

# Safeguarding Traditional Knowledge Through Intellectual Property Rights: An Indian Perspective

Ms. Amisha Dravid<sup>1</sup>, Mr. Ashutosh Mishra<sup>2</sup>

<sup>1</sup>Student, Law, Uttaranchal University

<sup>2</sup>Assistant Professor, Law, Uttaranchal University

## ABSTRACT

Over the past two decades or so, Traditional Knowledge or Indigenous Knowledge (TK or IK) has received increasing attention on the international agenda. It has attracted growing interest almost all parts of the world. Factors responsible to this include the recognition of importance of TK in the lives of the majority of the world's population and in the conservation of Bio Diversity; concerns about the rapid loss of TK and global cultural diversity; anxiety regarding unlawful, unauthorized and inappropriate patenting and use of TK with little or no sharing of benefits arising out of that with the original owner of such TK and increasing possibilities of earning huge foreign exchange from the business of the TK. Many countries and communities worldwide are considering how to address this issue at the national, regional and international levels. The Traditional and Indigenous peoples have emerged as major players and partners on the national and international scene and this knowledge has become an weapon of cultural and political identity of these peoples.

**Keywords:** Traditional Knowledge, political identity, Bio diversity

## INTRODUCTION

Traditional Knowledge is the knowledge, innovations and practices of indigenous and local communities around the world. It is experience gained over centuries, transmitted orally from generation to generation taking the form of stories, songs, proverbs, beliefs, and culture and most often linked to agriculture, animal husbandry, fisheries, health, horticulture, forestry and nature in general. This knowledge is important for the conservation of plants and animals, their genetic diversity and for managing the local environment. It can make a strong contribution to sustainable development and allow a sustainable future for all humans. It is also used by the aromatic, flavoring, food; cosmetic and health industries. The importance of traditional medicine as a source of primary health care was first officially recognized by the World Health organization (WHO) in the Primary Health care Declaration of Alma Ata (1978) and has been globally addressed since 1976 by the Traditional Medicine Programme of the WHO. Most of the world's population relies on traditional knowledge for health needs. New agricultural and industrial products are often developed using traditional knowledge without the Prior Informed Consent (PIC) of the knowledge holders or without ensuring fair and equitable sharing of the benefits with them. Traditional knowledge is a part of identity of most indigenous communities. Traditional knowledge has played and still plays a vital role in the daily lives of the vast majority of peoples. It is essential to the food security and health of

millions of people in the developing world. In many countries, traditional medicines provide the only affordable treatment available to poor people. In developing countries up to 80% of the population depends on traditional medicines to meet their health care needs. Traditional knowledge has become one of the most important sources of modern medicines today. It has been extensively used to gain useful understanding of how ecological systems generally work and interrelated. This knowledge has contributed to the production in modern economy and played significant role in the research and development programmes of industry. TK may contribute to improved development strategies in several ways such as by helping to identify cost effective and sustainable mechanisms for poverty alleviation that are locally manageable and locally meaningful; by a better understanding of the complexities of sustainable development in its ecological and social diversity and helping to identify innovative pathways to sustainable human development. TK has been used and is increasingly being used, in a wide range of industries for the development of new products. Increasing awareness of the economic value of biological diversity has resulted in industries seeking to exploit traditional knowledge and bio diversity through bio piracy.

The issue of protection of Traditional Knowledge (TK), innovations and practices of indigenous or local communities is currently on the agenda of different inter- governmental forums, including the WIPO, WTO and the CBD. The number of conferences, conventions, declarations, treaties and workshops on traditional knowledge is continuing to increase every year. The legitimacy and importance of this knowledge as a relevant source of information to protect eco systems has now been widely accepted. The importance of TK and TCEs is now recognized on countless occasions by various international organizations, institutions and authorities and also by the governments of various countries of the world including India. TK and TCEs have been discussed in a number of international forums. Foremost among these are those related to the conservation and sustainable development of biodiversity that is the Convention on Biological Diversity (CBD) and the International Undertaking on Plant Genetic Resources for Food and Agriculture (FAO International Treaty). Besides, TK is also addressed in the following international forums:

1. The International Labour organization (ILO),
2. The United Nations Commission on Human Rights and the United Nations Permanent Forum on Indigenous Issues;
3. The World Intellectual Property organization (WIPO);
4. The United Nations Educational, Scientific, Cultural organization (UNESCO);
5. The World Trade organization (WTO);
6. The United Nations Conference on Trade and Development (UNCTAD) etc.

Again some of the International legal instruments to protect and preserve the traditional knowledge are:

1. International Labour organization - Convention ( No. 169 ) 1989 ( The Indigenous and Tribal populations' convention and Recommendation 1957, No. 107);
2. Trade Related Aspects of Intellectual Property Rights (TRIPs) Agreement- 1994.
3. Convention on Biological Diversity (CBD).
4. WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC);
5. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous peoples, 1993.
6. Kari-oca Declaration [The World Conference of Indigenous Peoples on Territory, Environment and Development (25th- 30th May, 1992)] 1992.

7. Universal Declaration of Human Rights 10th Dec, 1948;
8. International Covenant on Economic, Social and Cultural Rights 1966;
9. International Covenant on Civil and Political Rights 1966;
10. Vienna Declaration and Programme of Action 1993;
11. United Nations Declaration on the Rights of Indigenous Peoples
12. International Treaty on Plant Genetic Resources for Food and Agriculture 1983;
13. TUNIS Model Law on Copyright for Developing Countries 1976;
14. Rio Declaration on Environment and Development 1992;
15. UNESCO Convention on the Preservation of Intangible Cultural Heritage (29th Sept.-10th Oct.2003);
16. Berne Convention for the Protection of Literary and Artistic Works.
17. WIPO - UNESCO Regional Consultation on the Protection of Expressions of Folklore for countries of Asia and the Pacific, Hanoi, April 21st to 23rd, 1999.
18. World Health Organization's Traditional Medicine Strategy 2002 - 2005.
19. WIPO Performances and Phonograms Treaty (WPPT) 1996 and WIPO Copyright Treaty 1996 (WCT).
20. WIPO - UNESCO World Forum on the protection of Folklore - 1997.
21. The Johannesburg Declaration on Bio Piracy, Biodiversity and Community Rights- 26th August to 4th September, 2002.

Among various International organizations and forums the World Intellectual Property organization (WIPO) has made remarkable contributions to protect Traditional Knowledge and Traditional Cultural Expressions. WIPO has stressed that protection of TK should be undertaken in a comprehensive manner, potentially using both positive and defensive forms of protections. WIPO began its work on TK-related subject matter in 1978, when it initiated discussions on the sui generis protection of expressions of Folklore in collaboration with the United Nations Educational, Scientific and Cultural organization (UNESCO)<sup>1</sup> This work resulted in 1982 in the adoption of "Model Provisions for National Laws on the Protection of Expressions of Folklore against illicit exploitation and other prejudicial actions". In 1998, WIPO started to explore the IP aspects of the protection of TK. The ultimate aim behind these objectives was to identify and explore the IP needs and expectations of the holders of TK in order to promote the contribution of IP system to their social, cultural and economic development.

WIPO has also commenced, in cooperation with the United Nations Environment Programme (UNEP) an on-site documentation project on the role of IPR in the sharing of benefit arising from the use of TK and associated biological resources. This project prepared three case studies which WIPO and UNEP jointly submitted to the Conference of the Parties (COP) of the Convention on Biological Diversity (CBD). After discussions among WIPO Member States beginning in September 1999 about Intellectual Property and Genetic Resources, the WIPO General Assembly decided that a distinct body should be established within WIPO to facilitate discussions among Member States on issues related to Genetic Resources, TK and Expressions of Folklore. The Member States, however, decided to establish this body. The name of the body was The WIPO Inter Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The Inter-Governmental Committee constitutes a forum for discussions among the member states on Intellectual Property issues relating to the:

- A) Access to genetic resources and benefit sharing;
- B) Protection of TK, whether or not associated with those resources and
- C) Protection of Expressions of Folklore. In the first session of the Inter- Governmental Committee, Members have expressed that the Inter-Governmental Committee should work closely with the

CBD(Convention on the Biological Diversity) and the FAO in order to ensure that its work is consistent with and supportive of the work undertaken by these organizations on Genetic Resources and TK. Following this opinion the WIPO Secretariat and the Secretariat of the CBD entered into a Memorandum of Understanding (MoU) in order to formalize the already existing cooperation between them. Within the frame work of the MoU an extensive programme of action was conducted. Some of these are as below:<sup>3</sup>

1. WIPO and UNEP jointly submitted to the 5th Meeting of the COP three case studies on the role of IP rights in the sharing of benefits arising from the use of biological resources and associated TK, as requested by decision iv/9 of the COP;
2. As requested in Decision v/26 of the COP, WIPO assisted the executive secretary of the CBD in the preparation of a "Report on the Role of IP Rights in the Implementation of Access and Benefit Sharing Arrangements" for the first meeting on the Ad hoc open ended Working Group on Access and Benefit Sharing of the CBD, which led to the development and adoption of the draft Bonn Guidelines;
3. The CBD Ad Hoc open- ended Inter-sessional Working Group on Article 8U) and related provisions contributed to the compilation of the WIPO Inventory of TK- related periodicals and the inventory of TK- related Database;
4. In 2002, WIPO and UNEP submitted a draft study to the 6th COP on the role of IP rights in the sharing of benefits arising from the use of biological resources.

## 2.1 DEFINITION OF TRADITIONAL KNOWLEDGE

Defining traditional knowledge is not an easy task because of different nature and forms of expression of information embraced by traditional knowledge. However, some international institutions and conventions instead of defining traditional knowledge tried to explain the meaning of traditional knowledge. There is no concise definition of traditional knowledge. It has been defined in so many ways depending upon the particular context in which it occurs.<sup>1</sup>

According to layman traditional knowledge means the knowledge developed and possessed by the traditional people, who are living in the forest, relating to all the fields. The Convention on Biological Diversity (CBD), 1992 defines traditional knowledge as knowledge, innovative and application of native and local communities representing traditional lifestyle important to conserve and sustainable use of biological diversity. This definition given by the Convention on Biological Diversity seems to be more constructive rather than elaborate. It defines the traditional knowledge relating to conservation and sustainable use of biological diversity. This does not cover the traditional knowledge relating to other areas such as drama, arts, song dance, folklore, medicine etc.

## Conclusion and Suggestions

The way voice for protection of Traditional Knowledge has been raised, it has generated a significant literary material in different international forums. There have been number of international attempts to define the term Traditional Knowledge. However, all these definitions are not exhaustive as to encompass all kinds of Traditional Knowledge. Either these definitions are illustrative or inclusive in nature. So far, there is no universally accepted definition exist at international level at Although, these international conventions, make some efforts to recognize the rights of indigenous people over their Traditional

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<sup>1</sup> Julia Honds, "The Protection Traditional Indigenous Knowledge by Intellectual Property Law" 2 (Grain Verlag, Germany, 2006)

Knowledge but the real and true scope, extent and ambit of the rights are not settled so far. Some proposals have been initiated either in IPR system or the outside, to protect the rights of Traditional Knowledge holders or the rights of indigenous people. These proposals generally fail to give a clear rationale and objective for its protection. The initiative of any kind for the protection of Traditional Knowledge should be based on some sound definition of Traditional Knowledge; objectives sought for protection and on the appropriateness of the proposal which is given for protection of Traditional Knowledge. Sometimes, IPR may be seen one of the tools to be used for its protection, but IPR has its own limitations and implications should be clearly understood. Till date, there is no clear formula has been given which can protect all forms of Traditional Knowledge. There are many serious issues associated with Traditional Knowledge that are creating hindrance in giving the Traditional Knowledge legal recognition, protection and enforcement.

### ***Definitional Issues***

There is no any globally agreed definition of Traditional Knowledge exist. Various conventions, international organization and instruments define the term differently. In a report of WIPO, it has been said that Traditional Knowledge is highly diverse and dynamic in nature, so it may not be possible and feasible to develop a singular, exclusive and complete definition for 'Traditional Knowledge'. There are many issues such as subject matter of TK, problems in identification of TK holders, problems in its implementation and enforcement etc. which are preventing a consensus to be framed at international level. These issues have been addressed one by one in following paragraphs. Considering that the right of Traditional Knowledge holders should be something akin to intellectual property rights, there is no international agreement on what should be the subject matter of the right. The subject matter is particularly diverse, dynamic, scattered and variable and it is managed and shaped by indigenous, local and cultural factors in contrast with other forms of IP. So, there is a clear need to make a systematic analysis in attempting to clarify the information categories that could be called Traditional Knowledge and sought to be protected. The clarity of the subject matter of Traditional Knowledge is the main thing to be addressed and resolved.

Another important issue is the identification of beneficiaries in relation to the Traditional Knowledge. There is no clear view in relation to the holders of the rights. It is not clear that to whom the rights should be given or who are entitled to be protected for Traditional Knowledge. As discussed previously that it is very difficult to identify the holders of Traditional Knowledge and the rights over the natural resources and knowledge are held by everyone collectively, so the cases are very rare where there is a single beneficiary. So, after making attempt for defining the subject matter, the concerned countries will have to try for a mechanism for identifying the holders. Since the owners or the holders of Traditional Knowledge generally belong to economically and educationally backward regions, they may not come forward for seeking protection. This creates a need that the states should initiate for necessary mechanism to identify the holders of Traditional Knowledge and enable them to receive protection. It will be the liability of states to define the rights but while doing so they should define it as broadly as possible so that it can include all concerned beneficiaries and holders of Traditional Knowledge. As the rights over the resource and knowledge are held collectively, questions rotate around how the communities should be defined. They may be defined geographically, ethnically or politically for the purpose of sharing benefits considering the finest benefits to TK holders. There can be instances where Traditional Knowledge may be held by communities of more than one country. There can also be situations where Traditional Knowledge is held in a country by more than one community or indigenous peoples. At national level also identification of beneficiaries will be a complex task when the knowledge holders are diverse and when the knowledge is

held by more than one community. In such situations, the benefits may be paid into a community fund. However, the concern was manifested that such funds can have high overheads, with restricted benefits reaching the Traditional Knowledge holders. There is a critique that generally benefits go to research institutions or government departments. In every case, the beneficiaries must be defined in such a way as to prohibit collection of benefits in few hands and to cover all the concerned.

After dealing with the subject matter and the contents of right, implementation and enforcement of the rights is the next issue to be solved. So far, there is no common consensus among the international community relating the implementation and enforcement mechanisms which can help in enforcing such sui generis rights. The problem of disagreement among the international community surrounds mainly as to the (i) Method and modalities for registration of Traditional Knowledge and procedure for its certification (ii) enforcement of prior informed consent and benefit sharing in the cases of exploitation of Traditional Knowledge. There is main question involved in the registration is that whether there should be a system of certification at international level to ensure prior informed consent or there should be a national one? This question is yet to be settled. However, a single definition might not determine the scope of subject matter for which protection is sought. This view has been taken in a number of international attempts and instruments dealing with intellectual property rights. Any international convention or treaties in the field of intellectual property rights do not give a single uniform definition which describes the holistic nature of protected subject matter. For example, the Berne Convention for the Protection of Literary and Artistic Works, 1883 does not establish a complete definition for literary and artistic works rather it presents an inclusive enumeration of subject matters that can be protected under it as original creations.

Following the same path, it would be highly expected to have a global planning and strategy of interested and concerned countries as to the subject matters that would be protected under the term Traditional Knowledge. The nations may have two ways: either they can define TK as to give a holistic view – *latosensu* or as a specific term representing the subject matter of exact protection aimed at the use of knowledge - *strictosensu*. Besides this, we will have to develop a mutually agreed formula as to the nature of Traditional Knowledge and the contents of the right. The prerequisite in defining the Traditional Knowledge is to clearly establish the nature and contents of the information that we want to protect. The definition should consider and keep certain key elements such as (i) the context in which the creation exists (ii) community association, (iii) establishment of link by which the ownership or responsibility of the community and against the community can be ensured and (iv) identification of Traditional Knowledge. once this criterion and the nature of Traditional Knowledge is clarified, the nations will have a wide range of options to protect the Traditional Knowledge, including options for sui generis system

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