

The interplay between Competition, Innovation, and IPRs

R Abhishake Castro¹

Introduction:

The south Africa recently adopted anew Intellectual property policy, which seeks to align IP with the country's national development plan. Like that the IP policy of a country must be aligned to the country's objectives of promoting local manufacturing, innovation, competitiveness and transformation of industry. The Indian IP policy adopted in 2016 overlooks the legislative intent and policy objective behind the patent regime something that other nations are taking note of. Indian IP policy does not make a reference to other existing policies like Health or Science and Technology, thereby disconnecting it from the country's development needs. The approach Indian IP policy offers only lip services to the use of flexibilities and does not offer any measures to optimise the use of flexibilities and use of IP and Competition law. Indian IP policy fails to take notice of obligations under fundamentals Rights and Directive Principles of the right to health engendered in its constitution while promoting IP rights. Instead it focuses on enhancing the protection and Enforcement of IPRs, which goes beyond its international obligations (referred as 'TRIPS –Plus') without taking into consideration its negative implications. India, which is at the fore front of international fora in defending the TRIPS Flexibilities, ignores their use for itself at the domestic level.

The National Development Plan (NDP) of South Africa calls for a greater emphasis on innovation, improved productivity, an intensive pursuit of a knowledge economy and the better exploitation of comparative and competitive advantages. Intellectual Property (IP) is an important policy instrument in promoting innovation, technology transfer, research and development (R&D), creative expression, consumer protection, industrial development and more broadly, economic growth. South Africa's economic development strategy aims to accelerate growth along a path that generates sustainable and decent jobs in order to reduce poverty and the

¹ Student, School of Excellence in Law, Chennai

extreme inequalities that characterise our society and economy. The National Industrial Policy Framework (NIPF), implemented through the Industrial Policy Action Plan (IPAP), is a central component of our economic development strategy. The NIPF and IPAP seek to encourage and upgrade value-added, labour-absorbing industrial production, and diversify the economy, by moving away from the current over-reliance on commodities and non-tradable services. Knowledge, innovation and technology are increasingly becoming the drivers of progress, growth and wealth. Therefore, South Africa needs to transition towards a knowledge economy, and away from an over-reliance on natural resources. A specific framework of conditions is necessary to enable South Africa to make this transition, and an IP Policy is one of the core elements required to achieve this objective. The South African Constitution already protects intellectual property rights (IPR) from arbitrary deprivation and in recent decades, South Africa has made significant strides in the just protection, administration, management, and deployment of IP. Statutes relating to IP in South Africa include, but are not limited to: Intellectual Property Rights from Publicly Financed Research and Development Act

- 51 of 2008 National Environmental Management: Biodiversity Act 10 of 2004
- Patents Act 57 of 1978²
- Merchandise Marks Act 17 of 1941³
- Copyright Act 98 of 1978⁴
- Designs Act 195 of 1993⁵
- Plant Breeders' Rights Act 15 of 1976⁶

2 Patents Act 1978, No. 57, Acts of Parliament, 1978.

3 Merchandise Marks Act, 1941, No. 17, Acts of Parliament, 1941.

4 Copyright Act 1978, No. 98, Acts of Parliament, 1978.

5 Designs Act 1993, No. 193, Acts of Parliament, 1993.

- Trade Marks Act 194 of 1993⁷
- Despite attention paid to IP law-making in the country, there is a need for a comprehensive IP Policy that will promote a holistic, balanced and coordinated approach to IP that is mindful of the many obligations mandated under the South African Constitution

The Goals of Comprehensive IPPolicy:

- To consider the development dynamics of South Africa and improve how IP supports
- small institutions and vulnerable individuals in society, including in the domain of public health to nurture and promote a culture of innovation, by enabling creators and inventors
- to reach their full potential and contribute towards improving the competitiveness of our industries to promote South African arts and culture
- To solidify South Africa's various international obligations, such as the Convention on Biological Diversity (CBD) and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol on ABS), in the service of our genetic resources and traditional knowledge associated with genetic resources.

The key reforms include:

The introduction of substantive search and examination (SSE) for patents, which is a

- key step towards ensuring that the patent regime fulfils its purpose of stimulating genuine innovation. This will benefit patent holders by granting them rigorously assessed rights, and benefit the public at large by ensuring that market exclusivity is only granted when appropriate.

⁶ Plant Breeders' Rights Act, 1976, No. 15, Acts of Parliament, 1976.

⁷ Trade Marks Act, 1993, No. 194, Acts of Parliament, 1993.

Importantly, SSE will not only apply in the health sphere; it will eventually have much broader application. However, with due regard to capacity constraints and resources, the IMCIP – in consultation with diverse stakeholders – will determine the initial fields in which full SSE will occur. These fields will be progressively expanded, as the capacity of the state increases. The leveraging of flexibilities contained in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to ensure that South Africa protects IPRs while simultaneously promoting public health, local manufacture, research and development, innovation, food security, environmental considerations, transfer of technology and broad socio-economic development. The promotion of regional cooperation and integration in IP.

- A commitment to all relevant international obligations South Africa is party to
- The promotion of economic empowerment through, among other means, the
 - implementation of the “utility model” to support the registration of patents by resident small, medium and micro-enterprises (SMMEs), historically disadvantaged individuals, and companies who are operating in the informal sector. This entails enacting exclusivity similar to a patent right, granted by a state, to an inventor or the inventor’s assignee, for a fixed period of time. However, the terms and conditions for granting a utility model are slightly different from those for ordinary patent, including a shorter term of protection and less stringent patentability requirements. The term “utility model” is sometimes addressed differently in other countries, with the terms “petty patents”, “short-term patents” or “innovation patents”. A coordinated approach to creating awareness about IP among South Africans, so as
 - to protect nationally-owned IP that is related to indigenous resources, traditional innovation and traditional knowledge. The creation of a system for protection for traditional knowledge which will guard
 - against misappropriation and exploitation, as well as promote further research and development into products and services based on traditional knowledge. The promotion of international best-practices in IP that align with South Africa’s development objectives. The strategy employed in this comprehensive IP Policy includes: Advancing a balanced and coordinated approach to IP that regulates IPRs in line with

- the South African Constitution Introducing key policy reforms that account for the development dynamics of South
- Africa Promoting innovation and a knowledge economy
- Leveraging competitive and comparative advantages to advance the transformation
- of the South African economy,the overarching objective is to ensure that this comprehensive IP Policy becomes a just, balanced, and integral part of the broader development strategy for South Africa by assisting in transforming the South African economy, and thereby leveraging human resources for the broader economic benefit, increasing local manufacturing, and generating more employment. The comprehensive IP Policy will be implemented in a phased approach. The current document constitutes the first phase in what will be a comprehensive policy to be developed and updated over the medium term. Phase I covers IP and public health, coordination in international forums, and the implementation of commitments undertaken in international agreements. Phase I priorities have been identified on the basis of South Africa's development objectives, supplemented by research, analysis, and experience, as well as assessments of existing capacity to implement the measures outlined herein. The comprehensive IP Policy proposes key reforms that are aimed at advancing South Africa's socio-economic development objectives as outlined in key policy documents of the national government, such as the National Development Plan (NDP), the New Growth Path Framework (NGP), National Drug Plan, NIPF and the various iterations of IPAP.

The Indian IP policy should advance following objectives in the Indian context and create necessary framework for national development:

- Engender the ethos of the Constitution
- Align the country's IP regime to its NDP and broad industrial policy
- Develop a coordinated inter-Ministerial approach to IP
- Strike a balance between the owners and users of IP

- Stimulate genuine innovation
- Facilitate the development of key industries while striking a balance with the public
- interest Foster investment and technology diffusion
- Adopt a coordinated approach to IP in sub-regional, regional and international forums
Promote public health
- Comply with international obligations, in particular those pertaining to human rights

IP and Competition law:

.. Competition law and policy have, in the recent past, been applied to cases involving IP and the public interest. Building on this recent history, a joint effort is recommended, along with the Competition Commission, to clarify the remit and scope of the intersection between competition law and IP.

The theoretical underpinning for providing IP protection to medicines is that the development of new medicines involves high costs and risks, and as such, IP protection is considered a legal method by which innovators may recoup these investments. Without adequate IP protection, the theory posits, these investments simply would not be made. Apropos this theory, currently, a global debate is underway, most prominently at the WHO, around incentive models in the context of medicines. Competition policy in South Africa, as reflected in the preamble to the Competition Act 89 of 1998 (Competition Act) seeks to address, amongst other things, inadequate restraints against anticompetitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans. It thus aims to open up the economy to greater ownership by a larger number of South Africans in order to attain an efficient, competitive, economic environment, one that balances the interests of workers, owners and consumers, and focuses on the development of all South Africans. This is accomplished by preventing cartels aimed at price-fixing, limiting output or otherwise restricting competition, by

preventing firms from gaining market power in unjustified ways, including through anticompetitive mergers, thus raising barriers to market entry by new firms. Competition policy is also concerned with preventing firms with market power from abusing their dominant positions, including by charging excessive prices to the detriment of consumers. The role of competition authorities is therefore to ensure markets function efficiently and to the benefit of both consumers and producers. Competition regulation has a role in ensuring that patents are not used as platforms for illegitimately extending market power. In addressing the interface between IP and competition, the TRIPS Agreement gives members the scope to use competition policy as an instrument to facilitate access to medicines. Article 8 on its own, and in particular, read through the interpretive lens of the Doha Declaration on TRIPS and Public Health, recognizes the right of WTO members to take measures aimed at restraining anticompetitive practices. Both competition law and patent law together can be used to implement competition related TRIPS flexibilities and advance consumer welfare. Chapter 2 of the Competition Act, which covers practices such as horizontal restrictions, vertical restrictions, and abuse of dominance, and various licensing provisions in the Patents Act are pertinent in this regard. 32 Under provisions of the Competition Act, a party can apply for an exemption from the application of parts of the provisions of the Competition Act, subject to relevant criteria. More specifically, in limited circumstances, section 10(4) of the Competition Act exempts agreements or practices which may relate to the exercise of specific IPRs such as patents, copyright and trademarks. Examples of agreements which may fall within the scope of exemption provisions under the Competition Act include delayed entry agreements, no challenge clauses, market division and allocation, tying, rebates and discounts, exclusive licensing, refusal to license or supply, price fixing, information sharing and standard setting. Competition authorities regulate market conduct and intervene in the exercise of IPRs where market distortions are created to the detriment of consumer welfare. The intervention of competition authorities is done on a case-by-case basis, informed by jurisprudence and principles developed over time, comparative analysis, and interaction with other regulators, to ensure that interventions lead to long-term competitive benefits. The application and enforcement of competition law ought to be done in a manner that fosters the protection and enforcement of competition on the merits, while recognizing IPRs and their potential to contribute to technological innovation, the knowledge economy, as well as the transfer and dissemination of technology to society which can advance social and economic

welfare. Although South African jurisprudence in relation to the interplay between competition law and IPRs is still in its infancy, there is scope to develop fields of work and guiding principles.

South African Intellectual Property Policy and lesson for India:

South Africa has recently adopted a new intellectual Property Policy, Which Seeks to Align IP with country's national development plan." The IP policy must be informed inter alia by the Constitution. National Development Plan (NDP), the National industrial policy framework(NIPF) and the various iterations of the industrial policy Action Plan(IPAP). It should also be aligned to the Country's objectives of Promoting local manufacturing, Competitiveness, and transformation of industry in South Africa "the Policy states.

IP policy and public health:

What Works for the new SA Policy is that it addresses the interface between IP and Public Health?

In facilitating local Production and export of Pharmaceuticals in line with its industrial policy, the new policy recommends the following changes: introduction of Substantive Patent search and examination, introduction of Patent opposition, strengthening of patentability criteria, incorporation of disclosure requirements, Parallel importation, exceptions, provisions to regulate voluntary licensing, Compulsory licenses, use of IP and Competition law.

All these Provisions utilize flexibilities Provided in the TRIPS (Trade related aspects of IP Rights) Agreement to Safeguard Development Objectives.

TRIPS flexibilities:

The implementation of SA's Patent Law Would be on Par with the Indian Patents Act, which successfully incorporated TRIPS flexibilities a long time ago while Complying with the TRIPS Agreement. But, there's a difference.

In Comparison to South Africa, India does have a history of Considering national needs while Complying with International IP obligations. As a result, the Indian Patents Act, along with Various Judicial Decisions, has Provided a balanced framework for the Protection of Public health, food security, and transfer of technology.

However, India's IP Policy adopted in 2016 overlooks the legislative intent and Policy objective behind the Patent regime—something that other nations are taking note of.

- Unlike SA's Policy, India's IP Policy does not make a reference to other existing Policies like Health or Science and Technology, thereby disconnecting it from the Country's development needs
- The approach of the Indian IP policy offers only Lip service to the use of Flexibilities and does not offer any measures to Optimize the Use of Flexibilities
- Ironically, it seems to move away from its orientation of optimum utilization of the TRIPS flexibilities incorporated in the Patents Act.

IP and Socio-Economic goals:

The SA Policy mentions that it must engender the ethos of the South African Constitution and also reflect the Country's broader Social economic development objectives. The Policy is aligned to constitutional objectives and Socio Economic Goals.

The South Africa Constitution Provides a balanced approach to Property rights in general by affording Protection against arbitrary deprivation of Property, while also taking into account the Public Interest. In this regard, Public interest includes the nations Commitment to bring about reforms that Promote equitable access to services and Products involving IP, such as in the Sphere of health.

India's need to give more importance and conclusion:

India's IP Policy fails to take notice of obligations under Fundamental Rights and Directive Principles of the right to health engendered in its Constitution While Promoting IP Rights, instead it focuses on enhancing the Protection and Enforcement of IPRs, which goes beyond

its international obligations (referred as “TRIPS-plus”) without taking into Consideration its negative implications. India, which is at the forefront of international fora in defending the TRIPS Flexibilities, ignores their use for itself at the domestic level.