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**INTELLECTUAL PROPERTY RIGHTS LAW PROTECTION OF
INDIGENOUS KNOWLEDGE**

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ABSTRACT

Unlike the preservation of the world's ecology, wildlife, ancient sculptures, and architecture, one of the less spoken fields is the preservation of indigenous knowledge. With the fast-paced growth of technology and globalization, the touch with ancient knowledge has become thinner than ever. The world of intellectual property rights and the forums existing have recently realized the importance of preservation of such knowledge and protection from bio-piracy and misappropriation. India being one of the most diverse and culturally rich nation, it consists of a myriad of traditional ancient knowledge which has been passed down from generations. This calls for efficient and effective mechanisms in place to deal with issues emerging out of cultural knowledge appropriation by western nations or corporations (as evident from real life instances). This paper deals with traditional knowledge and the importance of its protection. The research paper is divided into five parts starting from an introduction to traditional knowledge, then importance of protection of traditional knowledge, Criteria for something to be considered as traditional knowledge, domestic and international practices, and measures to ensure the protection of traditional knowledge and lastly the author's thoughts on traditional knowledge. The researchers adopted doctrinal research while referring to numerous online articles and books.

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INTRODUCTION

"When an elder dies, a library burns" – Amadou Hampâté Bâ

Human beings have been achieving innovations to great lengths at every stage of human evolution rising from the past as one of the Apex living beings on Earth. This has been possible due to the curiosity and innovative creations by humans through time. For centuries, this knowledge was passed down from generations to generations by way of scriptures, poetry, stories etc. which made it easier for the people in the past to memorize and practice certain things. In India, the ancient Indians primarily followed this way of passing down the ancient sciences, medicine, architecture etc. Most of these things were never privatised or made exclusive as the concept of protecting of intellectual property and exclusion of persons from using certain intellectual property. The rise in profit making institutions, businesses, and concepts of exclusivity resulted in the increase of Intellectual Property rights regime in the world. The increasing competitiveness in the world gave rise to the importance of entitlement of exclusive rights over one's intellectual property. This practice has been common in the urban world for the past few decades, particularly after the establishment of the world intellectual property rights organisations such as WIPO, TRIPs Council, Nagoya Protocol etc.

The downside to the emergence of the exclusivity of Intellectual property over its selling, manufacturing, and producing leads to corporations or individuals taking advantage of pre-existing common traditions or commonly known ways of living which could include a wide range of intellectual properties. This is where protection of traditional knowledge becomes imperative as it does not just end at protecting a particular cultural or traditional practice rather it also means to stop a civilizational practice from being appropriated by another. This problem usually arises from the west, where the western nations claim IPRs for discovering practices or elements of nature which has been common knowledge to the indigenous people of a particular civilization. The idea of Traditional Knowledge essentially means knowledge which is traditional which is integral part of a culture or a civilization. It is only with regard to a particular culture's identity and how the practice in question identifies itself in relation to the culture. For example, if it is to be said that fire was discovered in the early stages of humanity somewhere in the Rift Valley Civilization, it does not mean it automatically becomes Traditional Knowledge. The main reason for Protection of such

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traditional knowledge which is typically found in the developing nations of the world is to protect them from the commercialization by the developed nations.²

PROTECTION AND PRESERVATION OF TRADITIONAL KNOWLEDGE

Globalization in the past century has had a lot of its advantages for the developed as well as the developing countries. However, Globalization has a negative effect as well, it essentially allows for developed countries access to the other countries and their cultural or traditional knowledge which they can understand and patent as it is unprotected. This leads to the eradication of the culture, traditions, and the connections of those nations with its roots. In order to prevent such invasion, protection of traditional knowledge is acknowledged as one of the most important aspects of Intellectual Property. This protects the indigenous cultures, practices, religious and geographical identities of the particular country. Prof. Carlos M Correa, in his discussion paper on issues surrounding the protection of traditional knowledge dealt with the reasons for protecting traditional knowledge in the modern world.³ He averred certain key contentions in favour of protection of traditional knowledge which consisted of;

1. Consideration of Equity,
2. Concerns over Conservation,
3. Preservation of traditional and cultural practices,
4. Prevention of appropriation by unauthorized persons or parties of the traditional knowledge and
5. Promotion of its use and its importance in development.

Carlos theorized that due to the appropriation by the commercial entities the traditional workers, farmers, or breeders for example, do not get enough credit or value for their output. Due to the massive commercialization of products and services in the contemporary world, traditional knowledge which is utilized in the making of such products or services is often taken advantage of. The traditional workers who utilize this traditional knowledge in order to give the output are not treated with proper acknowledgment or value for their production. This makes it essential for international and national forums to recognise and protect traditional knowledge under Intellectual property owing to equity and fairness.

² WIPO, Technology Based on Traditional Knowledge and Genetic Resources, WIPO Magazine (Geneva, April, 2007).

³ Carlos Correa, "Traditional Knowledge and Intellectual Property: Issues and options surrounding the protection of traditional knowledge", 35 (3rd Ed., November 2001).

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The next reason he pointed out was Conservation and preservation of the biodiversity and environment. Carlos gives lays his arguments with help of farmers and traditional agricultural practices. abandonment of traditional knowledge and embracing the modern sciences would lead to a disruption in the natural order of ways with regard to farming or breeding varieties of the farmers.

Further, he also mentions the importance of the preservation of the culture or the tradition itself. Protection of Traditional Knowledge is also about preserving the remaining pieces of the past. For example, the certain ancient Indian practices such as Ayurveda and Yoga are integral to Indian culture, and they are part of the Indian civilizational identity. Losing such vital parts of our culture would divorce India from its very essence.

The professor notes the emergence of bio-piracy in the recent years particularly with regard to traditional knowledge and how corporations or individuals have been taking over the traditional knowledge of developing nations who cannot always defend their cultural practices. there exists no equity, no benefit for the persons who practice the said traditional Knowledge. This is called bio-piracy of intellectual property rights. This practice, significantly by the western nations and firms, has increased over the past several decades due to the lack of proper mechanisms in place to tackle such issues in the native country from who the traditional knowledge is essentially stolen. This practice is not uncommon to the developing nations as history is proof of the west appropriating and taking over the former's knowledge without any proper exchange of acknowledge or benefits. Bio-Piracy is defined as an exercises through which the practices, rights and culture of the indigenous cultures to certain "genetic resources and knowledge are eradicated and replaced" for the ones who exploited such knowledge at the first place.⁴

Lastly, promotion of use of traditional knowledge is extremely important in countries like India which are set on a path of westernization much like the times of British invasion into Indian culture. In order to secure the greater good, it is imperative to secure the traditional knowledge which would prevent the destruction of the indigenous identity of the society. Therefore, putting in place efficient mechanisms to deal with legal conflicts with international organisations from misappropriating of knowledge becomes essential.

Moreover, there are several other reasons to protect traditional knowledge as well which need to be considered. One such reason is the moral rights the author has when it comes to certain literary traditional knowledge where the author's moral rights shall be taken into consideration.

⁴Shiva, Jafri, Bedi and Holla-Bhar, 1997, p 31.

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CHARACTERISTICS OF TRADITIONAL KNOWLEDGE

While analysing the importance of traditional knowledge in the contemporary world and its preservation, it is equally imperative to distinguish traditional knowledge from other kinds of knowledge or cultural practices in order to define boundaries so that one can be entitled to rights. WIPO (*World intellectual property organisation*) has defined traditional knowledge as scientific knowledge, ecological knowledge, theories or practices with regard to medical treatment, agriculture, designs, literature, music, art, rituals, etc.⁵The *Convention on Biological Diversity*, Article 8(j) has clearly defined as knowledge that deals with awareness, inventions and cultural traditions which are indigenous to the local cultures on the globe.

It is essentially information accumulated through time, which usually is centuries old tradition or cultural practice which becomes indigenous knowledge of a certain region. However, the list of traditional knowledge is exhaustive and defines certain boundaries. The WIPO has stated that information or items that are not a produce of intellectual activity in cases of industrial, scientific, agricultural, literary, or artistic sectors and other such things which have components of heritage of a certain region or culture.

Therefore, from the available jurisprudence around traditional knowledge and its nature it is evident that in order to claim something as traditional knowledge, there must be formation of a new practice, then transfer of this process through generations as part of an indigenous custom and lastly this practice must be restricted within a certain cultural community as indigenous knowledge. Most of this knowledge has been cultivated in the past and have become an integral part of a certain societal structure inalienable to its culture. Traditional knowledge has a wide scope and in countries which still have surviving ancient civilizational practices such as India, there is abundance of knowledge which is considered traditional and indigenous to its people. This knowledge does not necessarily have to be codified or written down rather most of it is in forms of tales, stories, folklore, etc. something that is embedded in families through generations. Therefore, logic dictates for protection and preservation of such knowledge in a globalized world where there exists a risk of losing touch with the past and its knowledge.

⁵ See, e.g., WIPO, 2001, p25; also Mugabe, 1998

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INDIAN LAWS AND MEASURES TO PRESERVE TRADITIONAL KNOWLEDGE

❖ *Legislations protecting Traditional Knowledge.*

The Indian jurisprudence around Intellectual Property Rights has been abundant over the past several decades as there are codified laws in place to deal with recognition, registration, issues regarding IP disputes etc. However, there has not been an explicit legislation dealing with protection of traditional knowledge. Traditional knowledge has been dealt with other intellectual property legislations. One of the first examples of traditional knowledge's reflection in Indian laws is in the Patent's Act of 1970 where under Section 3(p) which explicitly deals with traditional knowledge by stating that an invention that is traditional knowledge cannot be considered as an invention. The same has been given as one of the basis on which a grant of patent can be denied if an objection is filed either before or after the patent has been granted under Section 25 (1)(K) and Section 25 (2)(K) of the Patents Act, 1970. Another example of the express manifestation of preservation of traditional knowledge can be found under Section 2 (k) Plant Varieties and Farmers Rights Act, 2001 which essentially aims to protect the rights of the farmers and their contributions in conserving, improving, and making plant genetic resources. The Act deals with the registration of "extant variety" and "farmers variety" by farmers or groups of farmers. This said extant variety has been referred to as "traditional cultivated and evolved by farmers".⁶ The Act implicitly recognises traditional knowledge and indigenous practices adopted by the farmers in India. Similarly, another such legislation protecting the Intellectual Property Rights is the Geographical Indications Act, 1999 which deals with protection of goods which are manufactured and sold with the tag of a particular geographical indication. The Act protects persons who use traditional knowledge in manufacturing and selling goods and services while using a certain geographical indication.⁷

❖ *Traditional Knowledge Digital Library (TKDL).*

Ever since the IP disputes with regard to the Indian traditional knowledge in the late 90s, the Indian Govt. had initiated Traditional Knowledge Digital Library initiative which essentially acts as a database which would contain all the available traditional knowledge belonging to Indian sub-continent. The aim of TKDL is to help international patent offices to determine whether certain inventions or creations are eligible for patents after considering the existing traditional knowledge. The TKDL was established when India was fighting its case for Neem and Turmeric patents which

⁶ Section 2(1) of the Plant Varieties Act, 2001.

⁷ Section 11 of the Geographical Indication Act, 1999.

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were initially granted by the European Patent office and US Patent Office. The WIPO's Intellectual Property Digital Library has a similar function as the TKDL. Despite the fact that the TKDL has its advantages and successfully tackles several issues with regard to bio-piracy, it has few flaws which need to be addressed. TKDL is cumbersome to understand and implement. Since TKDL is essentially for the international community as well it needs to function as per international standards on classification.

❖ *Cases of India and TK.*

As it is well known that India is associated with one of the oldest cultures and civilizations of Earth, it is only natural that it accumulates myriad of traditional knowledge in the fields of science, medicine, agriculture, politics, weaponry etc. The growing ignorance of the west is bound to cross paths with India in a legal battle when it comes to appropriating indigenous knowledge of India. There have been several international conflicts with regard to Indian Traditional knowledge and foreign countries' attempts to patent what is common knowledge to Indians. One of the very first cases with regard to an Indian traditional knowledge was the application for patenting Neem that was filed by W.R. Grace and the Department of Agriculture, USA. The patent was supposed to be a method by which the Neem Oil formula would restrict and control the growth of fungi on plants acting as a fertilizer. The said patent application was approved, and patent was granted. Consequently, the Indian counterpart started a legal battle against the grant of patent on the grounds that it is traditional knowledge to India and Indian farmers have been practicing and using Neem based substances in various daily life activities. They showed the importance of Neem in the ancient Indian culture, particularly in the ancient Ayurvedic texts and scriptures which delve in depth as to how Neem can be used to have different functions. After a decade long battle, the EPO (European Patents Office) recognised Neem as a traditional knowledge and also stated that there was no novelty, inventive step and forms part of prior common knowledge and hence revoked the patent citing above reasons.

Another such case, that also came out of the United States of America was with regard to the patenting of Turmeric. Turmeric which is popularly known as "*Haldi*" in India which is derived from the Sanskrit word "*Haridra*". It is vastly used as a medicine, food ingredient, dye, skin care substance etc. It is very common in Indian households, when someone sustains an injury which involves cuts or blood loss, they apply *Haldi* on the wound to treat it as an anti-parasitic powder. Similar to the Neem incident, the United States had attempted to patent the use of Turmeric as well

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for its healing properties. However, the *Indian Council for Scientific and Industrial Research* decided to raise an objection against the grant of the patent and submitted necessary evidence to prove that Turmeric or Haldi is one of ancient Indian practices which has become a traditional knowledge to India and has been passed down generations as common household practice. After hearing the CSIR's case, the USPTO decided to revoke the grant of patent to turmeric.

There have been many more such instances of Western Ignorance leading to bio-piracy where western corporations or nations attempt to patent common knowledge which is prominently indigenous as well as found in ancient texts of India. Even till date, cases of bio-piracy arise where different nations try to patent substances or naturally found for example, Basmati rice, yoga, Ashwagandha etc. are handful of examples which are being capitalized and filed for patents which causes concern for India and its rich culture and heritage which has never attempted to monopolize its riches and findings. Due to the rise in globalization and penetration of markets and cultures, it is important for us as an ancient civilization to protect and preserve the knowledge which has been passed down for thousands of years. This calls for careful and efficient mechanisms in place to tackle with such issues smoothly so that similar issues do not manifest themselves in the future.

INTERNATIONAL REGIME W.R.T. TRADITIONAL KNOWLEDGE

Ever since the establishment of International conventions such as *WIPO, TRIPS, UN, Berne Convention for the Protection of Literary and Artistic Works* etc. were some of the organisations that recognised traditional knowledge as a vital part to be preserved and protected. One of the first conventions which dealt with the idea of traditional knowledge was the Berne Convention whereby, it defined "works of folklore". Article 15(4) of the convention extensively deal with folklore where it essentially deals with unpublished works of authors whose names are lost in the past or unknown but there is reasonable grounds to believe his or her origin from a certain territory or country. This definition might not lay down the words folklore or traditional knowledge but its essence maybe found in the Article by a bare reading. *WIPO Intergovernmental Committee on Intellectual Property and Traditional Knowledge, Genetic Resources, and Folklore* was set up in the year 2000.⁸ It is basically a forum where the WIPO State-members come together to discuss and resolve issues related to intellectual property with regard to genetic resources, traditional knowledge and issues regarding benefit sharing in traditional knowledge. The UNHCHR (*United Nations High*

⁸ Protection of Traditional Knowledge: A Global Intellectual Property Issue" (WIPO/RT/LDC/1/4).

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Commissioner for Human Rights) is another forum which deals with the intellectual rights of indigenous people which relate to their cultural roots and traditions. A report of the High Commission on Human rights deals with the rising issues between intellectual property protection and the preservation of knowledge of the indigenous locals. Consequently, the *United Nations Declaration on the Rights of the Indigenous Peoples (UNDRIP)*. The framework is established to set certain minimum standards for the preservation and sustenance of the indigenous people and their traditional knowledge.⁹ There are numerous other models and forums which have been established to deal with the rising concerns of misappropriation and bio-piracy of traditional knowledge. These international forums essentially make it convenient for countries to put forth their agendas and interests with regard to their own traditional knowledge. This kind of global connection helps in understanding and acknowledging each other's indigenous knowledge and culture.

CONCLUSION

After an in-depth reading into the multiple dimensions of Traditional Knowledge, the author has noted that tapping the untapped resources of traditional knowledge especially in a country like India is imperative to assert India's position in the international market. The issue does not end at preservation of a culture or protecting it as it needs to become sustainable in order to survive generations to come. There are several cultures and countries across the world which have successfully capitalized and embraced their cultural practices which have now become part of their soft power over the world. India has the potential to establish its soft power over the world as well if it uses its traditional knowledge rightfully. This calls for stronger and direct rules and legislations in place in order to combat future issues of bio-piracy. The laws around recognition of traditional knowledge, persons who practice the said indigenous knowledge in their daily lives and regulation of benefit sharing should be a subject to focus on in order to safeguard certain indigenous communities. Traditional Knowledge forms an integral part of a country's culture and heritage; therefore, it is the duty of the country to ensure it is preserved and protected.

⁹ Article 12 of the draft UN Declaration of the Rights of Indigenous Peoples as agreed at the 11th Session (1993) of the Working Group on Indigenous Populations.

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