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Protection of Traditional Knowledge under Intellectual Property Rights in India: A Critical Analysis

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ABSTRACT

The protection of traditional knowledge under the domain of intellectual property rights is a multifaceted issue in today's rapidly globalising world. This research project examines the interlink between traditional knowledge and intellectual property right in Indian context. It studies the scope of existing intellectual property laws in India as well as international conventions in protecting traditional knowledge.

The study highlights important judicial decisions and their implications in protecting traditional knowledge. It also discusses various intellectual property laws of India for protection of Traditional knowledge. It Highlights importance of Traditional Knowledge Digital Library for the protection of traditional knowledge.

It offers recommendations and policy implementations for better protection of traditional knowledge that includes changes to TRIPS agreement, equitable benefit sharing and implementing strict national regulations.

I. INTRODUCTION

Nowadays creativity and innovations are new ways to boost world's economy. The tangible outcome of any idea or intellect is the expression which is protected by intellectual property (IP) laws. IP Rights aims to protect authors work and restricts the use by unauthorised persons. The society anticipates that the creative work should be floated in the public where it could be traded. The societal object is to promote creativity and it does not want to endorse monopolistic market dominance. For this purpose, the laws limits author's rights in terms of duration as well as scope. Intellectual property rights are granted for a limited time and the scope of the protection is limited to innovative expression and not the basic idea. The intellectual property rights no longer remain the interest of the state but are recognised globally as socio-economic, technological and political concern.

Traditional knowledge is a knowledge or custom which is used by generations of communities in accordance with their local customs, regulations and heritage. The traditional knowledge has

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been passed down and polished from generation after generation. Traditional knowledge has contributed to many fields like medicine, agriculture and food security and still continue to do so. Instead of recognising its contribution the society have consented and contributed to its decline through destruction of community's surroundings and cultural values.

Nowadays, western scientists have shown their interest in Traditional knowledge and its contribution to present day challenges, along with contemporary scientific and technological knowledge. Though the importance of traditional knowledge has been recognised, it is still being recognised as information freely available in public domain without regulations and protection. In addition, there are times where researchers and business claimed traditional knowledge as their intellectual property rights without giving any due credits to knowledge originators or guardians of the knowledge.

Research Problem

How lack of protection of Traditional Knowledge under Intellectual Property Laws of India effects the Rights of Indigenous people in India.

Rationale

The growing utilisation of traditional knowledge in modern world is a universal trend. However, in India there are legal challenges in protection of traditional knowledge under Intellectual Property law. An analysis of significant challenges in the of protection of traditional knowledge will help to identify shortcomings and propose recommendations for better protection of traditional knowledge and its fair use.

II. CRITERIA TO QUALIFY AS TRADITIONAL KNOWLEDGE

Article 8(j) of the “convention of the biological diversity act”² says “that traditional knowledge provides insights, innovations and customs of local and indigenous societies”. It usually takes form of stories, beliefs, songs, folklore, cultural values, community rules, community language and agricultural practices. It usually denotes to an oral heritage as it is communicated through songs, dances, drawings etc. imparted from generations to generations. Traditional knowledge turns practical in nature when applied to agriculture, fishing, and forestry and in overall environment stewardship.

The World Intellectual Property Organisation defines traditional knowledge as “the knowledge, skills, practices, and know-how that are developed, sustained, and passed on from generation

² “clause (j), article 8, convention on biological act <https://www.cbd.int/doc/legal/cbd-en.pdf>”

to generation within a community, often forming part of its cultural or spiritual identity”³. There is no internationally recognised definition of traditional knowledge but it can be said that: it is a knowledge which has been gathered through generations from customs. And besides this it is often adapted at time to time because of changing needs of the society. These innovations help us to increase our current knowledge and effects what information is to be passed on to upcoming generations and creating what becomes traditional knowledge for them.

So, keeping in view the above discussion key elements of traditional knowledge can be recognised as:

- A. Generating new ways to meet needs of the society
- B. Passing down such ways from generations to generations through customs
- C. Keeping the knowledge between specific group or society

The use of neem tree in India is a perfect example of traditional knowledge. Different uses of neem have been found throughout ancient texts of India in the form of insect repellent, beauty products medicine etc. which have been passes down from generations to generation and its use is still prevalent in Indian society.

III. INTERNATIONAL REGIME FOR PROTECTION OF TRADITIONAL KNOWLEDGE

The value of protection of cultural heritage is gaining importance throughout internal treaties and conventions as world the world has slowly started recognising it importance. At first, in 1978 the World Intellectual Property Organisation (WIPO) and The United Nations Educational, Scientific and Cultural Organization (UNESCO) tried to put traditional knowledge under the domain of intellectual property laws. The initiative was to protect the traditional knowledge from unauthorised use and harmful practices.

The increasing awareness about the protection traditional knowledge was further strengthen when Convention on Biological Diversity (CBD) was adopted.

World Health Organization (WHO)

World Health Organization was established on 7th April 1948. It is a specialised agency of United Nations which focuses on health and along with that it also aims to preserve traditional knowledge, especially traditional medicine.

Traditional knowledge has gained ample importance in the area of traditional medicine and the use of medicinal plant. Such medicinal plants and medics have been recognised for its monetary

³ *Traditional knowledge* (no date) WIPO. Available at: <https://www.wipo.int/tk/en/tk> (Accessed: 12 April 2025).

value specially in the developing areas like southern Asia and Africa. The member countries of World Health Organization are trying to protect and recognizing the traditional medicine and its usage around the world and making sure that the benefits are shared equally among the communities.

Convention on Biological Diversity (CBD)

The negotiation which took place under “the United Nations Environment Programme” (UNEP) in Rio De Janeiro in 1992 resulted in the formulation of Convention on Biological Diversity (CBD) on June 5, 1992. The CBD aims to protect the environment along with keeping up the economic growth. It aims to promote sustainable development and fair sharing of genetic resources. It emphasises on using genetic recourses like plants and animals in such a way that ensures biodiversity sustainability. It provides that the developing countries shall have right to access their traditional resources. It further states that sustainable use of biological resources shall not interfere with their intellectual property rights holders. Also, it strives to ensure promotion, creativity and usage of indigenous knowledge and creativity.

World Intellectual Property Organization (WIPO)

World Intellectual Property Organisation (WIPO) works around protection of traditional Knowledge and folklore since 1978. They worked along with UNESCO to create outlines for protecting national folklore. In 1998, WIPO started to work on a new idea that included a fact-finding mission by 28 countries to gain in depth knowledge about intellectual property and Traditional knowledge. This enhanced the global research about the needs and rights of traditional knowledge holders. In the 26th meeting of WIPO, its general assembly established an intergovernmental committee. The committee worked on creating important documents, such as clauses for contracts which involve genetic resources, a toolkit containing conventional information security documentation and efforts for Sui generis traditional knowledge safeguarding system.

IV. ROLE OF INTELLECTUAL PROPERTY LAWS IN INDIA IN PROTECTION OF TRADITIONAL KNOWLEDGE

1) Biological Diversity Act, 2002

A new act called Biological Diversity Act⁴ was introduced in 2002 India as it became the part of Convention of Biological Diversity. The main functions of the act is to protect different forms of life and to make sure their human use does not harm the environment.

⁴ “The Biological Diversity Act, 2002 <https://www.indiacode.nic.in/bitstream/123456789/2046/1/200318.pdf>”

The law deals with four important things:

- A) The right to use natural resources: it specifies who can use natural resources and how?
- B) Collecting and using natural resources: it specifies how to gather and use things from nature.
- C) Sharing the profits: it specifies the money which is collected for using the natural resources should be divided fairly.
- D) Preventing unauthorised use: it specifies rules for protection of natural resources from unauthorised use.

The act creates “National Biodiversity Authority” (NBA), “State Biodiversity Boards” (SBB) and “Biodiversity Management Committees” (BMC) at the local level. It formulated the rule that nobody can get intellectual property rights like patents or copyright over any natural resources without the permission from National Biodiversity Authority. The act also states the rules regarding the ownership over the traditional knowledge and its commercial use. The act further makes sure that the people who own the knowledge or the community in which the knowledge has been preserved get their fair share in the profits.

2) Copyright Act, 1957

In copyright law⁵ only expressions are preserved and not the ideas. Copyright laws can protect the traditional knowledge holders’ rights like the imaginative expressions of indigenous artists from unauthorised use and misuse. Such expressions can include works like stories, myths, customs, poems etc. in literary sphere; dramatic works; artistic works like pottery, paintings, ceramics, wood/stone carvings and textile work like fabrics, carpets, tapestries etc. performance rights such as of singers and dancers can also be protected under the domain of copyright act.

Further, the World Intellectual Property Organization do recognise the indigenous and local community performers as traditional knowledge. In copyright performance is covered as an accessory right. The traditional knowledge such as performance of ingenious and local communities could be protected under performers rights category.

3) Trademark Act 1999

Trademark acts⁶ work around two principles that is “distinguishability” and “avoid confusion”. It means that any mark like word, symbol, design, phrase related to a similar product shall not have such similarities that it creates confusion between the consumers.

⁵ “Copyright act, 1957 (14 of 1957) <https://copyright.gov.in/documents/copyrightrules1957.pdf>”

⁶ “Trade Marks Act, 1999 [Act No. 47 of Year 1999 dated 30th. December, 1999], <https://ipindia.gov.in/writereaddata/Portal/ev/TM-ACT-1999.html>”

The Trademark law also protects the agricultural and biological products of indigenous producers from that of others. Collective marks can be used by owners of traditional knowledge to secure their artisanal and cultural products. Also, certification marks could be used by indigenous groups to distinguish their brand and to ensure quality to the consumers. The trademark act can protect the traditional knowledge to some extent but will not be able to protect the content of traditional knowledge.

The trademark can protect the reputation of products originating from traditional knowledge possessed by ingenious people and preserve among their community which ensures product fidelity.

If the patent prohibits the indigenous community from selling their products in the market, such products could be registered under the trademark and further one could get it registered under the trademark to assure authenticity to the consumers. The communities could gain royalties by selling such products to the companies if it gains sufficient recognition.

4) The Protection of Plant Varieties and Farmer's Rights Act, 2001

The act⁷ came into force in September 2001. It is Sui generic legislation which was enacted to comply the TRIPS agreement under national laws. It lays down criterions under plant varieties which could gain protection such as “novelty, current variety, chiefly derived variety and cultivator's variety”.

The indigenous cultivators and farmer use unique techniques and methods to grow and preserve their traditional crops which could be protected under this act. The act revolves around the idea of fair profit sharing among the buyers and sellers. It aims to protect monetary rights of rational knowledge holders. The traditional plant breeder could obtain plant breeders' right (PBR) over a variety if it fulfils conditions like novelty, uniformity, stability and distinctiveness.

5) Geographical Indications of Goods (Registration and Protection) Act, 1999

Geographical indications are the best form of recognising and safeguarding traditional knowledge. The community of indigenous people from an exact location strikes with the geographical indication of goods act. Geographical indications are given to any goods originating from any territory, locality or nationality which have listing characteristics, quality which is inspired from the habitat of that area. Geographical inaction provides security for 10 years but it can be extended N number of times which provides security for infinity period.

⁷ “The Protection Of Plant Varieties And Farmer's Rights Act, 2001 https://ibkp.dbtindia.gov.in/DBT_Content_Test/CMS/Guidelines/20181115121824577_The%20Protection%20of%20Plant%20Varieties%20and%20Farmers%E2%80%99%20Rights%20Act,%202001.pdf”

Over the generations the traditional knowledge used by local and indigenous people have been preserved and evolved over the time which gives them unique features. Geographical indication aims to provide recognition to such goods evolved from traditional knowledge as long as they retain natural and cultural significance.

The act⁸ may be used to protect traditional therapeutic products and medicinal products where features of such products are due to the geographical origin of such products.

The geographical indicators help the traditional farmers to gain premium value of their products. Protection under geographical indicators will help the traditional knowledge in surviving and evolving by recognising cultural values of traditional knowledge holding communities and individuals.

6) Traditional Knowledge Digital Library (TKDL)

The “traditional knowledge digital library” is the project of government of India along with “Council for Scientific and Industrial Research” (CSIR) and ministry of “AYUSH”.the main function of the library is to collect the information about traditional knowledge from all around the country and store it in a single repository in multiple languages and formats.

TDKL is helpful for people who wishes to seek patent registration at international patent offices to check if their works is not a recognised work of traditional knowledge.

Storing data at one place makes it easier to access the data. Generally traditional knowledge in India is available in native languages like Sanskrit, Urdu, Arabic etc. the library translates such works in English, French, Spanish, German and Japanese which makes it accessible to the patent examiners around the world.

TDKL organises information in a similar format as patents application so it gets easier for patent examiners to use. For every traditional knowledge a complete list of bibliography of Indian traditional documents have been created, which further contains scanned images of the original documents.

7) Traditional Knowledge Resource Classification (TKRC)

Traditional knowledge Digital Library⁹ have created Traditional Knowledge Rehouse Classification (TKRC) that is a classification system of traditional knowledge. For instance, the Indian traditional median system into 25,000 subgroups for “Ayurveds, Unani, Siddha and

⁸TRADITIONAL KNOWLEDGE DIGITAL LIBRARY (TKDL), <https://www.tkd1.res.in/tkd1/langdefault/common/Home.asp?GL=Eng>

⁹TRADITIONAL KNOWLEDGE RESOURCE CLASSIFICATION (TKRC) <https://www.tkd1.res.in/tkd1/langdefault/common/TKRC.asp?GL=Eng>.

Yoga” which enhances the review of prior available art for the patent applications in the area of traditional knowledge.

There was an international conference organised in Delhi in 2011 by the World Intellectual Property Organisation which partnered with CSIR on “use of virtual knowledge digital library as a model for the security of virtual knowledge”. Also, WIPO conducted an “International study visit to TKDL”¹⁰ along with CSIR and Ministry of Commerce and Industry for around 20 countries which were interested in the replication of TKDL.

Traditional Knowledge Digital Library have successfully defended illegitimate rights over traditional knowledge and ensure Intellectual Property rights over such Traditional Knowledge. It has also taken steps to preserve such knowledge for future generations. The main aim of the TKDL is to ensure that that patent examiners do not provide for incorrect patent rights because of lack of knowledge of prior art; and not to limit the usage of traditional art by indigenous communities.

V. LANDMARK JUDGEMENTS

THE NEEM CASE

The neem case¹¹ caused a stir in the patent system of India. A company named W.R. Grace got a patent registered in the United States and the European Union for a unique way of storing a active ingredient in the neem plant called Azadirachtin. They stored azadirachtin for pesticidal use. In India it created a big controversy as Neem is considered a traditional medicine used from ages in Ayurveda and Unani. It is famous for its antibacterial and anti-viral properties. In Sanskrit language it is called “cure for all ailment” it is also recommended to use neem in skin diseases, so many ayurvedic skincare products use neem as an ingredient.

In the patent application W.R. Grace stated that how the use of neem as a pesticide was established and how it is difficult to store the azadirachtin for a longer time. The US patent protected the restricted invention of storing the azadirachtin in a unique way.

The granted patent caused a lot of protests and people questioned the examination by patent authority as Neem was traditionally used as pesticide from time immemorial. There were re-examination and post- grant opposition in both United States and the Europe. In the US there were no changes granted in the investigation and the patent grant was approved. However, in

¹⁰ “International Journal of Recent Scientific Research Vol. 9, Issue, 4(D), pp. 25785-25787, April, 2018 <https://www.recentscientific.com/sites/default/files/10605-A-2018.pdf>”

¹¹ “Werhane, Patricia H. and Severance, Kristi, W. R. Grace & Co. And the Neemix Patent (a). Darden Case No. UVA-E-0157, Available at SSRN: <https://ssrn.com/abstract=908425> or <http://dx.doi.org/10.2139/ssrn.908425>”

the European Union the patent grant was taken back on the grounds that the patent was not innovative.

THE TURMERIC CASE

Turmeric is mainly cultivated in India in the eastern region. It has many uses like medicine, food ingredient, a dye and more. Its medical uses are as a blood purifier in treating common cold and anti-parasitic for skin related issues. A university of US named university of Mississippi Medical Centre was issued a patent on turmeric use for wound healing. The main subject matter was “use of turmeric powder and its administration for wound healing”. The university got exclusive rights of distribution and sale.

The patent was objected by Indian Council for Science and Industrial Research (CSIR) on the grounds of prior art. It provided US patent office proofs of prior art. It was an established fact that turmeric was used in household since ages but finding concrete proofs about such uses was a difficult task. The CSIR did research and provided with 32 references of uses of turmeric in ancient written texts. The US patent office agreed that such uses of turmeric is traditional knowledge and revoked the patent granted. It stated that such use of turmeric is obvious and anticipated.¹²

THE BASMATI RICE CASE

In 1997 a US based company was granted a US patent named “Basmati Rice Lines and Grains”. The company introduced a rice line by crossing dwarf variety of rice from India and Pakistan, that includes 22 traditional Basmati Rice. The patent covered the new variety of rice along with the traditional basmati rice varieties from India and Pakistan. The name ‘BASMATI’ which was used by India and Pakistan for generations was also protected under the patent.

The traditionally grown basmati rice in India and Pakistan has a specific aroma and size. The use of basmati name by the company will leave the consumers misled against inferior goods. Such confusion shall affect the trade of basmati rice from India and Pakistan negatively. There was a pressure from farmers and non-governmental organisations on government to raise voice against the patent granted and file an application for re-examination. The Indian government claimed that the patent lacked innovation and invention. The US patent office recognised the

¹² “Saipriya Balasubramanian, 'Traditional Knowledge And Patent Issues: An Overview Of Turmeric, Basmati, Neem Cases' (Singhassociates.in, 2017) accessed 13 September 2019”

traditional use of patent and altered the claims of the patent granted. The company was also asked to drop the name basmati from their line.¹³

VI. ISSUES AND CHALLENGES

Traditional knowledge is an evolving concept, it changes with new conditions and new information is created. The IPR system protecting such traditional knowledge should continuously evolve with the growing recognition of traditional knowledge. There have been proposals made in the IP laws to provide a better protection to the traditional knowledge but they are not adequate because of the multiple aspects of traditional knowledge. Traditional knowledge needs to be protected for multiple reasons like equity, conservation, preservation and prevention of unauthorised use. There is also need for promotion of use and spreading awareness about traditional knowledge. Few people have a opinion that traditional knowledge should be covered under patent protection but argue that innovation and novelty are the important requirements of patent protection.

Under current IP regime there are no provisions to acknowledge indigenous people whose traditional knowledge has been used as medicine related expertise by large medical companies. Around the value of 43 billion dollars pharmaceuticals products from traditional medicine has been used worldwide in 1995.

For patent protection an invention must be novel. For deciding the novelty, it is examined that the work should not be a part of prior art. If any work is published its novelty is lost. A concern with traditional knowledge is that scientists usually make such knowledge a part of their research work and publish it. After such publications it becomes nearly impossible for indigenous people to get knowledge patentable.

Another issue in getting traditional knowledge protected under IP law is joint inventions. The contribution of indigenous people in the invention of new drug is difficult to be covered under the strict rules of joint invention. The rules of joint authorship demand that the inventors work towards the same outcome, by combining their efforts. Such contributions of the owners of traditional knowledge are not easy to be registered.

Providing monetary benefits to the local community who possess traditional knowledge is the main goal for protecting traditional knowledge in today's scenario. They have preserved and evolved such knowledge over generation for which they should get some acknowledgement and

¹³"Cases Of Misappropriation Of Traditional Knowledge' (Shodhganga.com) accessed 13 September 2019.<https://shodhganga.inflibnet.ac.in/handle/10603/22605>"

economic bent. If there will be serious lack of economic benefits, these communities will stop using and preserving such traditional knowledge which could be lost forever.

VII. CRITICAL ANALYSIS AND RECOMMENDATIONS

The developing countries around the world are concerned about the patents granted to people who have not originally invented the work but have produced it from traditional knowledge. Such exploitation of biological resources is because of lack of protection of traditional knowledge under intellectual property laws. It is necessary to bring changes in the provisions of TRIPS agreement which makes stricter regarding traditional knowledge. TRIPS could include principles which could prevent biological piracy like:

- A) Sharing the information about the source of traditional knowledge used in making any biological tools
- B) Informing the local population and taking their consent before using any part of their traditional knowledge
- C) Making provisions for equal benefit sharing

The protection of traditional knowledge is different around the world. For instance, in India for innovation to get patent it should be novel. Any use of conventional techniques or replication of known knowledge would result in failure of patent protection. However, in the US any subject matter is considered prior art only if it is published in scientifically validated printed form. There is a need to provide financial security to the owners of traditional knowledge. There should be provisions with stricter implementation of equity. The owner of the intellectual property which is developed through traditional knowledge should give a fair amount of share to the original owner of the traditional knowledge.

There should be national regulations of IPRs which preserve and recognise rights of traditional knowledge holders and such regulations should serve as bridge between indigenous committees and the public at large.

VIII. CONCLUSION

Traditional knowledge stores in itself many solutions for the modern problems. Exploring the information from traditional knowledge should be done while considering security, upliftment and sharing of profits with the indigenous people. Traditional knowledge is the newest player in the team of intellectual property rights. The informal nature of traditional knowledge, that it is mostly oral in form makes its protection difficult. India have taken an initiative to deposit such information about traditional knowledge through Traditional Knowledge Research

Library. But there is a need to take such step at the international level as IPs are being used and recognised internationally.

However, a national law for the protection of traditional knowledge which have strict rules for the protection of traditional knowledge under IP laws will result in growth of the cultural heritage. The proposals such as digital India and start up India shall be instrumental in saving the deteriorating structure of traditional knowledge. It is safe to say that is on the shoulders of present generation to preserve the precious knowledge of dying generation for the use and wellbeing of future generations.

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