



INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS (IJCRT)

An International Open Access, Peer-reviewed, Refereed Journal

PROTECTION OF TRADITIONAL KNOWLEDGE UNDER INTELLECTUAL PROPERTY RIGHTS

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ABSTRACT:

Traditional knowledge is a knowledge which is passed on from generation to generation in a particular community. The knowledge, skill or know how is not known by people outside that particular community. Thereby it becomes an essential form of intellectual property and requires measures to keep it protected. Traditional knowledge are age old practices or methods which have been practiced through generations and hence a special degree of care has to be ensured to make sure that it sustains the winds of time. It is often observed on multiple occasions that they fail to survive the withering of time due to lack of protection and hence are easily infringed or due to lack of economic gain people tend to move away from it as earning day to day essentials is more important for survival. Internationally several measures have been taken to ensure protection of traditional knowledge but in India no such substantial step have been taken. The only effective step in this direction was the formulation of the Traditional Knowledge Digital Library. However, no specific legislation is in place for the protection of Tradition Knowledge. The paper would deal with the consequences of lack of protection of traditional knowledge and the possible ways to protect it. The paper would also focus on the fact that how existing IPR laws in India are not sufficient in ensuring the protection of traditional knowledge, hence the enactment of a separate legislation for protecting traditional knowledge is essential.

KEYWORDS: Traditional Knowledge, Legislation, Protection, IPR, TKDL.

INTRODUCTION: -

Traditional knowledge refers to 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 identity¹. Innovations based on TK may benefit from patent, trademark, and geographical indication protection, or be protected as a trade secret or confidential information. However, traditional knowledge as such - knowledge that has ancient roots and is often oral - is not protected by conventional intellectual property systems. The conventional IP system does not provide adequate safeguard to traditional knowledge. Countries such as Hong Kong, Cambodia, Vietnam etc. have separate legislation for the protection of traditional knowledge². In India, there is an urgent need to have separate legislation on traditional knowledge as the conventional Intellectual property system is not adequate in safeguarding traditional knowledge. In India, the traditional knowledge is governed by geographical indications, patents, copyright etc.

In 1992, the value and importance of traditional knowledge as intellectual property were realized by the Convention on Biological Diversity. This became more pressing with the adoption of the World Trade Organization Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPs). After the International Labor Organization (ILO) Convention 169 (1989) and the Declaration on the Rights of Indigenous Peoples (2007), it was realized to have a sui generis³ law for the protection of traditional knowledge. In 2000, WIPO members established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), and in 2009 they agreed to develop an international legal instrument (or instruments) that would give traditional knowledge, genetic resources and traditional cultural expressions (folklore) effective protection. Such an instrument could range from a recommendation to WIPO members to a formal treaty that would bind countries choosing to ratify it. In 2001, the Government of India set up the Traditional Knowledge Digital Library (TKDL) as a repository of 1200 formulations of various systems of Indian medicine, such as Ayurveda, Unani and Siddha and 1500 Yoga postures (asanas), translated into five languages — English, German, French, Spanish and Japanese.

Nevertheless, still, no proper legislation has been formulated by the Indian Government for the protection and sustainment of traditional knowledge.

¹ Definition according to WIPO report.

² Survey of laws on Traditional Knowledge in South East Asia, report submitted to WIPO on October 2003

³ Latin word meaning 'Of its own kind'.

DEVIANCE OF TRADITIONAL KNOWLEDGE FROM EXISTING IPR LAWS:

Traditional knowledge comes under the purview of IPR but requires separate laws to govern it. Till date, traditional knowledge is governed by IPR laws such as Geographical Identification Act, Copyright Act, Patents Act etc. However, with time it has been evident that the existing laws have failed to protect and sustain the Traditional knowledge under IPR. Many countries have started to ponder about it and are in the process of formulating laws specifically for Traditional Knowledge.

(a) PATENT AND TRADITIONAL KNOWLEDGE:

Section 2(j) of the Patents Act defines a patentable invention as an invention as a new product or process involving an inventive step and capable of industrial application. It is clear that there is a requirement for an invention or process involving an inventive step and traditional knowledge as we know is a knowledge related to something transferred from generation to generation, and hence the scope for a new and inventive step declines.

The Indian Patent Act 1970 does not have any specific section for the infringement of patents. However, Section 48 of the Act gives exclusive rights upon the patentee to exclude the third party from making, importing, using, offering to sale or selling the patented invention. Patents are given for ten years, and after the expiration of the time period, the patent would have to be renewed. Traditional Knowledge passes from generation to generation, and hence it would be highly inconvenient to renew the patent after every ten years.

First of all, patenting Traditional Knowledge is not appropriate and secondly if at all it is patented then there is an absence of proper infringement law, and hence it would not be adequate to protect the traditional knowledge.

More interestingly one can use a community's traditional knowledge and formulate an invention and claim for patent, and in this case, he would be provided with a patent. As we know, Traditional Knowledge is nothing but a community heritage which is passed on from generation to generation by mainly word of mouth. If the knowledge escapes the community and is used by an entity in the production of a new product, then there is no way in which infringement could be sought.

“Jeevani” is a restorative, immuno-enhancing, antistress and anti-fatigue agent, based on the herbal medicinal plant arogyapaacha, used by the Kani tribals in their traditional medicine. Within the Kani tribe, the customary rights to transfer and practice specific traditional medicinal knowledge are held by tribal healers, known as Plathis. The knowledge was divulged by three Kani tribal members to the Indian scientists who isolated 12 active compounds from arogyapaacha, developed the drug “Jevaani”, and filed two patent applications on the drug. We could witness that by using the information from a particular community one can quickly develop a product and could have it patented and in this way risks the protection of Traditional Knowledge. This would devoid the community from using their

knowledge any further as it would have been patented by some entity and continuing the use of that knowledge would result in sanctions. There are communities which are solely dependent on their Traditional Knowledge for survival, and if it is taken away from them, then it would affect their livelihood.

So in this way, the procedure of patenting does not provide adequate safeguards to Traditional Knowledge.

(B)GEOGRAPHICAL INDICATION AND TRADITIONAL KNOWLEDGE:

In India, much Traditional Knowledge has been provided with the GI tag for their protection. Nevertheless, the fact is that GI can only protect the use of protected marks or indications. It does not protect the knowledge or the technology embracing that knowledge. This means that the famous Banarasi Saree could be produced anywhere in the world but cannot be given the name. The knowledge could very well be applied. For a consumer, it would not be preferable not to buy a GI certified product for more price. If a product of the same quality is available for a lesser price and it would lead to economic loss as stated earlier that there are communities which purely rely on their knowledge for their survival and if they face economic loss due to their product being produced by some other entity, it will affect their livelihood.

Same is the case with the GI tag, which is provided to the famous rasgulla of West Bengal. Export of the rasgulla is annually a 3600-crore business. It is interesting that instead of being having a GI tag, Odisha also produces rasgulla, and the recipe is the same. Getting the GI tag does not assure protection. It only gives an identity. Nobin Chandra Das formulated recipe of rasgulla in 1886, and it has been his family business till date. It has been the traditional Knowledge of his family. However, now it is produced all over India and Bangladesh, and the same recipe is followed in Odisha. It may lead to economic loss. There has been a bitter war over rasgulla between Odisha and West Bengal, and Odisha claimed that rasgulla is made in Odisha from the 12th Century and is platted as bhog to Lord Jagannath. However, there were no pieces of evidence to back the claims, and even a committee was formed to look into this matter, but it also failed in producing evidence. In 2017, GI tag for rasgulla was given to West Bengal. However, in 2019 Odisha was also awarded the GI tag for 'Odisha rosogolla'. It was contended that the recipe for Odisha rasgulla is different from that of Bengal rasgulla⁴. So, GI tag has been granted to two states for basically the same product with the same name. As mentioned above, the export of rasgulla is a 3600 crore business and providing GI tag to both the state would definitely hamper the business and result in economic loss. The broader picture is that the recipe of Bengal rasgulla was formulated by Nobin Chandra Das and through the protection of GI the state got the right, but the heirs of Nobin Chandra have no protection what so ever. The recipe of rasgulla is known worldwide now, and the traditional knowledge has been lost. However, it might be possible that some specific ingredient may be still kept a secret which separates the Bengal rasgulla from others, but the right is however not granted to Nobin Chandra rather the benefit is acquired by the State.

⁴Available at [<https://www.livemint.com/news/india/after-west-bengal-odisha-gets-gi-tag-for-its-version-of-rasgulla-1564394962835.html>]

Same is the case with Pattchitra of Odisha which has gained a GI tag, but it is also made by a specific community in Bengal and Bihar. In Bengal, they are called Patuas. They draw pictures and paintings on a piece of cloth, and then they travel from village to village and present their creation through various songs hymns and plays. The community of Patua is tiny, of about 250 Patuas. They are restricted to the Naya village of Paschim Midnapore district. Knowledge is dying a slow death due to lack of protection and sustainment. If proper protection and scope to prosper would have been provided, then this heritage of the country would not have been dying this slow death. The originality of the Patuas have been stolen, and Pattchitra is made at many places across Bengal itself, and it has resulted in significant economic loss resulting in patuas to change their work and pursue some other work to feed their families. Same is the case with that of Odisha. The Pattchitra is made by a small community of Chitrakaras who reside in a small village named Raghurajpur in Puri district. The next generation is forgetting the art as they do not have any economic benefit. The infringement clauses are also not adequate for its protection.

CONSEQUENCES OF LACK OF PROTECTION AND SUSTAINMENT TO TRADITIONAL KNOWLEDGE:

India is wealthy for its communities possessing specific Traditional Knowledge. Due to Lack of safeguards, Knowledge is losing its essence, and the communities are losing their rights. Traditional Knowledge is commercialized as we have seen in the above example of “Jeevani”. Due to commercialization, the knowledge is coming into the public domain and is no more a knowledge restricted to a particular community. The essence of Traditional Knowledge is lost there itself. Due to the lack of projects and methods to sustain the Knowledge, the future generations are not taking an interest in carrying the legacy forward. Due to lack of financial support, they are moving away from their essential practice. Earning a living is a necessity. The Koniyak tribe in Nagaland, famously known as the head hunters knew to make permanent tattoos from the horn of cattle. For centuries it has been a practice of their community, but over time, this practice has lost its essence. They also made various artefacts with the horns and bones of animals. Now, they produce limited artefacts due to lack of a market to sell their products. They also produced products made out of bamboo such as baskets, caps etc. However, now only selected people are left who possess this skill. This is due to the lack of support from the government. The government has taken no initiative in protecting their practice as traditional knowledge. Lack of sustainment has resulted in the extinction of much of such traditional knowledge of various communities.

The medicinal values of turmeric are known to us from pre-historical ages, and its record could be found in various Vedas, commentaries, historical documents etc. However, in 1995, two expatriate was granted a patent by US authority for finding out the value of turmeric. This was a result of poor and lack of protection methods to Traditional Knowledge. To avoid these consequences and loss of traditional knowledge and to make them less prone to patenting by the third party, the Traditional Knowledge Data Library (TKDL) was set up in the year 2000. The concerned community is

required to file a registration regarding its Traditional Knowledge, and then after verification, it would be recorded in the library. It functions under the TRIPS. If in future, anyone tries to file for a patent on a knowledge registered in TKDL, then he could be restricted. However, there is again no specific formulated process or law for safeguarding the rights. In case of any infringement, there is no proper law to govern the cause. The development of new technology and reformed use of traditional knowledge has been a significant threat to the communities possessing this knowledge. Various companies have initiated commercial exploitation. The backward tribes which hold knowledge are not developed and are miserable. They tend to give away their ideas to corporate giants for a small sum of money, and the company uses the information for its benefit. The companies often deceive the tribal men or fraudulently acquire their knowledge. Due to lack of record of Traditional Knowledge, patents have been granted to false patentees, which has deprived the original community of the right.

THE REQUIREMENT FOR SPECIFIC LAW ON TRADITIONAL KNOWLEDGE:

By virtue of the whole paper, it is evident that there is a requirement to formulate separate legislation for the protection of traditional knowledge. There are three reasons for this assertion:

1. The current system focuses on private ownership, but traditional knowledge is all about collective ownership.
2. The present method of protection which we have is time-bound but traditional knowledge passes from generation to generation.
3. The present system has a very restricted interpretation of invention which could satisfy the criteria.
4. The present system does not protect the Knowledge but instead protects the invention, which is an applied outcome of the knowledge.

There is an urgent need for a separate legislature because:

1. It is essential to respect the traditional knowledge of the respective community.
2. It is the urgency of the hour to conserve and protect the Knowledge. Furthermore, to assure that the knowledge passes on to the next generation.
3. There has to be a defence mechanism in place in the form of legislation which would ensure that TK would remain protected and cannot be infringed and if infringed, there have to be proper sanctions.
4. Promotion of their knowledge of innovations is essential.
5. A method to protect the exploitation of their Traditional Knowledge would have to be derived.
6. It should be made sure that the respective community gets an economic advantage for their specific knowledge.

Traditional Knowledge becomes the identity of the community. The uniqueness of Knowledge should be maintained, and its secrecy should be upheld. The WIPO has also started working in this direction. So, different legislative backing

could be provided to the field of traditional knowledge and to safeguard the rights of tribes and communities which possess the knowledge.

CONCLUSION:

In 1992, the value and importance of traditional knowledge were realized after the indigenous people came upfront in demand for rights for their Traditional Knowledge. Later WIPO recognized it and in accordance with its terms and conditions, the TKDL was established in India in 2001. However, the creation of a data repository was not sufficient as the issues are yet unsolved. The creation of the repository ensures that the TK of a particular community is registered with the government but does not provide any set parameters to determine that it cannot be infringed and most essentially does not talk about any relief if in case any TK is infringed. There are certain steps which the government must undertake to ensure that the TK of a community is protected and sustained and does not die with time:

1. The government must protect and promote TK of a community by ensuring their protection at the same time.
2. There has to be effective legislation in place which would deal with providing TK certificates, protecting them from infringement and in case of infringement would provide measures for relief.
3. The Indian market is gigantic and growing exponentially. The world targets the Indian market to sell their products. The government may formulate specific schemes to ensure that the products produced by the communities possessing TK are sold in the market. The government must provide the proper channel to them and link them with the leading economy of this country.
4. There has always been a need for Indian artefacts and products in the global market, be it be the rasgulla or the Bastar artworks. The government may include products made through TK under its program of 'Make In India' and may create a global market for such products.
5. It is perfectly the right time to start working in the direction of providing the value to the products of the communities which produce goods through traditional knowledge. The Honorable Prime Minister has raised the slogan of 'Vocal for Local' and under this slogan, the government may promote the production of the products through TK and may even bring these sectors under the definition of cottage industries or MSME and provide them with cheap loans or no-interest loans to help them to grow their business.

Economic stability is a very crucial issue. In most of the cases, it has been majorly observed that TK is lost due to lack of economic security generating out of its production and due to infringement by private entities resulting in the loss of their sole right over the production of the product. Hence, it becomes essential to protect TK as a separate branch of IPR as it has been observed that the Copyright Act, Patents and GI have failed to protect TK.

There has to be a law which governs the registration of TKs, infringement of Tks and which determines the punishment for infringement. A proper mechanism should be established so that the communities possessing TK could be promoted

to keep producing their products without the threat of economic loss and by protecting their rights. The interest of the respective groups remains protected. A monetary benefit scheme could be provided by the government to support the cause of the communities.

(a) Scheme to Benefit the Communities:

The communities have rich knowledge in their respective field. By applying that knowledge, they make certain artefacts or products. The government could initiate a scheme in which the government would buy those products from the communities directly and would sell them in the market or would export it. By doing this, it would provide a monetary benefit to the tribes as well as the government would benefit from it. Their talent would be recognized by society. Bastar art is globally well known, but it is not in the public domain. If the government recruits those products from the tribes by paying them for their product, then the products would be available easily in the market, and the tribes would benefit from it. It would be an excellent trade. It would be in accordance with the scheme of “Make in India”.

Certain measures have been taken by the government, but it is really not enough. The WIPO has also been conscious about the development of a specific law for Traditional Knowledge. Many countries are working in this direction. Protection of the rights of the respective communities is essential.

