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February 5, 2016

Probir Mehta  
Acting Assistant United States Trade Representative,  
Intellectual Property and Innovation  
Office of the United States Trade Representative  
600 17<sup>th</sup> St. NW  
Washington, DC 20508

**RE: U.S.-India Business Council Hearing Statement to the Office of the US Trade Representative concerning the 2016 Special 301 Review**

Dear Mr. Mehta,

In response to the Federal Register Notice (81 F.R. 10513), the U.S.-India Business Council (USIBC or "Council") is submitting the written statement and hearing statement below.

The U.S.-India Business Council ("USIBC" or "Council") is the premier business advocacy organization representing more than 350 of the largest global companies investing in India. USIBC was formed in 1975 to encourage the private sectors of both countries to enhance investment flows. The Council's mission is to serve as the primary interlocutor between business and Government leaders, resulting in increased trade and investment to strengthen ties between the two nations.

Overall, the U.S.-India Business Council believes there have been important developments related to the Intellectual Property ("IP" or "IPR") policy in the last 12 months in India that have paved the way for substantive improvement in India's IP environment. We are encouraged by the way things are trending. This past year was marked by several positive and sustained Government-to-Government dialogues on a broad range of IPR issues between India and the U.S. including the Trade Policy Forum, and the Strategic, Economic, & Commercial Dialogue. The level and frequency of engagement between the U.S. and Indian governments was encouraging and many have noted that they had not seen this level of engagement with the Government of India before.

Additionally, the Government of India has been extremely open and collaborative with industry over the past year, often meeting with Industry to discuss IPR issues and approaching discussions with a willingness to solve problems quickly. This past year, USIBC members met with the Department of Industrial Policy and Promotion ("DIPP") including Secretary Amitabh Kant and Joint Secretary Rajiv Aggarwal and the Indian Embassy in Washington D.C., who have consistently been welcoming and open to discussions on how to solve IPR issues impacting U.S. investors. Recently DIPP and the Ministry of External Affairs ("MEA") partnered with USIBC on a conference that convened policymakers, global experts, industry leaders, and relevant stakeholders for a conference entitled "Growing the Innovative Bio-pharmaceutical Industry and Expanding Healthcare Access in India." USIBC also partnered with DIPP to organize a Workshop with Patent Examiners, which provided a platform for officials from India, Japan, the United Kingdom, and the United States to discuss global intellectual property standards and practices in the area of biopharmaceuticals. The Indian Patent Office ("IPO") responded so well to the program that they invited USIBC and its partners to

form similar seminars and workshops in India's other patent offices around the country to ensure all examiners are receiving the benefit of information and experience of other jurisdictions. In short, USIBC members greatly appreciate the willingness of the Government of India to work with Industry over the past year.

The Government of India also has helped to improve judicial precedent and law by upholding decisions that have improved IPR. These positive decisions include the Delhi High Court's decisions in *MSD (Merck) v. Glenmark* and *Roche v. Cipla*. These decisions also reflected the increased capacity and competency of Indian judges to resolve patent infringement cases, assess damages, and order injunctive relief.

Another positive development in 2015 was for USIBC's member John Deere. The Delhi High Court established a positive trademark judicial precedent in *Deere & Co. & Anr. V. S. Harcharan Singh & Anr.* Even though court cases typically proceed through India's judicial system at a slow pace, the John Deere case is an example that, in certain instances, the courts in India can be expeditious on important matters of IPR.

Another significant and positive development in 2015 was that Prime Minister Narendra Modi made several public statements reaffirming his commitment to a strong and robust intellectual property regime. USIBC also took notice that the Government of India has denied several compulsory license applications, providing investor certainty and predictability that their patents will be upheld in India.

Most recently, USIBC was encouraged by the government's Start-Up India Initiative and the corresponding "[Scheme for Facilitating Start-Ups Intellectual Property Rights](#)," which recognizes that "Intellectual Property Rights (IPRs) are emerging as a strategic business tool for any business organization to enhance industrial competitiveness. Start-Ups, with limited resources and manpower, can sustain in this highly competitive world only through continuous growth and development oriented innovations; for this, it is equally crucial that they protect their IPRs." Initiatives and statements like this demonstrate a change in tone and recognition of the value of IPR to India.

The passage of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Bill in December 2015, which will allow for the creation of specialized commercial benches within the High Courts to more efficiently adjudicate commercial disputes, including IPR disputes having a threshold value greater than 1 crore rupees (approximately USD \$150,000), was another positive step taken by the Government of India to protect the interests of IPR holders.

USIBC also notes that the IPO has continued its modernization efforts and engaged with stakeholders in a transparent manner to discuss changes to the Patent Rules.

Unfortunately, one major setback on IPR in 2015 was the implementation of the Final Guidelines for the Examination of Patent Applications for Computer Related Inventions, which were implemented in September 2015 but then suspended, without explanation, on December 15, 2015. Aside from this development, USIBC members felt that the overall IPR environment and policies have improved in the past year.

While developments in 2015 have sent positive signals to investors, fundamental challenges remain in the protection of IPR in India, many of which are legacy issues from past Governments. This is why USIBC would recommend that India remain on the Priority Watch List, but would note, however, that USIBC's members eagerly await the Government of India's ("GOI") release of the National Intellectual Property Rights Policy ("National IPR Policy"), which will further articulate the government's intentions to increase the protection of IPR. USIBC would like to reserve its right to

amend its filing to take note of the National IPR Policy when it's released, and potentially recommend an upgrade to India's ranking at that time.

The Council will continue to support and encourage constructive efforts to collaborate with the GOI to strengthen IPR in India. Below are some of the ongoing issues and developments facing USIBC members broken down by sector. The Council hopes the list below serves only as a potential agenda for further collaboration and discussion with the Government of India.

### **Media and Entertainment**

With 800 plus television channels, more than 139 million pay-tv households, 94,000 plus newspapers and over 1,000 films produced annually, India's vibrant media and entertainment ("M&E") industry provides an attractive growth opportunity for global and domestic media and entertainment companies.

Over the last several years, India has made significant progress modernizing its pay-TV market. Today, with 168 million TV households and 149 million pay TV ("C&S") subscribers, India is the world's second largest television market after China. Moreover, in 2014 alone, 10 million more homes become pay TV C&S subscribers. By 2019, the C&S subscriber base is expected to reach 175 million, which by then will represent 90% penetration of all TV homes. America, by contrast, has roughly 100 million pay TV C&S homes and growth is flat.

All of the major U.S. media players are active in the Indian market over the last 10 – 15 years and have invested billions of dollars in creating local content in more than 15 languages - across 29 states- and engaging 700 million TV viewers, which gives consumers a plethora of choices and contributes to current \$17 billion dollar M&E industry in India.

This growth has been possible despite the fact that adequate copyright protection is not yet in place. Enforcing copyrights continues to plague virtually all participants in the value chain: Indian and foreign content producers, large cable distributors, and government tax collectors.

Last-mile cable operators in India have routinely "under declared" the number of subscriptions for which they were paid. In this way, they paid all the parties up the value chain (including Indian Multi-System Operators – who distribute programming and operate cable networks – as well as content owners) substantially less than the latter groups were rightfully owed. The level of under declaration is massive: estimates declared only on average 20% of the subscriptions they collected. Given the size of the Indian market, the loss to the industry from such levels of under declaration is huge.

In 2011, however, the GOI announced modernization plans that would fundamentally alter these conditions, and – at least in theory – result in full payment for pay-TV programming. The central government enacted a detailed plan to reduce or eliminate under declaration through digitization of cable networks. The rollout of the deadline for full digitization of the country has slipped, however, and Phase III has been delayed. Industry has urged the GOI to move forward with Phase IV, the final stage, without further delay.

The key to ensuring that digitization enhances respect for IPR is that the Government of India must insist that the only permitted vehicle for delivering cable programming in the future should be fully addressable digital networks. "Non-addressable" networks, though digital, would not - have the necessary benefits of transparency and auditability. It is important that the Government of India move forward with requiring fully transparent and auditable networks to replace analogue transmission on the scheduled timeline. USIBC looks forward to working with this GOI on this issue.

USIBC looks forward to encouraging the Government of India to provide better market incentives for digitization and accelerate the modernization process by liberalizing its “must provide” program supply legislation and allowing for greater rate flexibility for premium products distributed over digital systems.

The rise of satellite broadcasting has been key to the competitive dynamic supporting digitization, and that segment of the industry now reaches over 50 million subscribers. The tax burden on this sector now is disproportionate, totaling about 30% of consumer payments, including a 10% license fee. The tax burden facilitates piracy as pirate enterprises, online and off, do not have to pay similar taxes. There has been a consistent demand from the industry to reduce the taxation – especially the license fee - as other taxes are likely to be rationalized with introduction of a GST.

Another IPR issue that unfortunately has become more common with the spread of satellite reception boxes is the unauthorized use of such boxes by unscrupulous cable operators to provide (unpaid) premium programming to consumers. Indian courts have, however, recognized this practice as a clear violation of copyright laws, and the police have taken some actions against cable operators, which has had a useful deterrent effect. Indian courts have also been willing to grant pre-emptive “John Doe” blanket injunctions against cable-operator piracy of specific sporting tournaments. Such injunctions have been useful to the legitimate industry because they allow faster action against pirates, with immediate penalties.

Another significant concern for broadcasters in India arises from distribution of the channels of public broadcaster Doordarshan (“DD”) by satellite on an unencrypted basis – including sports content that is owned by private rights holders but obliged to be shared with Doordarshan under the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007. The unencrypted satellite distribution results in major overspill across all of Asia. The DD broadcasts can also be easily picked up by internet pirates.

Thus, due to the lack of encryption, the sports content that is the subject of compulsory sharing under Indian law becomes an easy object of global pirate distribution. Despite attempts to consult with the Government of India on this issue, DD continues to make its signal widely available outside of India on a free to air basis.

From a broader policy making perspective, copyright ought to be recognized as an industrial property and seen in the eyes of the Government of India as a valuable asset to be protected. In order for India’s creative / copyright industries to achieve national goals of increased contribution to the economy by providing more jobs, it is critical that the responsibility for the Copyright Act, 1957 and related International Conventions be consolidated and shifted to DIPP.

The current structure the Copyright Act, 1957, which impacts a broad range of industries including software, film, broadcasting, music, online content, and publishing, is under the Ministry of Human Resource Development. This Ministry has not adequately addressed issues important to the development of these copyright-driven industries and has resulted in fragmentation of the IPR regime in India.

Adding greater uncertainty and confusion to the copyright regime, the broadcast industry is licensed under the Ministry of Information & Broadcasting, but its monetization prospects are substantially determined by the Telecom Regulatory Authority of India (TRAI). The TRAI Act 1997, being primarily concerned with telecommunication services, had categorically kept broadcasting services out of its purview when it was originally enacted. Broadcasting services were squarely covered by the Copyright Act India is a signatory to the Berne convention and the related TRIPS Agreement. Subsequently, however, broadcasting services were nevertheless brought within the remit of the TRAI Act.

In short, broadcasting and the underlying IPR is caught in a quagmire between various ministries. The broadcasting industry and others are in need for centralized policy development. In all other jurisdictions that have signed the Berne convention their communication laws, while regulating broadcasting services, have always ensured a harmonious interpretation and construction between copyright and communication laws.

USIBC's broadcasting members would request the GOI to constitute a joint working group of copyright experts, industry representatives, and TRAI representatives to deliberate on and come up with recommendations with the required changes in the policy, legal, and regulatory frameworks that would inform the discourse of broadcasting in India. This would help to ensure that India's IPR regime in so far as copyright is concerned - is in line with international treaties.

Given that copyright has now moved into the realms of multiple industries, it is imperative that the legislative, regulatory, and policy framework pertaining to the same should be overseen by the DIIPP and USIBC looks forward to working with the GOI on these issues.

### **Life Sciences**

As noted above, there have been several positive developments for the life sciences industry on IPR over the past year. But India's patent law continues to prohibit patent protection for incremental innovation under Section 3(d) of its patent law ("Section 3(d)"). Inventions that strike at the core of the life sciences sector—such as treatments for various cancers—are excluded from patentability. Indian law still precludes patenting of a wide range of basic commercial products in the life sciences industry, discouraging both indigenous and international investment in a sector where India is well-positioned to compete and succeed.

USIBC members have noted that while they appreciate the new Guidelines for Examination of Patent Applications in the Field of Pharmaceuticals, the guidelines have had little impact to address these challenges of interpreting section 3(d), although USIBC recognizes, however, that the Government of India has indicated they would be willing to further clarify the guidelines. We look forward to working with the Government of India to bring more clarity and predictability to this important law for Industry.

India also does not provide patent linkage or regulatory data protection. USIBC looks forward to working with the GOI on finding a constructive method to solve this outstanding issue. USIBC has sent in several letters to the GOI recommending avenues on how the issue of patent-linkage might be solved, but no concrete proposals have yet to be tabled by the GOI. USIBC looks forward to continuing to discuss these issues with the GOI.

The Indian Patent Act also imposes unique disclosure requirements for inventions using biological materials. Applicants are required to identify the source and geographical origin of biological materials and also provide evidence that they have received permission from the National Biodiversity Authority ("NBA") to file for intellectual property protection on an invention using biological materials from India. This often places an undue burden on the applicant as it may be not be possible to ascertain the source and geographical origin of a particular material, especially if it has been procured from a commercial institution or depository or obtained from a public collection. Obtaining NBA approval has proved problematic and has resulted in the delay in the grant of patents. We look forward to continued engagement with the Government of India on this issue.

Despite compulsory licensing denials, Industry continues to be concerned by the potential threat of compulsory licensing. The Government of India has privately reassured India it would not use Compulsory Licenses for commercial purposes. USIBC would be further encouraged if the

Government of India made a public commitment to forego using compulsory licensing for commercial purposes and in public emergencies only, which would greatly enhance legal certainty for innovative industries.

### **Digital Economy**

As mentioned above, USIBC was disappointed that the Final Guidelines for the Examination of Patent Applications for Computer Related Inventions was delayed. We look forward to working with the Government of India to reinstate the guidelines as soon as possible.

As the Government of India may consider encryption policies, USIBC would urge the development of a policy that does not mandate companies releasing their encryption keys or other sensitive intellectual property.

USIBC believes that preventing online pirated content and preserving copyright is a paramount concern. Because India does not have a clear safe harbor framework for online intermediaries, however, U.S. internet companies are not necessarily protected from third party liability in India for user actions in case of copyright infringements. USIBC urges the Government of India to develop an enforcement framework that facilitates the removal of copyright works online and that does not necessarily put the liability on the internet companies, but on the individual infringers themselves. These safe harbors from intermediary liability are not just critical elements of balanced intellectual property enforcement frameworks; they also power digital trade and enable companies dependent upon intellectual property to access new markets.

### **Legal System**

Trademark protection and its connection to frivolous criminal cases brought against U.S. companies has been an ongoing issue in India. USIBC has seen several U.S. companies and senior executives taken into local criminal courts by a trademark defendant using the criminal system as a pressure tactic. Recognizing that India's judiciary is completely autonomous from the Government of India, Industry looks forward to working with the Government of India to determine how it can bring increased predictability to businesses that rely on trademarks in India and how it might be possible to discourage the use of India's legal system simply to put pressure on companies in effort to prevent lawful enforcement of trademarks.

### **Trade Secrets and Market Access**

Industry in the information and communications technology sector have stated that in-country testing requirements and data- and server-localization requirements limit market access in India and compromise their intellectual property and trade secrets. Industry looks for discussing with the Government of India how they can resolve this issue and is further encouraged by discussions with the Government of India that they are interested in discussing the possibility of trade secret legislation.

### **Membership and Ratification of International Treaties**

Although India is not a contracting party to many well-established international treaties, USIBC believes that the IP environment could be improved by further exploring its potential membership into these treaties including the WIPO Copyright Treaty; the WIPO Performances and Phonograms Treaty; and the Singapore Treaty on the Law of Trademarks.

In 2015, Industry was discouraged when the Indian delegation at the UNFCCC sought to undermine the incentives to develop green technologies by compromising intellectual property protections

through the use of forced technology transfer mechanisms and enhanced patentability standards. USIBC fully appreciates the importance of green technologies to India's economy and the imperative to provide power to all citizens in India. USIBC looks forward to developing methods that would both encourage the use of green technologies in India while maintaining and strengthening the intellectual property associated with it.

USIBC again commends the Government of India for the important progress that has been made over the past year on IPR. USIBC looks forward to deepening its engagement with the GOI and making continued progress and IPR in India.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mukesh Aghi', followed by a horizontal line.

Dr. Mukesh Aghi  
President  
U.S.-India Business Council