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THE INTERSECTION OF TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY: BALANCING INNOVATION WITH CULTURAL PRESERVATION IN INDIA

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INTRODUCTION

Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. It can be found in a wide variety of contexts, including: agricultural, scientific, technical, ecological and medicinal knowledge as well as biodiversity-related knowledge.² Traditional knowledge is frequently passed down orally from generation to generation and is developed from experience gained over many years and adapted to the local culture and environment. It belongs to everyone as a group and is preserved through tales, songs, folklore, proverbs, cultural values, beliefs, rituals, etc. Indigenous peoples follow oral traditions, including dances, paintings, carvings, and other artistic expressions, that have been practised and passed down through millennia.³ So Traditional Knowledge is also considered as *res communis*⁴ i.e. common things – belonging to a common group.

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² *Traditional knowledge* (no date) *WIPO*. Available at: [https://www.wipo.int/tk/en/tk/#:~:text=Traditional%20knowledge%20\(TK\)%20is%20knowledge,its%20cultural%20or%20spiritual%20identity](https://www.wipo.int/tk/en/tk/#:~:text=Traditional%20knowledge%20(TK)%20is%20knowledge,its%20cultural%20or%20spiritual%20identity). (Accessed: 06 June 2024).

³ *Traditional knowledge* (no date a) *Vajiram & Ravi*. Available at: <https://vajiramandravi.com/quest-upsc-notes/traditional-knowledge/> (Accessed: 06 June 2024).

⁴ *Res communis* (no date) *Oxford Reference*. Available at: <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100408305#:~:text=%5BLatin%3A%20common%20things%5D,legal%20title%20of%20any%20state>. (Accessed: 06 June 2024).

Traditional Knowledge and IPR are two terms that we don't often hear together. While IPR stands for Intellectual Property Rights, Traditional knowledge is something we all possess and tend to take for granted without realising its value.⁵ Traditional knowledge of various products in India should be protected from misuse by different countries and India needs to further update in the field of patenting Indian traditional knowledge in order to be safeguarded against this reality.⁶ The numerous definitions have been given to the word protection, which provide one rationalization for a lack of clarification about the justification for protection. Some understand this term in the sense of IPRs, where security generally means excluding third parties from unauthorized use. Others distinguishes protection as an instrument for protecting traditional information from exercise that may erode it or have a detrimental effect on the lives or cultures of the societies that have created and implemented it.⁷ For a patent to be granted, an applicant must satisfy certain criteria as defined by national patent law, in particular, an applicant must prove that a claimed invention is novel and not previously known.⁸

INTERSECTION OF TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY RIGHTS

Intellectual property rights are intended to protect research and development (R&D) investment and to promote creativity by providing discoverer with motivation.⁹ The purpose of the Protection of Indigenous Knowledge through Intellectual Policy is to argue for the protection of TK using the present system of Intellectual Property (IP). Thus, far, the IP has not been used to protect TK but has in fact been used to usurp TK, without any benefit to the knowledge

⁵ Kalra, M. (2023) *What is traditional knowledge and how to protect it?*, IPTSE. Available at: <https://iptse.com/what-is-traditional-knowledge-and-how-to-protect-it/> (Accessed: 06 June 2024).

⁶ Riya (2020) ' PROTECTION OF TRADITIONAL KNOWLEDGE UNDER INTELLECTUAL PROPERTY RIGHTS REGIME ', *Journal of Academic Innovation and Research in Intellectual Property Assets (E-JAIRIPA)*, Vol. 1 (01), pp. 149–164.

⁷ *Ibid page 152-153*

⁸ *Protecting India's traditional knowledge* (no date) WIPO. Available at: https://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html (Accessed: 06 June 2024).

⁹ Riya (2020) ' PROTECTION OF TRADITIONAL KNOWLEDGE UNDER INTELLECTUAL PROPERTY RIGHTS REGIME ', *Journal of Academic Innovation and Research in Intellectual Property Assets (E-JAIRIPA)*, Vol. 1 (01), pp. 149–164.

holders.¹⁰ Although there are a number of gaps in the way intellectual property can protect traditional knowledge and traditional cultural expressions, existing intellectual property laws can be useful to protect and promote contemporary creations and innovations of indigenous peoples and local communities.¹¹ There are mainly four recognized forms of intellectual property: Patents, Trademarks, Industrial Design, and Trade Secrets. Clearly, traditional knowledge does not find a place in the ambit of intellectual property. Since its conception, intellectual property has been hyper-focused on the needs of the technologically advanced society. There was never any provision for the protection of traditional knowledge. Only in recent times, the need to protect traditional knowledge has come to the forefront. There is still no international mechanism in place for the protection of traditional knowledge. The reason is protecting traditional knowledge poses specific practical and logistical problems: Traditional knowledge is an organic body of knowledge. It keeps evolving. The current intellectual property system is not equipped to cater to it. Every other form of intellectual property is granted for a limited period of time. Traditional knowledge cannot be protected for a limited period of time; it has to be safeguarded indefinitely. Then there is the problem of oral traditional knowledge. Not all traditional knowledge has been documented. A lot of it has been handed down from generation to generation, orally. Traditional knowledge is different from every other kind of intellectual property. It is unique insofar as its organic nature is concerned.¹² Indigenous people argue that they have legitimate rights to control, access and utilize in any way, including restricting others' access to, knowledge or information that derives from unique cultural histories, expressions, practices and contexts. Indigenous people are looking to

¹⁰ Chaterjee , I. (no date) *Intellectual Property Rights and Traditional Knowledge - Indian Perspective* , *Manupatra* . Available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.manupatra.com/roundup/363/articles/ipr%20and%20traditional%20knowledge.pdf (Accessed: 06 June 2024).

¹¹ *Intellectual Property and Traditional Knowledge-WIPO* (no date) *WIPO*. Available at: chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf (Accessed: 06 June 2024).

¹² (No date) *Traditional knowledge and intellectual property rights | intepat*. Available at: https://www.intepat.com/blog/traditional-knowledge-and-intellectual-property-rights/ (Accessed: 06 June 2024).

intellectual property law as a means to secure these ends.¹³ The intellectual property protection of TK and TCEs can be understood as taking measures to prevent their unauthorised use or misuse by third parties. The issues around such misuse of TK and TCEs are a big concern for Indigenous Peoples as it may cause spiritual, economic, reputational or cultural harm to them. However, the approaches to protecting TK and TCEs are often complex. One of the reasons is that the conventional intellectual property system was not designed and developed considering the special characteristics of TK and TCEs. For instance, TCEs are often of a collective nature, which makes it difficult or even impossible to identify their author or authors. As a result, they cannot be protected under the conventional copyright system.¹⁴ Despite these challenges, there are several options for the intellectual property protection of some aspects of TK and TCEs. Indigenous Peoples can use conventional intellectual property systems to protect and promote indigenous-owned businesses¹⁵

PROTECTION OF TRADITIONAL KNOWLEDGE IN INDIA

Attempts to exploit TK for industrial or commercial benefit can lead to its misappropriation and can prejudice the interests of its rightful custodians. In the face of such risks, there is a need to develop ways and means to protect and nurture TK for sustainable development in line with the interests of TK holders. The preservation, protection and promotion of the TK-based innovations and practices of local communities are particularly important for developing countries. Their rich endowment of TK and biodiversity plays a critical role in their health care, food security, culture, religion, identity, environment, trade and development. Yet, this valuable asset is under threat in many parts of the world.¹⁶

India's TKDL, a collaborative project between the Council of Scientific and Industrial Research (CSIR), and the Department of AYUSH³, is a home-grown effort to ensure patent

¹³ *Indigenous/Traditional Knowledge & Intellectual Property -- Introduction: Duke university school of law* (no date) *Duke Law*. Available at: <https://web.law.duke.edu/cspd/itkpaper2/> (Accessed: 06 June 2024).

¹⁴ Richter, S. (ed.) (2024) *Traditional knowledge and intellectual property*, *International Journal for Rural Development*. Available at: <https://www.rural21.com/english/a-closer-look-at/detail/article/traditional-knowledge-and-intellectual-property.html> (Accessed: 06 June 2024).

¹⁵ *Ibid para 6*

¹⁶ *Protecting India's traditional knowledge* (no date) *WIPO*. Available at: https://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html (Accessed: 06 June 2024).

offices around the world do not grant patents for applications founded on India's wealth of age-old TK. The idea to establish a TKDL came to the fore amid India's efforts to revoke the patent granted by the United States Patent and Trademark Office (USPTO) on the wound healing properties of turmeric, and the patent granted by the European Patent Office (EPO) on the antifungal properties of neem. These endeavours, while successful, proved extremely costly and time-consuming. Now India's innovative TKRC is modelled on WIPO's International Patent Classification (IPC).¹⁷ The original idea was put forward in 1997 when India fought an expensive patent battle to revoke a US patent on turmeric, a yellow spice used in Indian curries, granted for its wound healing properties.¹⁸

CSIR and the Indian government have prepared a digital library for traditional Indian medicinal knowledge. This library has been created to protect the traditional knowledge of Indian medicines and curb misappropriation at International Patent Offices. Over the years, the Traditional Knowledge Digital Library has systematically and scientifically recorded traditional medicinal knowledge such as Ayurveda and Unani from ancient Indian texts. These recordings have also been translated into various global languages. With the Traditional Knowledge Digital Library, India has gone a step ahead and shown the world that with policy changes, protective mechanisms can be put in place to prevent exploitation of traditional knowledge.¹⁹ There exists another problem that Traditional knowledge, by its very definition, is in the public domain and hence, any application for patent relating to TK does not qualify as an invention under section 2 (1) (j) of the Patents Act, 1970, which defines that "invention means a new product or process involving an inventive step and capable of industrial application". Further, under section 3(e) of the Patents Act "a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or process for producing such substances" is not an invention and hence, not patentable. The Indian Patents Act also has a unique provision under Section 3 (p), wherein "an invention which, in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components" is not an invention and hence,

¹⁷ Ibid

¹⁸ Singh, S. (no date) *India leads the way in protecting traditional knowledge*, *Science*. Available at: <https://sciencebusiness.net/news/72773/India-leads-the-way-in-protecting-traditional-knowledge> (Accessed: 06 June 2024).

¹⁹ Kalra, M. (2023) *What is traditional knowledge and can IPR protect it?*, *IPTSE*. Available at: <https://iptse.com/what-is-traditional-knowledge-and-can-ipr-protect-it/> (Accessed: 06 June 2024).

not patentable, within the meaning of the Patents Act. Additionally, sections 3 (b), (c), (d), (f), (h), (i) and (j) are of relevance with respect to the patent applications related to TK and/or biological material.²⁰

Intellectual property laws have fallen well short of providing appropriate legal protection and guaranteeing returns on indigenous knowledge, such as varieties of crop plants or herbal remedies, or newly-exploitable resources such as genetic diversity. Now India is setting up a database to establish prior art on traditional knowledge. To date, international systems of intellectual property law have failed to protect traditional knowledge. But then India also expects to be one step ahead, after opening its newly built Traditional Knowledge Digital Library (TKDL), for international patent searching.²¹

CONCLUSION

As India moves ahead in the twenty-first century to be a global player, it must take a balanced and inclusive approach. Where the world is fast losing its natural resources, promoting traditional knowledge (TK) could become an initiative for its reconstruction in post-COVID 19 scenarios. Apart from reinstating the rights of these indigenous communities, this step would also facilitate the economic benefit of the country through the incorporation of TK in the realm of Intellectual Property. This would be a masterstroke for India to lead the Global South²²

In conclusion, integrating traditional knowledge into India's IPR regime presents both opportunities and challenges. Progress has been made through initiatives like the Traditional Knowledge Digital Library (TKDL) to prevent biopiracy and protect indigenous knowledge. However, the communal and evolving nature of traditional knowledge requires a more tailored approach such as strengthening legal frameworks. Additionally, fostering international

²⁰ *GUIDELINES FOR PROCESSING OF PATENT APPLICATIONS RELATING TO TRADITIONAL KNOWLEDGE AND BIOLOGICAL MATERIAL* (2021) *Official Website of Intellectual Property India*. Available at: https://www.ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_39_1_5-tk-guidelines.pdf (Accessed: 06 June 2024).

²¹ Singh, S. (no date a) *India leads the way in protecting traditional knowledge*, *Science*. Available at: <https://sciencebusiness.net/news/72773/India-leads-the-way-in-protecting-traditional-knowledge> (Accessed: 06 June 2024).

²² Chakraborty, S. (2021) *A primer to Traditional Knowledge Protection in India*, *National Center for Biotechnology Information*. Available at: <https://pubmed.ncbi.nlm.nih.gov/> (Accessed: 06 June 2024).

cooperation and promoting sustainable use and innovation can enhance protection and benefit-sharing. By balancing respect for cultural heritage with economic development, India can safeguard its traditional knowledge while fostering national progress and innovation. India should focus on balancing the innovative aspect of Intellectual Property Rights along with preserving the culture of the country.