existing ones to foster a rich environment for limitations and exceptions, in order to achieve a holistic and balanced intellectual property framework. It is further submitted that this would also be in consonance with the objective of the negotiation of international treaties and agreements in consultation with stakeholders.

48. While the granting of exclusive rights over intellectual property is considered to be an incentive for further investments into innovative activities and the production of knowledge, allowing the exercise of the full scope of this exclusion in all circumstances may not meet the end goal of the enhancement of public welfare, using the intellectual property system. Therefore, it is essential that an intellectual property system be flexible allowing for certain limitations and exceptions in order to strike a balance between right holders, the public and third parties. The need for such flexibility in the intellectual property system of a country has also been highlighted by the World Intellectual Property Organization.

49. It is therefore suggested that the Policy include an additional recommendation for

86 ¶3.2 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 12.

87 ¶3.6 IPR Think Tank, NATIONAL IPR POLICY (First Draft) at page 13.

the inclusion, adoption and periodic renewal of limitations and exceptions in India's intellectual property laws, either be enacting new legislations or by amending existing legislations wherever applicable. It is further suggested that this recommendation also inform India's negotiations at the international level, where any agreement that India might potentially sign, not invalidate or narrow in any form any limitations and exceptions and provide for their continued exercise in the broadest possible scope and manner.

### 3.5.4. On Standard Setting

50. CIS commends the Policy's focus on standards in technology and standard setting organisations. CIS strongly supports the adoption of open standards as a measure that helps stimulate active competition amongst implementors of various standards, and thereby encourages innovation. The Department of IT finalized its Policy on Open Standards for e-Governance in 2010,[88] and CIS strongly supports this policy, and would encourage it be adopted by all state governments as well.
51. CIS strongly recommends developing and supporting the evolution of open standards. The Policy must not encourage use of IPR to limit access to standards, because these are the foundational rules any technology must adhere to enter the market or ensure quality.[89] CIS submits that access to these standards must not be limited by making them proprietary through IPR protection. Further, the Policy must support transparent standard setting processes and procedures in national and at international for a for all participants.
52. CIS further appreciates the endeavor to encourage the development of global standards influenced by technologies developed in India.
53. CIS submits that it is also important to ensure that India emerges as a global player in the technology sector, not just in the development of indigenous standards, but also in the equally important space of manufacturing using existing standards, particularly in light of the Government's recent "Make In India" and "Digital India" initiatives. It is further submitted however, that in most instances, these standards are protected by patents; where patents essential to a standard would be standard essential

88 *See 'Open Standards Policy'*, available at http://cis-india.org/news/open-standards-policy (last accessed January 28, 2015).

89 *See 'The BIS, Standards and Copyright'*, available at http://spicyip.com/2014/11/the-bis-standards-and-copyright.html (last accessed January 28, 2015).

patents. CIS suggests that the Policy recommend measures that might be adopted to ensure access to standards essential patents, including, for instance, the establishment of a government aided patent pool. It is submitted that addressing the question of access to standards and not just their development would be a holistic approach that the Policy should adopt.

On Objective 5: Commercialization of IP

54. CIS appreciates that the Policy seeks to promote licensing and technology transfer for intellectual property, and notes that the Policy also seeks to promote reasonable and non-discriminatory patent pooling to maximise the ability of smaller companies to commercialise IP and bring innovative solutions based on standards to the market.

55. CIS believes that the government establishing patent pools for digital technologies will promote access to knowledge and stimulate manufacturing in the information technology and electronics sectors in India, in line with the government's "Make In India" and "Digital India" initiatives. CIS has earlier urged the government to enable access to low cost access devices by establishing a government-aided patent pool of essential technologies, without which there is a high likelihood of such devices getting caught up in the 'patent wars' that have happened elsewhere around the world over smartphones.[90] CIS submits that the creation of government-aided patent pools and facilitation of cross-licensing will also be helpful in resolving issues created by patent thickets and gridlocks by reducing transaction costs for licensees and solving an economic cooperation problem.

## IV. Concluding Remarks

56. Debabrata Saha, the Deputy Permanent Representative of India to the United Nations, while speaking on the introduction of the Development Agenda at the World Intellectual Property Organization, with admirable clarity noted, "Let me start on a positive note by asking: with all the damage that TRIPS has wrought on developing countries could it possibly have a silver lining? Maybe — if we want to be generous. TRIPS, one might argue, did bring intellectual property to the forefront of consciousness of people everywhere, and, over time made them aware of

90 *See CIS' Letter for Establishment of Patent Pool for Low-cost Access Devices through Compulsory Licenses*, available at http://cis-india.org/a2k/blogs/letter-for-establishment-of-patent-pool-for-low-cost-access-devices (last accessed January 29, 2015).

the dangers inherent in a protective regime that takes little account of either public policy, or the state of development of a member country." It is thus imperative that when we fashion our public policy, we take account of the dangers he mentioned. He went on to note, "Intellectual property rights have to be viewed not as a self contained and distinct domain, but rather as an effective policy instrument for wide ranging socio-economic and technological development. The primary objective of this instrument is to maximize public welfare." We wholeheartedly support this position of the Indian government, and would encourage the IPR Think Tank to seek to maximize public welfare and creativity and innovation rather than maximizing IPR alone. Importantly, as Mr. Saha, speaking on behalf of the Indian government noted, IP is not an end in itself, contrary to what the current draft of the National IPR Policy seems to promote.

57. Flexibility is considered to be an essential characteristic in defining and shaping the intellectual property system of countries around the world. Such flexibility allows scope for further innovations and creations, thereby subserving the common good. As per Article 39 of the Constitution of India, "the State shall in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good." It is therefore submitted that the National IPR Policy of India should be contoured in such a manner that it encourages greater use of exceptions and limitations to the otherwise exclusionary use of intellectual property, encourages the expansion of the public domain, secures proportionality in enforcement of IP rights, promotes alternatives to IP — including open access to scholarly literature, open educational resources, free/open source software, open standards, open data, and aims to create a regime of intellectual property that aims to serve the public interest and not just the narrow interest of private right holders. Such an approach should not be merely rights-based, but look at interests of the general public, especially the poor, as well, in order to further the aim of the nation to create a more egalitarian society, and adopt the Directive Principles in the Constitution.