



SAFEGUARDING INDIAN TRADITIONAL KNOWLEDGE: A NECESSITY IN THE GLOBALISED WORLD

Ms. Manjari Chandra¹

TRADITIONAL KNOWLEDGE: DEFINITION

World Intellectual Property Organization (WIPO) characterizes customary learning as "*custom based abstract, imaginative or logical works; exhibitions; developments; investigative revelations; outlines; stamps, names and images; undisclosed data; and all other convention based advancements and manifestations coming about because of scholarly action in the mechanical, exploratory, artistic, or creative fields.*"²

It is pertinent to note that "Custom based" alludes to learning frameworks, manifestations, advancements and social declarations that are by and large transmitted from one generation to another ; and are for the most part viewed as relating to specific individuals or their domain or traditional cultural expression³; and are continuously advancing in light of an evolving world.

Traditional and indigenous knowledge (TK) has been used for centuries by indigenous and local communities under local laws, customs and traditions. It has been transmitted and evolved from generation to generation. TK has played, and still plays, an important role in vital areas such as food security, the development of agriculture and medical treatment. However, Western societies have not, in general, recognized any significant value in TK nor any obligations associated to its use, and have passively consented to or accelerated its loss through the destruction of the communities' living environment and cultural values.

Worldwide licensed innovation systems which address nearby learning are of basic significance to variety of neighborhood groups. Such systems can be said to be an outcome of wealth creation for neighborhood groups to the degree that they are composed in way which is adaptable. Such adaptable systems may empower the stream of assets to be switched and empower neighborhood groups to add advantage to a more noteworthy degree from the potential advantages of worldwide exchange structures. Aside from using accessible writing on these difficulties, the primary proposals from the World Intellectual Property Organization, Intergovernmental board on Intellectual Property and Genetic Resources, Traditional learning are broke down with a perspective to proposing bearings that can help enhance the way in which traditional knowledge is ensured through Intellectual Property.

A significant part of the conventional exclusive standard is that customary information (traditional knowledge) is alluded to nearby learning. Experience picked up from the frontier presence of non-western societies proposes that at whatever point western qualities and foundations clash with those of non-western culture the later must respect the supremacy of their western partners. Pluralism or concurrence of different social qualities and foundations was, best case scenario endured.

Traditional knowledge can be deciphered as a body of knowledge, pertaining to innovations and practices of a group of local people, extracted and developed through their close contact with nature for

¹ Assistant Professor, Rashtriya Raksha University, India

² WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998- 1999) (WIPO publication no. 768(E)).

³ "Traditional cultural expressions" refer to tangible and intangible forms in which TK and cultures are expressed, communicated or manifested. Examples include traditional music, performances, narratives, names and symbols, designs and architectural forms. The terms "TCEs" and "expressions of folklore" (EoF) are used as interchangeable synonyms.

generations,⁴ which is later shared with the successive future generations. Traditional knowledge engulfs in itself the development from one generation to another, tangible and intangible knowledge, and innovations of both potential and actual value. Traditional knowledge has continued to play a critical role in substantial areas such as food security, agricultural development and medical treatment. India is abundantly rich with been

Traditional knowledge has been a central component for the daily life of millions of people in developing countries. Traditional Medicine (TM), which forms an eminent part of Traditional knowledge, serves the health needs of a vast majority of people in developing countries, where access to "modern" health care services and medicine is limited due to economic and cultural reasons. For instance, the per capita consumption of Trade Mark products is more than double that of modern pharmaceuticals in Malaysia. *Trade Mark is also significant and more advanced in developing countries such as South Korea, where the per capita consumption of Trade Mark products is about 36% more than modern drugs*⁵. It is often the only affordable treatment available to poor people and in remote communities. Similarly, the use and continuous improvement of farmers' varieties (landraces) is essential in many agricultural systems. In many countries, seed supply fundamentally relies on the "informal" system of seed production which operates on the basis of the diffusion of the best seed available within a community, and on its movement, even over large distances during migration or after disaster.⁶ Furthermore, TK is the origin of a great variety of artistic expressions, including musical works and handicrafts.

The full definition proposed by UNESCO in the framework of joint work with Internal Council of Science (ICSU) states: "Traditional Knowledge is a cumulative body of knowledge, know-how, practices and representations maintained and developed by peoples with extended histories of interaction with the natural environment. These sophisticated sets of understandings, interpretations and meanings are part and parcel of a cultural complex that encompasses language, naming and classification systems, resource use practices, ritual, spirituality and world-views."⁷ However it is inappropriate to generalize about indigenous or traditional knowledge without making proper distinctions. The gender-specific division of labor, property rights, decision-making processes and perceptions of the environment all shape the local knowledge, use and management of natural resources. Traditional knowledge is capable of providing sustainable solutions to many modern day problems especially in health care, biotechnology and agricultural sectors. Traditional knowledge has the potential of being translated into commercial benefits by providing valuable leads for development of useful products and processes. The commercialization of traditional knowledge by others with no benefits to the holders is a blatant piracy. Bio piracy and patenting of traditional knowledge is a double theft because first it allows theft of creativity and innovation of indigenous communities, and secondly, the exclusive rights established by patents on pirated knowledge steal economic options of everyday survival on the basis of preservation of biological diversity and associated traditional knowledge.⁸ The patents can be used to create monopolies and make everyday products of indigenous communities highly priced. The local and traditional communities who have conserved and developed traditional knowledge are not being given a share in the benefits arising out of use of such traditional knowledge,

⁴ <https://pdfcoffee.com/traditional-knowledge-4-pdf-free.html>

⁵ https://www.wipo.int/edocs/pubdocs/en/global_challenges/1027/wipo_pub_1027.pdf

⁶ www.geneva.quno.info/pdf/tkcol3.pdf

⁷ (UNESCO/ICSU 2002)

⁸ example: use of indigenous knowledge of medicinal plants for patenting by medical companies without recognizing the fact that the knowledge is not new, or invented by the patentee, And thereby the piracy deprives the indigenous community to the rights to commercial exploitation of the technology that they themselves had developed



in particular where use takes place outside of the country of origin. The current global practice of obtaining IP protection on traditional knowledge based products with sharing of no benefits to its original holders needs to be stopped urgently. The holders of traditional knowledge need to be acknowledged and rewarded. They should also be encouraged to apply their knowledge in developmental activities. However, the indigenous communities who preserve the traditional knowledge are generally belonging to economically backward areas and they have no formal education. Moreover, they are not well equipped to voice their rights. Their rights can be protected only through a legal mechanism. However, so far there is no comprehensive legislation in India to address these issues and protect traditional knowledge. Lack of legal protection has led to patenting of many traditional knowledge based products in foreign countries and India had to spend several years in fighting cases. India could not win all such cases though she could revoke certain patents.⁹ Protecting traditional knowledge would be more appropriate than letting it go patented first and then challenging it with no certainty of winning. Hence, there is a need to protect traditional knowledge not only for the benefit of indigenous community but for the benefit of the whole nation since application of traditional knowledge is important for developmental and economic activities too. Since the current IPR regime often violates the rights of local and indigenous communities over their traditional knowledge there is a need to study the parity and disparity existing between these two systems of knowledge. The systems of IP and traditional knowledge need to be analyzed in the light of subject matter of protection, nature and contents of rights. The chances of protecting traditional knowledge under the ambit of existing intellectual property regime need to be analyzed. If IP and traditional knowledge are not commensurable, then the possibility for devising a *sui generis* system needs to be studied. Appropriate form of protection for traditional knowledge is of great importance to countries like India which are rich in biodiversity and associated Traditional Knowledge.

International conventions related to Traditional Knowledge (TK)

The Convention on Bio Diversity (CBD) and the 2010 Nagoya Protocol introduces the recognition and protection of Traditional Knowledge (TK) at international level. Article 8(j) of the CBD¹⁰, requires parties are required to respect and maintain knowledge held by indigenous communities, and promote broader application of TK based on fair and equitable benefit-sharing. Article 16 recognizes TK as a 'key technology' for effective practices of conservation and sustainable use of biodiversity, with procedural requirements established in Article 15 for access to genetic resources, including those based on prior informed consent and mutually agreed terms. The Nagoya Protocol broadens the CBD provisions relating to access and benefit-sharing.¹¹

International flora and fauna are increasingly recognizing the value of preserving the expertise, creativity and traditions of indigenous and local communities. The immediate need is to ensure that the benefits of traditionally acquired cumulative breakthroughs go to their holders while enhancing their socio-economic development. The first effort to protect traditional knowledge (TK) under the IP regime was a joint initiative taken in 1978 by World Intellectual Property Rights Organisation (WIPO) and the

⁹<https://birac.nic.in/webcontent/dib.pdf>

¹⁰*Article 8 clause (j) of the CBD* states that each member nation must move towards the preservation, sustainable and main use of resources which are important to the traditional knowledge of the indigenous community in accordance with its domestic law. Member States are urged to promote greater use of traditional knowledge with the prior approval and involvement of the knowledge holders. The fact that industries are using traditional knowledge without the knowledge holders' prior informed consent is a concern as is the lack of mechanisms for benefit-sharing.

¹¹<https://www.mondaq.com/india/patent/743482/>



United Nations Educational, Scientific and Cultural Organization which led to the Protection of Folklore 's Expressions from Illicit Exploitation and Other Prejudicial Actions.¹²

An expansive literature has studied protection of Traditional knowledge. These broadly highlight challenges to protection related initiatives on TK.

Besides, several reports on WIPO deliberations on the protection of TK are in the public domain. A sizable literature on also exist. These include several studies by such as on potential for cooperation on traditional medicines in the Indian Ocean region, Chaturvedi, et al. (eds) (2014) on traditional medicine policies in China and India, Dhar, et al. (2014) on access and benefit sharing under the Biological Diversity Act 2002, Chaturvedi, S. (2007) on IPRs and access and benefit sharing, *Ragavan, S. and Mayer. J. (2007) on community rights and IPR Regime*, Dhar, et al. (2001) on Intellectual Property Rights regime on protection of biodiversity , Chaturvedi, S. and Chauhan. K.P.S (2001). Other RIS publications include book on traditional medicine in BRICS (2016), and Policy Briefs such as James et al. (2017) on Traditional Knowledge Digital Library (TKDL) and James and Pathak (2018) on Traditional Chinese Medicine.

A holistic study on TK protection in India with reference to all major legal, regulatory and civil society initiatives is yet to be made. In addition, available literature has not made a comprehensive study of India's efforts to protect TK with reference all existing related international regimes.

Need for protection of Traditional Knowledge

National and regional regimes share a number of common objectives. They are the agencies who define what is to be protected and how the same has to be recognised. To fulfil this mandate they often seek to (a) ensure that traditional knowledge rests under the control of indigenous or local communities, (b) preserve and guard against misappropriation and misuse by third parties and (c) promote equitable benefit sharing. While we try to define the above, we sum that protection often goes well beyond intellectual property (IP) aspects of traditional knowledge (e.g. eligibility to acquire IP rights over traditional knowledge), encompassing all aspects of its use in a traditional context.

Drawing these shared policy objectives into an international agreement would offer a more adequate response to the unauthorized use of traditional knowledge, or acquisition of IP rights over that knowledge, by third parties who have no legitimate claim on it. At the very least, an international agreement that was implemented at the national level would ensure that the custodians of traditional knowledge have control over and can manage its use and are properly compensated.

The history of international IP law-making offers some useful insights of relevance to policymakers involved in these negotiations.

For example, we see that changes in economic and technological circumstances can be an important trigger for developing new international laws. Indeed, the first international IP law, the Paris Convention for the Protection of Industrial Property of 1883, was largely a response to the expansion of cross-border trade in the late 19th century. At the height of the industrial revolution, companies were increasingly looking to commercialize their wares in other countries. This gave rise to the need to safeguard the interests of nationals operating in foreign markets, and *vice versa*. In response the Paris Convention Article 2(1)¹³ and the Berne Convention for the Protection of Literary and Artistic Works of 1886

¹² <https://www.wipo.int/edocs/lexdocs/laws/en/unesco/unesco001en.pdf>

¹³Paris Convention (Article 2(1): *Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this*

Article 5(1)¹⁴ introduced the principle of national treatment. The principles of reciprocity, mutual recognition and most favored nation have also since been introduced into international law, including within the framework of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)¹⁵

National treatment is unlikely to help in protecting traditional knowledge, however, because it is only applicable where such national laws exist. That means that the traditional knowledge of an indigenous community in Peru will be protected in Kenya and *vice versa*, because these countries have laws governing the protection of traditional knowledge. But it does not apply in countries where legislation to protect such knowledge is not in place.

It is also worth noting that many international laws tend to draw on the provisions of existing national laws. The Paris Convention, for example, sought to harmonize national patent laws, which proved inadequate in protecting inventors operating beyond national boundaries. Likewise, the Berne Convention drew on existing national copyright laws to establish minimum international standards for copyright protection. But when it comes to the protection of traditional knowledge, the limited number of countries that have national laws in place makes developing an international framework based on existing laws all the more challenging.

Any attempt to establish an international regime needs to carefully define international policy objectives, particularly in terms of what and who needs to be protected. Another important step is to clearly identify points of convergence in national laws.

Further if we debate on the Prior Informed Consent and Equitable Benefit Sharing issue, we may conclude that According to the principle of prior informed consent, holders of traditional knowledge, traditional cultural expressions or genetic resources should be fully consulted before their knowledge is accessed or used by third parties. An agreement should then be reached on appropriate terms and the holders should be fully informed of the consequences of the intended use. The agreed scope of use may be set out in contracts, licenses or agreements, which may specify how benefits arising from the exploitation should be shared.

Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

¹⁴ *Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.*

¹⁵ *Article 4 of TRIPS: With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member: (a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property; (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country; (c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement; (d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members*

In WIPO discussions, many argue that the use of protected subject matter ought to be subject to prior informed consent, especially for sacred and secret materials. However, others fear that granting exclusive control over traditional cultures could stifle innovation, diminish the public domain and be difficult to implement in practice.

The idea of equitable balancing of interests is common to many legal systems. In IP law this is often phrased in terms of balancing the interests of right holders and the general public. According to this principle, holders of traditional knowledge, traditional cultural expressions or genetic resources receive an equitable share of the benefits that arise from their use. This may be expressed in terms of a compensatory payment or other non-monetary benefits.¹⁶

One of the key advantages of establishing an international legal framework, of course, is that such arrangements provide for minimum acceptable standards of protection and thereby create greater legal certainty by offering some degree of harmonization of national laws. This makes it easier for rights holders, including custodians of traditional knowledge, to manage and trade their IP assets.

History also shows us that international IP laws have, over time, moved from policy guidance toward more detailed substantive provisions regarding eligibility for protection, subject matter, criteria for protection, scope of rights, exceptions and limitations, and more recently enforcement and other administrative provisions. International treaties should, however, not be too prescriptive in terms of how they are to be implemented. As long as minimum standards are in place each member state has the flexibility to decide on how to make their provisions operational. The overriding goal should be to ensure that the stated objectives are achieved.

Conclusion

Traditional knowledge is increasingly under threat. Its appropriation and use by third parties who seek to acquire IP rights in it are on the rise. Examples include traditional knowledge associated with neem, turmeric and hoodia. In each case, the knowledge held by indigenous and local communities was crucial in the subsequent pharmaceutical use of these plants, yet in each case, this contribution was not initially recognized or rewarded.

In this context, international policy objectives might include the preservation of traditional knowledge, control of its commercial use, safeguards against third-party claims on IP related to traditional knowledge, access and benefit sharing, equitable remuneration, facilitation of innovation using traditional knowledge and provisions on prior informed consent.

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¹⁶ [*Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: An Overview*](#).



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