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Bridging the Gap: Intellectual Property Rights as a means to Safeguard Traditional Knowledge in Modern Context

TARUN SHARMA[1]

ABSTRACT

This research paper explores the role of intellectual property rights as a mechanism to safeguard traditional knowledge in the context of the modern world. Traditional knowledge, which encompasses the accumulated knowledge, innovations, and practices of indigenous and local communities, is increasingly vulnerable to exploitation and misappropriation. With the rapid advancements in technology and globalization, traditional knowledge faces challenges that require effective legal protection and preservation measures. The paper begins by highlighting the significance of traditional knowledge as a valuable cultural and scientific resource, contributing to sustainable development, biodiversity conservation, and human well-being. However, the lack of proper legal frameworks and recognition poses a threat to the custodians of this knowledge, as their rights are often overlooked or undermined. The study delves into the various approaches taken by national and international legal systems to address the issue of protecting traditional knowledge. It examines the potential of existing IPR regimes, including patents, copyrights, trademarks, and geographical indications, to safeguard traditional knowledge. The paper also discusses the limitations and shortcomings of these frameworks in adequately accommodating the unique characteristics and communal nature of traditional knowledge. By analyzing case studies and relevant legal instruments, the paper aims to offer insights into potential strategies for integrating traditional knowledge into the current intellectual property framework. It highlights the importance of collaborative efforts involving indigenous and local communities, policymakers, researchers, and legal experts to develop comprehensive and context-specific solutions that respect the rights and interests of traditional knowledge holders. Ultimately, this research contributes to the ongoing discourse on the protection of traditional knowledge and offers recommendations for policymakers and stakeholders to bridge the gap between intellectual property rights and the safeguarding of traditional knowledge in a modern context.

Keywords: *Traditional Knowledge, Intellectual Property Rights, Copyright, Trademark, Geographical Indication.*

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[1] Author is a LL.M. Student at Hidayatullah National Law Univeristy, India.

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I. Introduction

Traditional Knowledge (TK) refers to a wide variety of knowledge systems that have been established and passed on within indigenous and local communities over the course of many generations. One dilemma in defining TK is that it is often seen as being inextricably linked to culture and identity, and as such, there may be resistance to defining it in a way that could be seen as limiting or reducing its significance. Another dilemma in defining TK is that it is often context-specific and may not fit neatly into Western scientific categories or frameworks. TK may include knowledge about the environment, spirituality, social organization, and other aspects of life that are interconnected and holistic, rather than being narrowly defined and compartmentalized. Furthermore, TK is often transmitted through oral traditions and practices, rather than through written texts, which can make it difficult to document and preserve. This can make it difficult to define TK in a way that is intelligible to those who aren't part of the original group.

TK is an essential component of millions of people's everyday lives in underdeveloped or developing nations. Traditional medical practices meet the health requirements of a great majority of people in poor nations when economic and cultural factors limit access to "modern" healthcare facilities and pharmaceuticals[2]. IPR has an important role in protecting indigenous people's cultural legacy, and this includes protecting TK. Many times, Western governments have used indigenous people's knowledge without giving them any credit or compensation.

IPR can be an effective way to protect TK for several reasons:

1. <u>Preventing Misappropriation</u>: TK is often vulnerable to misappropriation, where unauthorized individuals or entities may use it for their own commercial gain without proper attribution or compensation. By using IPR such as patents, trademarks, and copyrights, the rightful owners of TK have the power to stop other people from using or misusing it without their consent.

2. <u>Encouraging Preservation</u>: IPR can encourage the preservation of TK by providing a financial incentive for communities to continue to develop and maintain their knowledge. By protecting TK through IPR, communities can benefit from commercializing their knowledge and receive compensation for sharing it with others.

3. <u>Promoting Innovation</u>: TK can be a beneficial resource of innovation and creativity, and

[2]Thorsen, R.S. and Pouliot, M. (2016) Traditional Medicine for the rich and knowledgeable: Challenging assumptions about treatment-seeking behaviour in rural and peri-urban Nepal, Health policy and planning. U.S. National Library of Medicine. Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4779144

IPR can help to promote its development and dissemination. By protecting TK through IPR, inventors and creators can be encouraged to share their knowledge with others, which can lead to new ideas and discoveries.

4. Strengthening Cultural Identity: TK is often closely tied to a community's cultural identity, and protecting it through IPR can help to preserve and strengthen that identity. By ensuring that the knowledge remains in the hands of the community, IPR can help to prevent its exploitation or misuse by outsiders, which can erode the community's sense of cultural ownership.
5. Ensuring Fair Compensation: TK can be a valuable resource, and IPR can help to ensure that communities are fairly compensated for sharing their knowledge with others. Communities can negotiate equitable licensing agreements or be compensated for the use of their expertise in commercial products and services if they take steps to secure their intellectual property rights.

Approaches through which TK can be protected under the current Intellectual Property Regime:-

II. Trade Secrets Protection

WIPO has defined Trade Secrets (TS) as "Intellectual Property rights on confidential information which may be sold or licensed."[3] It provides a competitive advantage to a business or organization. TS can include formulas, processes, designs, patterns, techniques, customer lists, and other valuable information that is kept confidential[4]. Confidential information is recognized as an IPR under Article 9 of TRIPS[5]. In order to prevent the unauthorized exposure of private information, the law mandates the use of confidentiality and access agreements, which may include financial compensation for the information holders. A TS is information that has economic worth, is not in the public domain, and is the subject of reasonable efforts to protect secrecy. A TS can only be useful if it remains secret. The goal is to make it illegal for others to access, collect, or utilize private information about you in a way that goes against standard business practices. However, once the information is made public, nobody has a choice.

[3]Trade secrets– Everything you need to know. Available at: https://www.wipo.int/tradesecrets/en
[4]What is the definition of trade secret?, Winston & Strawn Legal glossary , Winston & Strawn. Available at: https://www.winston.com/en/legal-glossary/trade-secret.html
[5] Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (Apr. 15, 1994)

(A) What qualifies as a trade secret?

Basically, TS helps in protection of the undisclosed knowledge through the act of secrecy and the access agreements towards it which includes the payment of royalties to those knowledge holders in order to get benefits by accessing and using their knowledge for fruitful purposes. With the huge debate going on around the globe, some people suggest that protective measures towards herbal and plant-based medicinal products can be achieved through the medium of trade secrets. Although there is no written legislation in India governing the use of trade secrets, great emphasis has been placed over the years on safeguarding trade secrets against exploitation by corporate and governmental entities, as well as local communities in general. There are some important elements required in order to be a trade secret and that is the knowledge:

- having a commercial value
- must not be made available to the general public
- And that knowledge in itself is subject to reasonable efforts in order to maintain the secrecy or there needs to be sufficient evidence available to show that efforts were made in line to maintain that secrecy for the respective information.

Commonly, the theory of unfair competition protects trade secrets. This serves to shield dishonest commercial conduct, providing the information bearer takes reasonable efforts to keep the knowledge secret under the circumstances. The TK that is kept secret inside the community is a trade secret, but if that knowledge is made public, it is no longer a trade secret. Trade secrets have no legal protection except in cases of "breach of confidence and other acts contrary to honest commercial practices."[6] So in such a case it is important to prove that there exists a malicious intent on the account of that contracting party being a definite cause of that diffusion amongst the public at large and he/she needs to be compensated for that loss of secrecy and the secret which was being protected. The main characteristic of trade secrets is it does not need any government intervention or registration as such but "particularly in the case of TK, which is known to a small group of people, the definition of secrecy is of critical importance. Secrecy does not have to be absolute and it is possible to disclose the information on a "need to know" basis as well as under the exceptions provided for under confidentiality agreements."[7] As far as this TK is concerned if no efforts were made with respect to maintaining the secrecy of TK then the protection of trade secrets is not applicable to the TK. As per the researcher,

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[6] Trading into the Future: The introduction to the WTO, Intellectual Property Protection and Enforcement, World Trade Organization, August 2002, Available at: http://www.wto.org/english/thewto_e/tif_e/agrm6_e.htm

[7] Eiland, M.L. (2023) Law Journal Library, HeinOnline. Available at: https://home.heinonline.org/content/Law-Journal-Library/

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Trade Secretes were found to be the best possible branch of law in order to protect the TK in the current conventional forms of the IPR mechanism. The first step toward TS protection of TK is the holders' recognition of its worth; they must be aware of their rights and the long-term advantages that will be realized if protected as a trade secret[8].

(B) Laws Regarding Trade Secrets in the USA

In the United States, TS legislation can be utilized to safeguard TK. TS is protected by Defend Trade Secrets Act ("DTSA") of 2016[9]. The DTSA creates a private civil right of action for victims of TS espionage or theft when a TS is misappropriated, and the stolen TS must be connected to a product or service utilized in, or intended for use in, interstate commerce. TS lawsuits have grown in popularity among litigants since the DTSA's enactment, including in high-profile cases such as the dispute between Waymo and Uber[10] that was litigated in 2018. A perfect example of protection given by TS is the case of coca cola, as the recipe for making this soft drink is protected by means of TS. But this act is also not properly equipped for the protection of TK, as who will hold the TS for the protection is still a point of contention and it can be solved by the making of trust-like organization by the local communities.

(C) Laws regarding TS in Australia

Australian law does not provide a precise definition for "trade secret", instead of seeing it as a generic term for proprietary knowledge. Unlike in the United States, Australian law does not define the term "trade secret". As a result, exactly like in India, there is no explicit legal protection for the TS. But, as Australia is also a part of the TRIPS agreement, under Article 39 it is also obligated to protect the undisclosed information or TS.

III. Patent protection to the traditional knowledge

A patent is a government-issued legal document that grants the inventor the exclusive right to produce, use, and sell their invention for a certain period of time. This authorization is granted in exchange for public disclosure of the innovation, which enables others to study it and maybe improve upon it once the patent has expired. Patents are meant to encourage innovation by providing an incentive for inventors to produce new and valuable innovations and share their knowledge with the public. Patents are issued for a wide range of inventions, such as machinery,

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[8] Thomas J. Carlson, and Steven R. King, "Shaman Pharmaceuticals: Integrating Indigenous Knowledge, Tropical Medicinal Plants, Medicine, Modern Science and Reciprocity into a Novel Drug Discovery," Available at: https://dash.harvard.edu/bitstream/handle/1/29408322/5033432.pdf

[9] The Defend Trade Secrets Act: An overview and key developments JD Supra. Available at: https://www.jdsupra.com/legalnews/the-defend-trade-secrets-act-an-39692/#:~:text=The%20DTSA%20provides%20a%20private,for%20use%20in%2C%20interstate%20commere.

[10] Waymo LLC v. Uber Techs., Inc., No. C 17-00939 WHA, 2018 WL 646701

methods, designs, and plants. WIPO defines Patent as "an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem"[11]. Merriam-Webster Dictionary defines a Patent as "a writing securing for a term of years the right to exclude others from making, using, or selling an invention"[12].

The concept of patents can be traced back to ancient civilizations such as Greece, Rome, and China, wherein innovators received temporary exclusive rights to use their inventions. Consider how, during the time of the Ancient Greeks, Archimede's creation of a water screw for irrigation was awarded a patent-like safeguards by the King of Syracuse[13]. Similarly, in ancient Rome, there were no official patents, but there were laws and practices in place to protect inventors and their creations. For example, the Roman Senate granted a monopoly to a particular glassmaker in the 1st century AD, allowing him exclusive rights to produce and sell glass in Rome[14]. However, the emergence of the printing press and the subsequent necessity to safeguard the rights of inventors and publishers gave rise to the current notion of patents in Europe in the 15th century. In 1474, a glassmaker in Venice received the first ever patent for an improved process for creating eyewear[15]. This was followed by other European countries, such as England and France, introducing their own patent laws in the 17th century.

Patent protection for TK is a complex and controversial issue. The issue arises when TK is appropriated or exploited for commercial purposes by individuals or entities outside of those communities, without their consent or compensation. In some cases, these outsiders may apply for patents on products or processes that incorporate TK, which can prevent the communities who developed the knowledge from continuing to use it themselves. There is ongoing debate about whether and how TK should be protected under patent law. Some argue that TK should not be subject to patent protection at all, as it is a communal resource that should be freely accessible to all members of the originating community[16]. Others argue that TK should be protected, but in a way that respects the rights of the originating communities[17]. This might involve recognizing communal ownership over TK, or establishing a system of benefit sharing that ensures that communities receive compensation for any commercial use of their knowledge.

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[11] World Intellectual Property Organization, Patentscope, https://www.wipo.int/patentscope/en/
[12] Merriam-Webster, s.v. "patent," https://www.merriam-webster.com/dictionary/patent
[13] Waddell, E. (2021) A brief history of patents, CSY. Available at: https://csy-ip.com/a-brief-history-of-patents/
[14] *Id.*
[15] *Id.*
[16] Franz von Benda-Beckmann & J.P.M. van der Koning, Folk Law and Legal Pluralism, Utah L. Rev. 1083 (2001)
[17] Johannes Grau, Protection of TK: A Practical Guide for Policy Makers and Drafters, International Development Law Organization (2008)

While there is a debate regarding whether TK should be held patentable or not, another matter of concern for the protection of TK under Patent laws is statutory and conceptual barriers. Patentability is the measure of an invention's eligibility to be granted a patent. The criteria of patentability are the standards that an invention must meet in order to qualify for a patent. These criteria include novelty, non-obviousness, utility, and industrial applicability.

(A) Requirement of Novelty vis-à-vis TK

Novelty is regarded as the most important prerequisite for granting a patent for an invention. Although, Indian Patent Act, of 1970 did not defined the term, but later an amendment of 2005 [18]diluted the concept of novelty and brings up the term as "new invention" under section 2(1)(l) of the 2005 Amendment Act. It defines the term as: "new invention means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e. the subject matter has not fallen in public domain or that it does not form part of the state of the art".[19] The main thing that makes something novel is that it is new. It says that the public should not have known about this idea before, which suggests that this information needs to be kept secret to meet the standards of novelty.

An idea can be seen coming by:

(a) prior publication or

(b) prior use.

Section 13 of the Act compels patent examiners to look for prior art[20]. The prior use is the use of information in the course of a trade by a person or is well known to the general public or those participating in the trade[21]. If a product or procedure based on the invention is already on the market or being used in the production of a product, then the invention is considered to be in use.[22]

The above conditions needs to be meet to fulfil the criteria of the novelty. But as TK already falls under the domain of prior art, to prove novelty of the TK becomes difficult.

(B) Requirement of Non-obviousness or Inventive step vis-à-vis TK

In order to secure patent protection, this is the second most crucial need. Non-obviousness was

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[18]WIPO - World Intellectual Property Organization. Available at: https://www.wipo.int/edocs/lexdocs/laws/en/in/in018en.pdf

[19] *Id.*

[20] Patent Act, 1970, No. 39, § 13, No. 13, Acts of Parliament, 1970 (India)

[21]Automatic Coil Winder etc. Co. Ltd. v. Taylor Electrical Instruments Ltd., [1944] RPC 41.

[22] Indian vacuum Brake Co. Ltd. v. E. S. Laurd, AIR 1926 Cal. 152.

supplanted by an imaginative step. The act defines the inventive step "as a feature of an invention that involves technical advance as compared to the existing knowledge or having economic significance or both and that makes the invention not obvious to a person skilled in the art."[23] This stipulation was included to guarantee that adequate time and thought went into the development of a really original and useful idea. Therefore, the standard used by the courts is to determine if the inventor's creative skills were really put to use[24]. The correct assessment of the inventive step also requires that analysis of the prior art and prior knowledge about whether the invention is in existence or not. Sometimes, this might be possible to have more than one inventor of the invention in that case they would be regarded as joint inventions in the context of the law. This requirement in the end not only assesses the novelty but also look at the presence of the prior art and the intellectual labour by the inventor.

(C) Requirement of Industrial Applicability vis-à-vis TK

Any of the invention which wants to have the patent protection must be having industrial applicability which was defined under Section 2(1)(ac) of the Patents Act "as Capable of industrial application in relation to an invention means that the invention is capable of being made or used in an industry"[25]. The development and successful rant of the patent always depends upon the industrial applicability that means the invention which are useful for the society could be granted a protection under IPR regime. To be deemed useless to society, an innovation must be either frivolous or harmful to others[26]. The fact that TK may benefit society is one among its many advantages. Only knowledge that has been demonstrated to be of societal utility has been passed down to subsequent generations, and this success is what defines traditional knowledge as having stood the test of time. this means that there is always the possibility of providing proof of TK application[27].

Now, according to Section 3(p)[28] the TK and its duplication or its known properties are not patentable. Lawmakers took this action to prevent multinational corporations from improperly acquiring patents in other jurisdictions in order to profit off of indigenous people' exclusive knowledge. The case of Neem and Turmeric bio-piracy is the evident example that will be discussed later in the dissertation. Also, Section 3(a)[29] lays down that inventions that are

[23] Patent Act, 1970, No. 39, § 2(1)(ja), No. 13, Acts of Parliament, 1970 (India)
[24] M/s. Bishwanath Prasad Radhe Shyam v. M/s. Hindustan Metal Industries, AIR 1982 SC 1444; Windsurfing International Inc. v. Tabur Marine (Great Britain) Ltd., [1985] R.P.C. 59.
[25] Patent Act, 1970, No. 39, No. 13, Acts of Parliament, 1970 (India)
[26] Bedford v. Hunt, 3 F. Cas. 37 and Reliance Novelty Corp. v. Dworzek, 80 F. 902 (N.D. Cal. 1897).
[27] Chapter 4, Protection of TK under the existing modes of the IPR and the Surrounding issues.
[28] Patent Act, 1970, No. 39, No. 13, Acts of Parliament, 1970 (India)
[29] *Id.*

contrary to well-designed natural laws cannot be patented.

(D) Irregularities in patenting of the plant and medicinal plant vis-à-vis TK

In this conventional IPR mechanism of the country there is still much irregularity being found in the patenting of the plant and the medicinal plant which may lead to threat to the knowledge of the indigenous communities. Firstly, in general there is lack of education in order to what to be considered as a new variety of plant and with respect to novelty possessed by it. Many of these communities have managed and cultivated the various plants where were of a commercially beneficial and having an high economic value for example – "The Mexican yellow bean" an invention which the community is not being aware off, however, unlike other plants like ayahuasca, which must be artificially created, new plant kinds can be "discovered" by a community[30], plants that met the criteria for discovery were uncovered. :

- It must not have been discovered growing in an uncultivated state,
- which simply means that if it was found growing freely in a field, the woods, or
- a mountain side, it would not qualify as a "new" species because its existence would already be known outside the community.

That means its current form might have emerged independently of human influence. However, the probability that the plant was the result of human intervention rise if it is found in a human-managed environment, such as a garden or a neighbourhood[31]. So these are the irregularities and the inconsistencies with the patenting of the plant varieties and recognition of that in the current IPR regime.

(E) Impediment created by Patent Laws on TK

The requirement which is discussed above act as an impediment to the protection of TK by the Patent regime. Holders of TK face Evidentiary, Substantive, Administrative, and Cultural hurdles under the patent regimes[32].

a. Evidentiary Impediment

Patent law's evidentiary hurdles are the most significant challenge to TK. It emerges throughout the patent application process while trying to establish when the knowledge was first developed.

[30] Kubala, J. (2022) What is ayahuasca? experience, benefits, and side effects, Healthline. Healthline Media. Available at: https://www.healthline.com/nutrition/ayahuasca (Accessed: March 3, 2023).
[31] Vipin Sandu, "Voracious Intellectual Property Hunting TK", Tomorrow´s research Today SSRN. Available at: http://www.ssrn.com/ (Accessed: April 4, 2023).
[32] Sumathi Subbiah, Reaping What they Sow: The Basmati Rice Controversy and Strategies for Protecting TK, 27 Boston College International and Comparative Law Review, 542 (2004)

The holder of the TK is not eligible for patent protection if they are unaware of this fact. Furthermore, as TK evolves through time, there is no one year that can be identified as the beginning of its development. Prior art is another source of evidential difficulty for TK. As in the United States, where a foreign country's TK is not recognized as public knowledge by the United States if it is not documented in some way, the lack of documentation of TK prevents it from being used as prior art to block another person from patenting the same information.[33]. These roadblocks must be eliminated so that indigenous communities can be fairly compensated for their years of hard work in developing TK and protected knowledge.

b. Substantive Impediment

Inventiveness is currently seen as the "isolated, individual achievement of a known inventor." In contrast, TK is often owned and made by the natives of a certain territory as a group. This means that an invention that is protected by the patent law is the work of one or more people, while TK is made by a group.

c. Administrative Impediment

The administrative barrier to TK is created by the patenting process itself. [34]In the first place, owners of TK typically lack the financial means to file for patent protection. Second, the patents must be written in patent terms, which TK holders find challenging to communicate since they lack the linguistic skills to articulate the "language of chemistry" or "language of molecular biology"[35]. This puts corporations at an edge over local populations.

Hence from the above requirement, the researcher can make an observation that Patenting TK can have both positive and negative outcomes. Here are some examples of each:

(F) Positive outcomes of patenting TK:

- <u>Protection of TK</u>: Patenting TK can provide legal protection to communities who may have been using certain practices for generations, but may not have had formal recognition or legal rights over them.
- <u>Economic benefits</u>: Patenting TK can create economic opportunities for communities by providing them with the ability to commercialize their TK and receive royalties from its use.
- <u>Preservation of TK</u>: Patenting TK can help to preserve and maintain traditional practices

[33] Garcia javier, Fighting Biopiracy: The Legislative Protection of TK, Berkley La Raza Law Journal, 17 (2007)
[34] *Id. at* 56
[35] Graham Dutfield, TRIPS Related Aspected of TK, Case Western Reserve Journal of International Law, 233 (2001)

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and knowledge by providing incentives for communities to continue using and sharing them.

(G) Negative outcomes of patenting TK:

- Exploitation: Patenting TK can lead to the exploitation of TK by corporations or individuals who seek to profit from it without adequately compensating or acknowledging the communities from which it was derived. Hoodia Case is the best example of this aspect, and it will be discussed in detail in the Case Study chapter.
- Limited access: Patenting TK can limit access to that knowledge for those who have traditionally used it, particularly if patents are held by entities that are not part of the community.
- Disruptive to traditional practices: Patenting TK can disrupt traditional practices and knowledge sharing by forcing communities to adopt a more formalized approach to sharing their knowledge, which may be at odds with their traditional methods.

IV. Protection of TK through Copyright

The primary focus of copyright laws is to safeguard fixed artistic creations, such as books, songs, and movies. Copyright law may provide protection for a wide variety of traditional works, including but not limited to "songs and dances, stories, legends, myths, traditions, poems, plays, paintings, textiles, clothing, textile compositions, tapestries, carpets, and three-dimensional works like ceramics, sculptures, wooden carvings, and artefacts"[36]. But many forms of TK are not. One of the main challenges with protecting TK through copyright law is the difficulty in identifying the original creators or owners of the knowledge. TK is often developed and transmitted collectively by a community, rather than by individuals, making it hard to establish individual ownership rights. Additionally, TK is often passed down orally rather than through written records, which further complicates the process of identifying ownership[37].

Another challenge is that TK is often considered to be part of the public domain and is freely shared among members of a community. This means that copyright protection may not be appropriate or desirable for TK in some cases. Instead of relying solely on copyright law, some countries have developed specialized legal frameworks for protecting TK, such as sui generis systems. These systems are designed to recognize the unique nature of TK and provide a means

[36] Cause list, High Court of Punjab and Haryana. Available at: https://highcourtchd.gov.in/
[37] *Id.* at 51

of protecting it that is tailored to the specific needs and characteristics of TK.

Some of the WIPO laws and provisions provide for a protective regime for the TK and their holders. The WIPO and UNCESCO provisions not only provide the regime but also guarantees the right to individual and to the communities who helps in getting the protection of the creations through the TK[38].

There were some of the instances and debates in the IPR regime with respect to getting the copyright protection towards the TK. Bikram "hot" yoga, which consists of 26 yoga postures and two breathing exercises conducted at a room temperature of 105 degrees Fahrenheit, has been the subject of various disputes, including court battles[39]. In this case, the person Bikram obtained copyright protection and publicly stated that infringement of such copyright would not be tolerated. As a result, he filed a suit against Kim Schreiber Morrison alleging that he did not follow the practice and deviated from it numerous times, and yoga institutions and practitioners were also served with cease and desist notices, as a result of which many yoga gurus, institutions, and practitioners formed a corporation name[40]. Disputes arose as a result of this, and a lawsuit was brought in July of 2003; nevertheless, the parties eventually settled out of court and Bikram Choudhry's copyright protection was upheld. In an interview, Sri Sri Ravi Shankar addressed the growing concern over yoga-related intellectual property by saying, "we had to take copyright because someone else was going to take copyright over what we had done, and so our teachers went and took the copyright so that nobody else could claim it."[41]. The govt. of India and the Indian judiciary must take into cognizance of such claim of copyright and stop the exploitation and misappropriation of the TK by the way of such copyright.

In conclusion, while copyright law may provide some protection for certain forms of TK, it is not always the most appropriate or effective means of protection. Specialized legal frameworks, such as sui generis systems, may be necessary to adequately protect TK.

V. TRADEMARK FOR TK

Indigenous communities are increasingly turning to trademark law, which is far from perfect, in order to safeguard their cultural practices and knowledge. It is crucial to recognize the limitations and potential risks of using trademark laws to protect TK, although there are

[38] Traditional knowledge and intellectual property – background brief. Available at: https://www.wipo.int/pressroom/en/briefs/tk_ip.html

[39] Krishna Ravi Srinivas, '*Intellectual Property Rights and TK: The Case of Yoga*' Economic & Political Weekly Vol. 47 No. 27 & 28, July 14-20, 2007 p 2866 – 2871.

[40] George, M.P. and SpicyIP (2020) Bikram yoga and copyright: A lot of 'hot' air?, Spicyip. Available at: https://spicyip.com/2011/12/bikram-yoga-and-copyright-lot-of-hot.html

[41] Sri Sri Ravi Shankar interview with S Sivaswamy and Nikhil Lakshman, ' Knowledge Should Be Free for All', February 22, 2006.

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situations in which this can be a useful strategy. WIPO defines Trademark as "a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises. Trademarks are protected by intellectual property rights."[42]

Protecting corporate identities has long been a primary goal of trademark law. On the other hand, indigenous cultural expressions and other types of TK may also be eligible for trademark protection if they are applied in commercial settings. For example, if an indigenous community has a traditional design or pattern that is used in their cultural arts and crafts, they may be able to register that design as a trademark to prevent others from using it without permission or in a way that misrepresents its cultural significance.

There are two main tenets of trademark law, distinctiveness and avoiding consumer confusion[43]. For a trademark to be unique, it must not be confusingly similar to any existing trademarks for related goods. Customers must buy these items to eliminate any doubt about where the product was produced. Products need marks to avoid consumers mistaking them for something else or thinking they were made by a certain manufacturer. Even agricultural and biological goods can be shielded from competition from local manufacturers thanks to the Trademark Act of 1999[44]. Native American, Inuit, and other indigenous producers, practitioners, artisans, and merchants, as well as the organizations that represent or organize them (cooperatives, guilds, etc.), can benefit from trademarks and service marks by using them to set themselves apart from the competition.

Artisanal and cultural goods can be protected by using collective markings[45]. Products and services as diverse as fine art, food, clothing, and travel itineraries have all found creative ways to make use of certification marks[46]. Native American businesses can register their trademarks and promote their wares using the trademark sign to highlight the authenticity and originality of their items in the marketplace[47]. Consequently, the trademark system can safeguard the status of common knowledge, but not the content of such information. It will provide defensive protection against activities that involve passing off counterfeit goods or services.

Using a trademark in this way is a certain approach to show off the quality of your product and protect your company's name from being tarnished by the use of a catch-all phrase for what you

[42] Trademarks. Available at: https://www.wipo.int/trademarks/en/
[43] Trademarks (2023) S.S. Rana & Co. Available at: https://ssrana.in/ip-laws/trademarks-in-india/
[44] Trademarks Act, 1999, No. 47, Act of Parliament, 1999(India).
[45] Trademarks Act, 1999, § 2(1)(g), No. 47, Act of Parliament, 1999(India).
[46] Trademarks Act, 1999, § 2(1)(e), No. 47, Act of Parliament, 1999(India).
[47] Native American tribal insignia (2022) United States Patent and Trademark Office - An Agency of the Department of Commerce. Available at: https://www.uspto.gov/trademarks/laws/native-american-tribal-insignia

do best. The use of trademarks to guarantee continuous product fidelity after patent expiration is very similar to the practice of licensing pharmaceutical patents. Even if a patent prevents the indigenous people from selling their products, they can still ensure the item's legitimacy by registering a trademark and licensing it to a business. By performing and authorizing pre-existing procedures on things, a community may add value to such products and earn royalties from their sales.

However, there are some potential drawbacks to relying on trademark laws for TK protection. For one, trademark protection is limited to specific goods or services and does not necessarily extend to broader cultural or spiritual contexts. In addition, the registration procedure can be lengthy and costly, making it difficult for local communities and individuals seeking this form of protection. Moreover, in some cases, registering TK as a trademark may even have negative consequences. For example, it could potentially limit the community's ability to freely share their knowledge or restrict its use in ways that are inconsistent with their cultural practices or beliefs.

Therefore, while trademark laws can provide a useful tool for protecting some forms of TK, they should be considered as part of a broader range of legal and policy approaches that taking into consideration unique cultural, social, and economic notion in which TK is developed, shared, and used.

VI. Geographical indication to the TK

There has been much debate among the issue that what needs to be the nature of protection provided to the TK in order to avoid the misappropriation and undue gain by the others for the economic gain. Basically, "a geographical indicator identifies a good as originating in a territory or region, or locality in that territory, where a given quality, reputation, or other characteristic of the good is attributable to its geographical origin."[48] In order to have proper protection and recognition system under the IPR regime India needs a well-developed approach in order to handle exploitation of the TK. Under this IP mechanism, a particular product will be get known by its geographical place from where it comes and originated. India established Geographical Indications (GI) of Goods (Registration and Protection) Act, 1999 with one of aims to examine the application of GI protection for TK and policy needs in the Indian context.[49] GI refers to

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[48] Art. 22-1, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 81 (1994).

[49] Achintyanath, Protection of traditional knowledge as geographical indications, Share and Discover Knowledge on SlideShare. Available at: https://www.slideshare.net/achintyanath/protection-of-traditional-knowledge-as-geographical-indications

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"indication that identifies agricultural, natural or manufactured goods originating in a territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristics of such goods is essentially attributable to its geographical origin."[50] Sometimes the GI could be applicable to some of the tangible manifestation of the TK that could be recognized through its geographical indications. Moreover, the Geographical indicators can't be ever used to describe any product until and unless it belongs to some particular region just like – The phrase "Swiss watch" implies a watch was manufactured in Switzerland due to the country's long history of producing precision timepieces. The French cheese Roquefort is another example of a product that has become synonymous with excellence and which serves as a regional identifier. Cheese labelled "Roquefort" may only refer to cheese made in Roquefort-sur-Soulzon, France, and matured in the traditional caves (a method also linked to the geographical indication)[51].

Since GI is intrinsic to a certain area, it is not subject to the usual novelty, innovative step, or innovation standards. Many globally sourced goods are made using time-tested techniques and local wisdom that have been passed down through generations in certain areas[52]. The Appellation of Origin (AoO) is a type of GI that is protected by the Lisbon Agreement of 1958 since it guarantees the quality of a product based on its origin. Twenty nations have signed on to the Lisbon deal despite concerns that it is not compatible with the TRIPS pact. When traditional, natural goods have qualities that can be traced back to a certain area, the GI and AOI can be employed to boost their economic worth. The promotion of tradition-based GIs makes it possible in order to get a better amount of protection for economic and commercial interests. Thus, in order to preserve, develop, and safeguard the register and the product bearing the protection of the GI, the producers in the specific area and the indigenous groups and people join together. This subfield of law is not yet being used to its full potential in protecting indigenous culture's art and customs. Since a GI or trademark may serve as a marker for a specific kind of tribe or indigenous community, they can be utilized as a useful strategy to safeguard some indigenous art forms. The Madrid agreement of 1891 establishes a method for trademark registration, while the Lisbon Convention of 1958 is the sole agreement to recognize GI and define the procedure for its registration. The TRIPS agreement formalized the worldwide

[50]Prietika Singh and Dheeraj Seth, Correspondent, M.I.P. (2022) Traditional knowledge and geographical indications: Fighting back, MIP. MIP. Available at: https://www.managingip.com/article/2a5c72nm2plzlt4bvgsn5/traditional-knowledge-and-geographical-indications-fighting-back

[51] Raguvaran Gopalan'*The interface between geographical indication and TK',* Journal of Intellectual Property Right, Vol 12, Nov 2007, pp 581-588

[52]Kannadi, A.A. (2023) Aranmula kannadi - Aranmula metal mirror from Kerala, India, ARANMULA KANNADI - ARANMULA METAL MIRROR FROM KERALA, INDIA. Available at: https://aranmulakannadi.org/

recognition of the Madrid and Lisbon conventions.

VII. Conclusion

The issue of safeguarding TK in a modern context through IPR is a complex and multifaceted one. While the concept of bridging the gap between TK and modern IP regimes holds promise, it is not without its challenges and criticisms. On the positive side, utilizing IPR can provide legal recognition and protection for TK holders. By granting exclusive rights and control over their knowledge, traditional communities may be empowered to negotiate fair compensation and prevent unauthorized exploitation. This can help preserve TK systems, promote cultural diversity, and ensure the equitable sharing of benefits derived from these resources.

However, there are valid concerns regarding the compatibility and appropriateness of IPR in safeguarding TK. Critics argue that IP frameworks, primarily designed for industrial innovation and commercialization, may not adequately address the communal and collective nature of TK. TK is often deeply rooted in cultural practices, spirituality, and interconnectedness with the environment, which are not easily captured by the individualistic and proprietary nature of IP systems. Moreover, the implementation and enforcement of IPR can present significant challenges. Many TK holders lack the awareness, resources, and legal expertise necessary to navigate complex IP processes. This can lead to potential exploitation, misappropriation, and marginalization of traditional communities. Additionally, there is a risk that the granting of IPR may further commodify TK, creating a market-driven approach that could undermine the intrinsic values and cultural significance of these knowledge systems.

To address these concerns, a balanced and culturally sensitive approach is required. It is crucial to engage in inclusive and participatory processes that involve TK holders in policy-making and decision-making. Recognizing the collective nature of TK and the importance of community consent is essential. Alternative mechanisms, such as customary laws, community protocols, and benefit-sharing agreements, should be explored to complement or supplement intellectual property regimes.

In conclusion, while IPR can offer a potential means to safeguard TK in a modern context, critical analysis is necessary to navigate the complexities and address the limitations of existing frameworks. An inclusive and culturally sensitive approach, coupled with the recognition of collective rights, community consent, and alternative mechanisms, can help strike a balance between preserving traditional knowledge and promoting innovation and development in a manner that respects the values and aspirations of traditional communities.

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