

# A Guide to the Proposed India-European Union Free Trade Agreement

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3 July 2010

## Part I

### Preface

Free trade agreements (FTAs) are treaties negotiated between states that generally lower barriers to trade in order to benefit mutually their contracting parties and that, once ratified, carry the full force of law in their member countries. Unfortunately, as in the case of current proposed FTA between India and the European Union (EU), they are often deliberated upon in committees to which the public lacks access. But their relative distance from the public during negotiations should not obscure their significant impact upon the lives of millions. Provisions included in FTAs may dictate commercial relationships within a state as well as between or among actors in different states, and moreover they may supersede longstanding national laws. Key among the issues most often encountered in FTAs negotiated today are those implicating intellectual property (IP) and intellectual property rights (IPRs), the careful navigation of which has become vital particularly for developing countries in an increasingly technologized world. Intellectual property rights may be used both to stifle and to encourage innovation, to maintain the status quo and to effect change at the individual and societal levels.

In its ongoing negotiation for a FTA with the EU, a process that began in 2007 and is expected to end sometime this year, India has won several significant IP-related concessions. But there remain several IP issues critical to the maintenance of its developing economy, including its robust entrepreneurial environment, that India should contest further before ratifying the treaty. This guide covers the FTA's IP provisions that are within the scope of CIS' policy agenda and on which India has negotiated favorable language, as well as those provisions that it should re-negotiate or oppose.<sup>1</sup>

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<sup>1</sup>References not otherwise identified are to the IP chapter in the draft India-EU FTA as of

A summary of findings precedes the general introduction.

## Part II

# Summary of Major Issues

- India has become a de facto leader of developing countries at the WTO, and an India-EU FTA seems likely to provide a model for FTAs between developed and developing states well into the future.
- The EU has proposed articles on reproduction, communication, and broadcasting rights which could seriously undermine India's authority to regulate the use of works under copyright as currently provided for in the Berne Convention, as well as narrowing exceptions and limitations to rights under copyright.
- The EU asserts that copyright includes "copyright in computer programs and in databases," without indicating whether such copyright mirrors or supersedes that provided for in the Berne Convention. Moreover, by asserting that copyright "includes copyright in computer programs and in databases," the EU has left open the door for the extension of copyright to non-original databases.
- India should explicitly obligate the EU to promote and encourage technology transfer – an obligation compatible with and derived from TRIPS – as well as propose a clear definition of technology transfer.
- The EU has demanded India's accession to the WIPO Internet Treaties, the merits of which are currently under debate as India moves towards amending its Copyright Act, as well as several other international treaties that India either does not explicitly enforce or to which it is not a contracting party.
- In general, the EU's provisions would extend terms of protection for material under copyright, within certain constraints, further endangering India's consumer-friendly copyright regime.
- An agreement to establish arrangements between national organizations charged with collecting and distributing royalty payments may obligate such organizations in India collect royalty payments for EU rights holders on the same basis as they do for Indian rights holders, and vice versa in the EU, but more heavily burden India.
- The EU has proposed a series of radical provisions on the enforcement of IPRs that are tailored almost exclusively to serve the interests of rights

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April 23, produced during the sixth round of negotiations held in March in New Delhi.

holders, at the expense of providing safety mechanisms for those accused of infringing or enabling infringers.

- The EU has proposed, under cover of protecting intermediate service providers from liability for infringement by their users, to increase and/or place the burden on such providers of policing user activity.

## Part III

# Introduction

The India-EU FTA has proved especially controversial because the EU is seeking to impose a more restrictive IP regime on India. India has thus far resisted implementing more than the base level of restrictions required – which nonetheless are quite extensive and circumscribe greatly the authority of national policy makers – by the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).<sup>2</sup> The World Trade Organization (WTO) drafted TRIPS, and all WTO members, including India, have accepted the agreement.

Among other things, TRIPS sets minimum standards for members' IP regimes, regarding computer programs, irrespective of their form, as literary works protected under the Berne Convention (Art. 10.1); clarifying that databases, by reason and force of design, are eligible for copyright protection even though their content is not necessarily eligible for such protection (Art. 10.2); extending copyright protection for literary works to 50 years after an author's death (Art. 12); limiting national exceptions to copyright to "certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder" (Art. 13); and requiring that patents be available for any inventions regardless of the nature of the technology involved (Art. 27.1). The treaty also establishes general enforcement procedures for IP rights (IPRs) and subjects disputes between contracting parties to the World Trade Organization's dispute settlement procedures.<sup>3</sup>

But there is more at stake in the India-EU FTA than India's interest in retaining its current level of authority over IP. A report from the NGO Traidcraft notes that developing countries which have entered into FTAs with more developed partners have "faced serious risks to their vulnerable sectors [including] small and medium enterprises and workers – as well as reduced flexibility to implement national policies," resulting partly from a lack of regulatory authority.<sup>4</sup> The report further notes that India has become a de facto leader of developing countries at the WTO, working to mitigate just the kinds of risks

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<sup>2</sup>"Agreement on Trade-Related Aspects of Intellectual Property Rights," [http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm).

<sup>3</sup>See "Overview: The Trips Agreement," [http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm).

<sup>4</sup>Sophie Powell, "The EU-India FTA: initial observations from a development perspective," [http://www.traidcraft.co.uk/Resources/Traidcraft/Documents/PDF/tx/policy\\_report\\_eu\\_india\\_FTA2.pdf](http://www.traidcraft.co.uk/Resources/Traidcraft/Documents/PDF/tx/policy_report_eu_india_FTA2.pdf), 5.

that it is now facing in its negotiation with the EU. In this context, taking into account India's unique status both as a developing country and a leader among its peers, an India-EU FTA seems likely to provide a model for FTAs between developed and developing states well into the future.

## Part IV

# Analysis of the Proposed FTA

## 1 Context

### 1.1 Developmental Focus

In his indispensable analysis of the India-EU FTA as proposed last June – to which this post is greatly indebted and which often it will cite – University of Buenos Aires Professor Carlos Correa notes that the agreement's objectives overlooked developmental differences between India and the EU in favor of a standardized IP regime explicitly extending beyond TRIPS and other IP treaties (Art. 8.1.2), treating IPRs as ends in themselves rather than as means to promoting Indian development.<sup>5</sup> Moreover, Correa notes that the objectives overlook these differences in spite of "the European Parliament's repeated calls on the European Commission not to seek TRIPS-plus standards of protection in developing countries."<sup>6</sup>

India has since, however, proposed qualifying language recognizing "that the protection and enforcement of [IP], in a manner appropriate to and justified by [the Parties'] levels of development, plays a key role in fostering creativity, innovation and competitiveness" (Art. 1.2). India has also clarified that its objective is to "achieve a level of protection and enforcement of intellectual property rights that is consistent with the TRIPS Agreement" (Art. 2[a]) – and not necessarily extending beyond it. And it has proposed that the parties "agree that an adequate and effective enforcement of [IPRs] should take account of the development needs of India, provide a balance of rights and obligations between right holders and users and allow both parties to protect public health and nutrition" (Art. 8.2).

### 1.2 Scope of the Agreement

Both India and the EU define IP as consisting of or applying to copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits, and undisclosed information. The EU also

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<sup>5</sup>Carlos M. Correa, "Negotiation of a Free Trade Agreement European Union-India: Will India Accept TRIPS-Plus Protection?" <http://www.eed.de/dyn/download?entry=page.en.pub.de.365>, 2.

<sup>6</sup>Ibid.

includes protection against unfair competition as referred to in the Paris Convention, to which India is already a contracting party, as an IPR. While India follows TRIPS and the Berne Convention in protecting computer programs as literary works, as well as applying copyright law to compilations of data or other material which by reason of the selection or arrangement of their contents constitute intellectual creations, the EU states generally that copyright includes "copyright in computer programs and in databases," without indicating whether such copyright mirrors or supersedes that provided for in the Berne Convention (Art. 8.3). Thus the implications of the EU's language are unclear and best avoided lest they unduly tighten India's copyright regime, which has been praised as the best in the world for consumers.<sup>7</sup>

Originally, the EU sought to establish *sui generis* protection – which covers material outside of IP's traditional categories such as copyright, patent, and trademark – for "non-original databases" whose contents are in the public domain and whose creator has not spent enough time or effort to justify their consideration as legitimate intellectual creations qualifying for copyright. India has rejected such explicit protection, which helps to ensure that information in the public domain will remain publicly accessible and that it cannot be legally obscured merely by its inclusion in a database. Here, too, India finds itself in the company of the United States, which has refused to extend copyright to non-original databases.

However, by asserting that copyright "includes copyright in computer programs and in databases," the EU has left open the door for the extension of copyright to non-original databases. India should maintain its position and insist that the FTA clarify that copyright extends only to original databases constituting intellectual creations, and that computer programs shall not be subject to any further protectionary measures aside from those accorded to literary works under the Berne Convention.

## 2 Issues

### 2.1 Technology Transfer

Technology transfer is "the diffusion of practical knowledge from one enterprise, institution or country to another [which] may be accompanied by transfer of legal rights to use of the technology, such as sale of licensing of associated [IPR]." <sup>8</sup> Correa indicates <sup>9</sup> that India has previously suggested that TRIPS risks encouraging "exorbitant and commercially unviable prices for transfer or dissemination of technologies held through. . . IPRs" and also that it has noted the

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<sup>7</sup>"Consumers International IP Watchlist Report 2010," <http://a2knetwork.org/watchlist>. Full disclosure: The Centre for Internet and Society was asked to contribute information to this report.

<sup>8</sup>Institute for Trade & Commercial Diplomacy, "Glossary," [http://www.itcdonline.com/introduction/glossary2\\_q-z.html](http://www.itcdonline.com/introduction/glossary2_q-z.html).

<sup>9</sup>Correa, 2.

lack of TRIPS provisions ensuring "an effective transfer of technology [from developed to developing countries] at fair and reasonable costs."<sup>10</sup>The proposed India-EU FTA initially lacked any such provisions as well, placing on India the responsibility for creating an enabling environment for technology transfer.

It is worth noting that TRIPS itself obligates "Developed country Members [to] provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base" (Art. 66.2). However, ambiguity in the definitions of "developed country members," "least-developed country members," and "technology transfer" has resulted in a lack of clarity regarding which countries are obligated to do what and for whom.<sup>11</sup> Thus India stands to gain from explicitly obligating the EU to promote and encourage technology transfer – an obligation compatible with and derived from TRIPS – as well as proposing a clear definition of technology transfer. New Zealand, for example, broadly interprets technology transfer to "include training, education and know-how, along with any capital component," and considers that its key modes include

1. physical objects or equipment;
2. skills and human aspects of technology management and learning
3. designs and blueprints which constitute document-embodied knowledge on information; and
4. production arrangement linkages within which technology is operated.<sup>12</sup>

India would clearly benefit from a similar definition obligating the EU to lend its expertise in the included areas.

Interestingly, the India-EU FTA's original language regarding technological transfer came from the EU-CARIFORUM Economic Partnership Agreement (EPA) signed in October 2008 between the EU and the Caribbean Forum of African, Caribbean and Pacific States.<sup>13</sup> Although Correa does not acknowledge this fact, he does suggest that India might benefit by incorporating additional technology transfer provisions from the EPA<sup>14</sup> – which it has since done.

In fact, India has inserted two more provisions lifted directly from the EU-CARIFORUM EPA, requiring that:

1. The Parties agree to take measures, as appropriate, to prevent or control licensing practices or conditions pertaining to [IPRs which] may adversely

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<sup>10</sup>Permanent Mission of India to the World Trade Organization, "Preparations for the 1999 Ministerial Conference: Proposals on IPR Issues," <http://www.commerce.nic.in/D644e.doc>, 2.

<sup>11</sup>Suerie Moon, "Does TRIPS Art. 66.2 Encourage Technology Transfer To The LDC's?: An Analysis Of Country Submissions To The TRIPS Council (1999-2007)," <http://ictsd.org/i/publications/37159/>, 2.

<sup>12</sup>Ibid., 3.

<sup>13</sup>See "Trade for Development European Union – Caribbean Economic Partnership Agreement," <http://trade.ec.europa.eu/doclib/html/124787.htm>.

<sup>14</sup>Correa, 5.

affect the international transfer of technology and that constitute an abuse of [IPRs] by right holders or an abuse of obvious information asymmetries in the negotiation of licences (Art. 9.2); and that

2. [The EU] shall facilitate and promote the use of incentives granted to institutions and enterprises in its territory for the transfer of technology to institutions and enterprises of the Republic of India. (Art. 9.3)

These are both positive additions to the FTA which will encourage development in India by providing a framework in which to limit IP abuse and placing the responsibility for creating an enabling environment at least partly on the EU, which currently has a greater store of practical knowledge than India. Moreover, by facilitating technology transfer to India, the EU will help encourage the economic growth that FTAs generally are intended to serve and from which trading partners mutually benefit.

Finally, India has added a provision stating that "The Parties shall ensure that the legitimate interests of the [IPR] holders are protected as per the respective domestic laws" (Art. 9.4). The scope and import of this provision are unclear, as TRIPS already ensures that member states shall afford protection to IP holders from other states under its national treatment provision (Art. 3).

## **2.2 Copyright and Related Rights**

### **2.2.1 International Treaties**

The EU has demanded India's accession to a number of international treaties that India either does not explicitly enforce or to which it is not a contracting party. Accession to these treaties would fundamentally alter the landscape of a copyright regime that has garnered praise as the best in the world for consumers.

Both India and the EU agree on compliance with Article 1 through 21 of the Berne Convention for the Protection of Literary and Artistic works and appendix thereto (1971) (Art. 11.1), to which India is a contracting party and which it explicitly enforces. However, the EU has also requested India's compliance with Articles 1 through 22 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations; Articles 1 through 14 of the WIPO Copyright Treaty (WCT); and Articles 1 through 23 of the WIPO Performance and Phonograms Treaty (WPPT) (Art. 11.1).

India has signed and complies with the Rome Convention. But India has signed neither the WPPT nor the WCT, collectively known as the WIPO Internet Treaties. Proposed amendments introduced to the India's Copyright Act of 1957, however, aim to bring the country into basic conformity with the Internet Treaties. An analysis of India's potential accession to the WIPO Internet Treaties is beyond the scope of this guide, though many have criticized such a move. Professor Ruth Okediji of the University of Minnesota Law School, for example, has asserted that the "WIPO Internet Treaties marginalize collaborative forms of creative engagement with which citizens in the global South have

long identified and continue in the tradition of assuming that copyright's most enduring canons are culturally neutral."<sup>15</sup>

### **2.2.2 Terms of Protection**

In general, the EU's provisions would extend terms of protection for material under copyright, within certain constraints, further endangering India's consumer-friendly copyright regime. India and the EU agree, for example, that performers should retain copyright over their performances for at least 60 years after the performances themselves, but the EU proposes extending the term of protection for at least 50 years from the date of the first lawful publication or lawful communication to the public of the performance (Art. 11.3).

Where India proposes merely that phonograms, or sound recordings, shall remain under copyright for at least 60 years after publication, the EU proposes instead a term of at least 50 years after fixation in material form – unless they are lawfully published or lawfully communicated to the public, in which case copyright would run for at least 50 years after such events, dating from whichever is earlier (Art. 11.3). And where India proposes that films remain under copyright for at least 60 years after publication, the EU proposes instead a term of at least 50 years from the date of first lawful publication or lawful communication to the public, whichever is earlier (Art. 11.3).

Both countries agree that broadcasters shall hold copyright over their broadcasts for at least 25 years after first transmission, whether by wire or over the air, including by cable or satellite (Art. 11.3). Such an agreement, unfortunately, bears comparison with the proposed and oft-maligned WIPO Treaty on the Protection of Broadcasting Organizations, which has been criticized as both unnecessary and harmful to copyright owners whose work is already protected.<sup>16</sup> It is, however, consistent with India's 1994 amendment to its Copyright Act of 1957.

### **2.2.3 Arrangements Facilitating Content Access and Delivery and Transfer of Royalties**

Both the EU and India have agreed to "facilitate the establishment of arrangements between their respective collecting societies with the purpose of mutually ensuring easier access and delivery of content between the territories of the Parties, as well as ensuring mutual transfer of royalties for use of the Parties' works or other protected subject matters" (Art. 11.4).

Correa notes that in light of the FTA's reference to TRIPS, "this provision might be interpreted as ensuring the application of the principle of national treatment to right-holders with regard to royalty payments by collecting societies."<sup>17</sup> Specifically, TRIPS provides that "Each Member shall accord to the

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<sup>15</sup>Ruth Okediji, "The Regulation of Creativity Under the WIPO Internet Treaties," [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1433848](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1433848), Abstract.

<sup>16</sup>Public Knowledge, "WIPO Broadcasters Treaty," <http://www.publicknowledge.org/issues/wipobroadcasters>.

<sup>17</sup>Correa, 7.



nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of [IP]" (Art. 3.1). In other words, Indian reproduction rights organisations might be obligated to at least collect royalty payments for EU rights holders on the same basis as they do for Indian rights holders, following relevant Indian law, and vice versa in the EU. This would seem more heavily to burden India than the EU, whose royalty collection and distribution infrastructure is much more developed than India's.

#### **2.2.4 Reproduction, Communication, and Broadcasting Rights**

The EU has proposed articles on reproduction, communication, and broadcasting rights (Art. 11.4-11.5) which could seriously undermine India's authority to regulate the use of works under copyright as currently provided for in the Berne Convention, which has successfully protected the interests of rights holders in both developed and developing countries since 1979. The Berne Convention provides that generally authors "shall have the exclusive right of authorizing the reproduction of these works, in any manner or form," (Art. 9.1). However, the convention also provides a limitation to Article 9 – under certain conditions – in any developing country "which, having regard to its economic situation and social or cultural needs, does not consider itself immediately in a position to make provision for the protection of all the rights as provided for" (Appx. Art. 1.1). Such a country "may substitute for the exclusive right of reproduction provided for in Article 9 a system of non-exclusive and non-transferable licenses" (Appx. Art. 3.1). The EU, unfortunately, would like to ensure that India retains no such right of substitution.

Moreover, the EU has proposed restricting exceptions and limitations to rights under copyright (included in Art. 11.1-11.9) to "certain special cases which do not conflict with a normal exploitation of the subject matter and do not [unreasonably] prejudice the legitimate interests of the right holders in accordance with the conventions and international Treaties to which they are Parties" (Art. 11.10.1).

India has thus far accepted none of the EU's proposals regarding reproduction, communication, and broadcasting of protected material, nor should it; the rights provided to authors and other rights holders by TRIPS and Berne are more than sufficient to protect rights holders' interests. Importantly, too, the limited exceptions regarding reproduction rights (and also translation rights) in Berne remain necessary for developing countries like India, whose growing economies rely in part on the considered reproduction and communication of IP that, lacking Berne's exception, would remain unavailable.

#### **2.2.5 Technological Protection Measures and Rights Management Information**

Prior to the current draft FTA, Correa reports that the copyright section contained "two detailed provisions" on technological protection measures (TPMs) (including anti-circumvention measures) and rights-management information

(RMI), each of which, "if broadly defined, may drastically limit access to knowledge and put a significant obstacle to the implementation of educational policies."<sup>18</sup> Technological protection measures are mechanisms designed to limit or obstruct the use of rights-protected information in digital form – such as code preventing users from making copies of music or software – while anti-circumvention measures are employed to inhibit technology users from bypassing TPMs. Such measures rarely discriminate between legal and illegal uses of the information under their "protection," and therefore they often restrict wholly lawful user activity. This results in the establishment of a de facto copyright regime controlled by commercial producers and distributors whom are unaccountable to the public.

India appears to have succeeded in striking the provisions on TPMs from the draft FTA. It should hold fast to this position. Moreover, provisions on TPMs and anti-circumvention measures are already implicated in the WIPO Internet Treaties to which the EU would like India to accede, and the merits of which India is currently debating as it moves towards amending its Copyright Act. Therefore TPMs deserve full consideration as part of India's national debate over copyright, and not solely within a bilateral trade agreement.

The draft FTA still includes a definition of "rights-management information" as "any information provided by right holders which identifies the work or other subject-matter referred to in this Agreement, the author or any other right holder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information" (Art. 11.5*bis*1). Additionally, it states that Article 11.5.2 – which provides rights holders with "the exclusive right to authorize or prohibit the making available to the public [of their information under copyright] by wire or wireless means" – "shall apply when any these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject-matter referred to in this Agreement" (Art. 11.5*bis*3). And it provides that "distribution, importation for distribution, broadcasting, communication or making available to the public works or other subject matter protected under this Agreement from which electronics rights-management information has been removed or altered without authority" constitutes infringement (Art. 11.5*bis*1).

Rights-management information is not harmful in and of itself, but India should make clear that RMI shall not itself serve as a ground for expanded copyright protection, and that information items including RMI will remain subject to all the exceptions and limitations to copyright accorded by Indian law. Again, however, like TPMs, issues related to RMI are implicated in the WIPO Internet Treaties and thus more properly belong to debates about India's Copyright Act.

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<sup>18</sup>Ibid., 8.

## 2.3 Patents

### 2.3.1 International Treaties

Both India and the EU have agreed to comply with the Patent Cooperation Treaty (PCT), which was concluded in 1970 and provides a unified procedure for filing patent applications that has been implemented by all contracting parties – including India, which ratified the treaty in 1998 (Art. 17.1[a]). The EU is also seeking India's accession to the Patent Law Treaty (PLT), which was concluded in 2000 and harmonizes additional patent procedures, such as requirements to obtain filing dates for applications, and the form and content of applications. Only 25 states thus far are contracting parties to the PLT, which India has not ratified.

In fact, Correa suggests that the PLT's implementation may pose difficulties for India because, among other things, it limits the grounds for revoking or invalidating a patent "in a way that may exclude the possibility of taking these measures in case of lack of disclosure" of the origin of a biological material, as required by the Indian Patent Act.<sup>19</sup> However, he also notes that in the EU-CARIFORUM EPA, the EU agreed to "a softer requirement" establishing that parties "shall endeavour to accede" to the PLT (Art. 147.1.3).<sup>20</sup> India should push for a similar requirement in order to maintain its authority over patent revocation and invalidation, especially considering the lack of international consensus on the PLT.

### 2.3.2 Enforcement of Intellectual Property Rights

The EU has proposed a series of radical provisions on the enforcement of IPRs under the draft FTA. These provisions, contained in the draft's longest section, manifest the greatest divide between the interests of India and the EU, respectively.

In general, India has proposed incorporating language lifted directly from TRIPS' enforcement provisions, including those regarding general obligations (Art. 21), evidence (Art. 23), measures for preserving evidence (Art. 24), rights of information (Art. 25), provisional and precautionary measures (Art. 26), corrective measures (Art. 27), injunctions (Art. 28), and damages (Art. 28). In each of these areas, however, the EU has proposed "complementary measures, procedures, and remedies" that in some cases substantially increase India's obligations under TRIPS (Art. 21.1). These measures include a series of provisions on the liability of intermediate service providers whose users are found to have infringed IPR. Although the draft FTA does not define "intermediate service providers," typically the term includes Internet access and telecommunications providers, and may also include web hosting, e-mail, and other online communications service providers, so that the FTA potentially subjects a large set of actors to increased scrutiny and regulation.

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<sup>19</sup>Ibid., 9.

<sup>20</sup>Ibid.

Because they are so wide-ranging and extensive and would compel India to dedicate far greater resources to police IP infringement – and in fact to revamp its entire system for adjudicating IP disputes – the EU’s enforcement provisions deserve special scrutiny. They are tailored almost exclusively to serve the interests of rights holders, at the expense of providing safety mechanisms for those accused of infringing or enabling infringers.

Specifically, the EU proposes that:

- the parties agree "to order, where appropriate and following an application, the communication of banking, financial or commercial documents under the control of the opposing entity, subject to the protection of confidential information" (Art. 23.1);
- measures to preserve evidence "may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto" (Art. 24);
- authorities may compel the provision of "information on the origin and distribution networks" of infringing goods and services by persons possessing, using, providing, or otherwise identified as "involved in the production, manufacture or distribution of the goods or provision of the services" (Art. 25.1);
- information ordered may include "(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers; [and] (b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question" (Art. 25.2);
- authorities may issue interlocutory injunctions – against either an infringer or an intermediary whose services are enabling the infringing activity – "intended to prevent any imminent infringement of an intellectual property right, or to forbid... the continuation of the alleged infringements of that right, or to make such continuation subject to... the compensation of the right holder" (Art. 26.1);
- authorities may issue interlocutory injunctions ordering "the seizure or delivery up of the goods suspected of infringing an [IPR] so as to prevent their entry into or movement within the channels of commerce" (Art. 26.2);
- "authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets" (Art. 26.3);

- "authorities may order... the recall, definitive removal from the channels of commerce or destruction of goods that they have found to be infringing an [IPR and] may also order destruction of materials and implements principally used in the creation or manufacture of those goods" (Art. 27);
- where a judicial decision is taken finding an infringement of an [IPR], the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement... [and] that right holders [may] apply for an injunction against intermediaries whose services are used by a third party to infringe an [IPR]" (Art. 28.1);
- that in setting damages, authorities "shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement; or... they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the [IPR] in question" (Art. 30.1); and that
- even if the infringer did not knowingly... engage in infringing activity... the judicial authorities may order the recovery of profits or the payment of damages... " (Art. 30.2)

These fairly severe provisions are all far more wide-ranging than their TRIPS counterparts – which deal much more in generalities and do not outline so specifically what kinds of information may be compelled, and from whom, nor authorize specific kinds of injunctive relief or obligate certain damages – and India has, rightly, not yet acceded to any of them. Accepting the EU's enforcement provisions would be tantamount to creating an entirely new regime in India for enforcing IPR, which remains unnecessary in a country with such an efficient and robust consumer-oriented IP regime.

### 2.3.3 Liability of Intermediate Service Providers

The EU also proposes, under cover of protecting intermediate service providers from liability for infringement by their users, to increase and/or place the burden on such providers of policing user activity.

Intermediate service providers' exemption from liability for user infringement is, among other things, conditional upon:

- compliance with "conditions on access to the information" transmitted via their networks" (Art. 35.3.1[b]) and with "rules regarding the updating of the information" (Art. 35.1.3[c]);
- non-interference "with the lawful use of technology...to obtain data on the use of the information" (35.3.1[d]);

- expeditious action "to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled" (Art. 35.1.3[e]); and
- lack of knowledge of illegal activity or information and/or lack of awareness "of facts or circumstances from which the illegal activity or information is apparent," or, upon such knowledge or awareness, expeditious action "to remove or to disable access to the information" (Art. 35.4.1).

Moreover, while intermediate service providers shall have "no general obligation to seek facts or circumstances indicating illegal activity" (Art. 35.1.1), they may be obligated "promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service" or otherwise "to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements" (Art. 35.1.2).

All of these provisions serve to increase tensions between intermediate service providers and their users, creating an atmosphere of distrust in which suspicion and concerns about liability will dictate the customer-provider relationship, and possibly forcing liability onto parties not directly implicated in infringement. They will likely lead to increased barriers to sending, receiving, and storing information freely and without hassle, disrupting commercial flows as well as the lawful transfer of personal information, as intermediate service providers struggle over what constitutes "knowledge" and how they can best safeguard themselves from liability. Therefore India should reject all of the provisions regarding liability of intermediate service providers discussed above in favor of retaining the standard TRIPS provisions, which continue to serve both India and the 153 WTO members – including the European Union – who have agreed to abide by them.

## Part V

# Conclusion

India stands greatly to benefit from an FTA with the EU, but there remain significant IP-related issues on which the EU must offer concessions before India should ratify the agreement, particularly in the areas of technology transfer, copyright, and enforcement of IPRs, including conditions governing the liability of intermediate service providers for infringements by their users. Otherwise, India risks endangering its robust and consumer-friendly IP regime, which has been largely responsible for the proliferation in India of emerging technologies that have driven the country's economic and cultural growth and positioned it as a global power in the 21st century. India has already acceded to international standards for IPRs via its membership in the WTO and compliance with TRIPS,

and under the terms of which the EU stands only to gain from increased trading with India. In general, there is no need for a “TRIPS-plus” FTA.