

PROTECTION OF TRADITIONAL KNOWLEDGE UNDER THE INTELLECTUAL PROPERTY RIGHTS (IPR) SYSTEM

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ABSTRACT

The issue of protecting Traditional Knowledge (TK) is an important concern for local communities which own the knowledge as well as global communities which are engaged for promotion of sustainable development. This issue delves into areas of both international Law and the legal frameworks of intellectual property rights (IPRs). This article analyses the issue from IPRs legal frameworks perspectives. In brief, the study examines the compatibility of IPRs as a mean of protection of TK. The discussion explores the necessity of protection of TK as well as scope and validity of the protection of TK under different kinds of IPRs that includes patent, trademark, and trade secret. The study starts with explaining the necessity of TK protection – protecting biopiracy, which is an unauthorized use of TK and gaining benefit out of that unauthorized use. As instances of biopiracy, the study briefly covers some contentious cases of biopiracy like Quinoa, Ayahuasca, Turmeric, Neem, and Hoodia cases. It demonstrates that prevention of unauthorized use or biopiracy of TK can be attained through creating both defensive and positive protection. While defensive protection is possible through creating databases for existing TK, theoretically positive protection of TK can be obtained through conferring IPRs to TK. The article shows that under the current IPRs system TK cannot obtain patent as it does not fulfil the novelty requirement (something new) of the modern patent system. But it argues that if TK holders can keep their knowledge successfully secret, trade secret can be a viable option for protecting TK. It further shows that it is possible to gain both defensive and positive protection through obtaining trademark. Finally, the article recommends that best possible protection of TK is possible to gain through adopting a sui generis kind of protection for TK.

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I. 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.”¹ It is an inherent property of the indigenous people, who are somehow dependent on this knowledge for their livelihoods. At the same time TK has an important role in maintaining the balance of biodiversity. Thus, protection of TK is an important concern of the international forum working for sustainable development of the planet earth.

The issue of the protection of traditional knowledge (TK) delves into both the areas of Intellectual Property Rights (IPRs) and International Law. Under IPRs system generally two concepts are considered as a measure of protection of TK.² One is “defensive” protection *i.e.*, *preventing any unauthorized use of TK and gaining benefit from the unauthorized use*. The other protective concept for TK under IPRs system is known as “positive” protection *i.e.*, *obtaining protective legal rights over TK usually achieved by either using the existing laws or using legislative measures in view to enact new laws*.³

This article addresses whether TK can be protected under the existing IPRs regime governed by the 1994 Agreement on Trade related Aspects of the Intellectual Property Rights (TRIPs).⁴ It considers the potential of both “positive” and “defensive” protection concepts. To attain its purpose, first, this article discusses the objective of TK protection. Thereafter, it provides a short overview of “positive” and “defensive” protection. Finally, the article focuses its discussion on compatibility of IPRs protecting TK. The discussion as to compatibility

¹ World Intellectual Property Organization (WIPO), “Traditional Knowledge”, available at: <<https://www.wipo.int/tk/en/tk/>> (Last visited on January 04, 2021).

² Dutfield, G., “Protecting Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formulation” (June 2003), International Trade and Sustainable Development Series, Issue Paper No. 1, ICTSD-UNCTAD Project on Sustainable Development, Switzerland, available at: <<http://www.iprsonline.org/resources/docs/Dutfield%20-%20Protecting%20TK%20and%20Folklore%20-%20Blue%201.pdf>> (Last visited on January 04, 2021).

³ *ibid.*

⁴ The TRIPs Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on April 15, 1994.

of IPRs as means of protecting TK, the article first considers the possibility of protecting TK under patent, as it is considered as the most relevant IPR for TK protection. Then, the discussion covers trade secret, trademarks, and *sui generis* protection issues, respectively. Since copyright is exclusively given for expression not for idea, and TK is mostly found as orally transmitted knowledge, this study keeps copyright beyond scope of discussion.

II. PREVENTION OF “BIOPIRACY” AND OTHER OBJECTIVES OF TK PROTECTION

The objectives of protecting TK are to prevent the unauthorized exploitation *i.e.* “biopiracy”, to promote and encourage the innovations based on TK, to protect misappropriation, alteration and such types of prejudicial actions, to conserve the cultural and biological diversity, and to protect the pride and moral rights of indigenous innovators and creators, etc.⁵ Among the above-stated reasons, the most significant reason is to prevent “biopiracy”.

“Biopiracy” is the practice through which the rights of indigenous communities to their biological resources and TK are “erased and replaced for those who have exploited indigenous knowledge and biodiversity”.⁶ “Biopiracy” is thus an off-putting expression for the misappropriation, usually through patents, of TK – specifically traditional biomedical knowledge with no return to the original TK Holders.⁷ The result of such misappropriation is granting of patent for the invention to the “first-to-file” (the pharmaceutical or agro-chemical company) rather than to the “first-to-invent” (the indigenous community).⁸ However, as this can be seen as violating global conventions and subsequent national

⁵ World Intellectual Property Origination (WIPO), “FFM to the South Pacific”, available at: <<http://www.wipo.int/tk/en//tk/ffm/report/final/pdf/part2.pdf>> (Last visited on May 25, 2020).

⁶ Shiva, V., Jafri, A. H, Bedi, G., & Holla-Bhar, R., *The Enclosure and Recovery of the Commons: Biodiversity, Indigenous Knowledge and Intellectual Property Rights*, New Delhi, 1997, at p. 31.

⁷ Dutfield, G., “New Forms of Sui generis Protection”, Paper presented at the International Expert Workshop on Access to Genetic Resources and Benefit Sharing, Mexico, October 24- 27, 2004.

⁸ Grain & Kalpavriksh, “Traditional Knowledge of Biodiversity in Asia-Pacific: Problems of Piracy and Protection” (November 2002), at p. 7, available at: <<https://grain.org/article/entries/81-traditional-knowledge-of-biodiversity-in-asia-pacific-problems-of-piracy-and-protection>> (Last visited on May 05, 2020).