

## DEFINING TRADITIONAL KNOWLEDGE

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### INTRODUCTION

Growing up, how often have you heard that coconut oil makes your hair stronger or multani mitti makes your skin glow? When you get a cold, have you not been given some honey or sometimes even told to eat it with turmeric? The kinds of ethnic variety we see in clothes; how we can distinguish a persons' background from their traditional clothes, simply by seeing them is all part of traditional knowledge. Indians knew how to navigate via stars much before the West claimed to use it. All of these are examples of traditional knowledge we experience in our daily life without even thinking twice. While at the first glance it may be easy to determine what is traditional knowledge, the concept is hard to encompass within a sentence. This is due to the sheer vastness of the subject matter which ranges from medicines to clothing to agriculture to almost all spheres in life.

We already have laws to protect intellectual property, so that begs the questions; why do we need to define traditional knowledge separately? That is because to protect something, we must be able to clearly determine its characteristics and distinguish it from other things. However, with no formal definition that is very hard to achieve. Another problem that arises is sharing of economic rights. The whole concept of providing protection to Intellectual Property is to be able to provide economic benefits to the owners. However, with traditional knowledge, it is often difficult to determine who is the owner(s) and therefore, it becomes harder to share the profits earned. This defeats the purpose of attempting to protect traditional knowledge under Intellectual Property Laws. One can find several examples wherein a third party has misappropriated the traditional knowledge and, in some instances, even to the detriment of the holders of such traditional knowledge<sup>1</sup>.

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<sup>1</sup> Marisella Ouma, Why and How To Protect Traditional Knowledge At The International Level Wipo.int (2016), [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_ipk\\_ge\\_2\\_16/wipo\\_ipk\\_ge\\_2\\_16\\_presentation\\_11ouma.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_ipk_ge_2_16/wipo_ipk_ge_2_16_presentation_11ouma.pdf) (last visited Sep 16, 2018).p 2

It is not that other International Bodies have not attempted to define traditional knowledge. However, none of the definitions truly encompassed its entire scope; probably because the holders of traditional knowledge live in the modern as well as the traditional world<sup>2</sup>.

### **WORLD INTELLECTUAL PROPERTY ORGANISATION**

*World Intellectual Property Organisation* (Hereinafter referred to as 'WIPO') defines Traditional knowledge as<sup>3</sup>:

*“Traditional knowledge is a living body of knowledge passed on from generation to generation within a community. It often forms part of a people’s cultural and spiritual identity.”*

Whilst at a primary glance this definition seems to coherently explain the meaning of traditional knowledge, it fails to cover the vastness of the term being defined and requires subsequent clarifications. It fails to mention the kind of information that would fall under the knowledge. Even if we were to assume every information one could imagine is being referred to, the term 'generation to generation' lacks exactness as it fails to set a timeline or even minimum number of years required to be adhered. Thus, would such a time period stand in the next couple of years when the new information that would be derived would essentially be considered as modern right now? Another problem with protection traditional knowledge is that ownership lies jointly by multiple people with no clear distinction between their collective rights and individual rights. A definition of Traditional Knowledge that does not deal with ownership cannot be deemed complete.

However, WIPO has given due importance to how traditional knowledge is fluid and flexible and moulds itself to the changing time.

### **INTER-GOVERNMENTAL COMMITTEE**

The *WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Hereinafter referred to as the 'Intergovernmental Committee') established in 2000, is a forum for WIPO members to discuss the various issues relating to intellectual property that arise due to access to genetic resources, benefit-sharing,

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<sup>2</sup> Intellectual Property Needs and Expectations Of Traditional Knowledge Holders, WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) 59 (2001), [http://www.wipo.int/edocs/pubdocs/en/tk/768/wipo\\_pub\\_768.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf) (last visited Sep 17, 2018).

<sup>3</sup> Traditional Knowledge, Wipo.int, <http://www.wipo.int/tk/en/> (last visited Sep 15, 2018).

protection of traditional knowledge and traditional cultural expressions<sup>4</sup>. It recognises the diverse and dynamic nature of traditional knowledge and how therefore, it would be difficult to establish a single definition for it.<sup>5</sup>

**Annexure 3 of the Session 1**<sup>6</sup> explains what traditional knowledge is. However, the Annexure does not provide one definition but provides explanation of the term under speculation by providing specific context that is attached to it. It has given due importance to the definition of the Executive Secretary of the **Convention on Biodiversity**<sup>7</sup> who explained the term knowledge to mean and include innovation which is a feature of indigenous and local communities whereby tradition acts as a filter through which innovation occurs. Furthermore, the **Session 1 Report** also specifically lays the scope as limited to just particular pieces of knowledge that persist<sup>8</sup>.

Perhaps one of the most important explanations of the term traditional knowledge is the one explained with reference to the Articles in *United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification* (Hereinafter referred to as the 'UNCCD'), particularly in Africa<sup>9</sup>.

The Intergovernmental Committee has dealt with the issue of defining traditional knowledge in the most comprehensive manner. The Committee understood that traditional knowledge is so diverse that it must be read in consonance with the subject. It even incorporated the flexibility of traditional knowledge that moulds itself based on the field in which it is used

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<sup>4</sup> The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Wipo.int, [http://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_tk\\_2.pdf](http://www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_2.pdf) (last visited Sep 20, 2018).

<sup>5</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge And Folklore, 2001; **Annex 3; Session 1**

<sup>6</sup> Ibid

<sup>7</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge And Folklore, 2001; **Annex 3 B (IV), Session 1 Traditional Knowledge: .... a term used to describe a body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use. [...]**

<sup>8</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge And Folklore, 2001; **Annex 3 B (VI), Session 1 Traditional Knowledge: "traditional knowledge, innovations and creativity," refers to the creative and innovative aspect of traditional knowledge systems and a preliminary working definition of this term has been used by WIPO for the purposes of its own work from an intellectual property point of view. UNEP/CBD/TKBD/1/2: paragraphs 84 and 86**

<sup>9</sup> Supra Note 5; subject matter which "consists of practical (instrumental) and normative (enabling) knowledge about the ecological, socio-economic and cultural environment. Traditional knowledge is people-centered (generated and transmitted by people as knowledgeable, competent and entitled actors), systemic (inter-sectoral and holistic), experimental (empirical and practical), transmitted from one generation to the next and culturally valorized. This type of knowledge promotes diversity; it valorizes and reproduces the local (internal) resources

and how knowledge so ancient is still relevant in modern times and can be used to enhance our current standard of living.

While it is commendable that they understood the vastness of traditional knowledge and hence, linked it based on specific contexts; there is still not one single definition that can be used on an International level.

In the 17<sup>th</sup> Session, different forms of traditional knowledge were identified<sup>10</sup> such as fixed and unfixed, disclosed and undisclosed, traditional knowledge as is and traditional knowledge that is used for innovations and other creations, sacred and secular, individual and collective, commercialised and non-commercialised, indigenous

It has been further stated that traditional knowledge need not only be in written forms but can also exist in the verbal or non-verbal form or passed on via demonstration. It was held imperative to document traditional knowledge, especially from the point of view of granting patents that are derived by using such knowledge. It also stated that publicly disclosed traditional knowledge are those which are easily accessible and thus, are very hard to protect.

The most recent session of the Intergovernmental committee was held in August 2018. In which traditional knowledge definition was also provided. The definition was divided in to a broader description and in the narrow sense.

In the broader sense of the subject matter, traditional knowledge has been defined to mean that the content of knowledge in itself along with the traditional cultural expressions which includes the characteristic signs and symbols that are meant to be associated with traditional knowledge.<sup>11</sup> While in the narrower sense, traditional knowledge refers to only traditionally acquired knowledge<sup>12</sup>

However, these definitions came with a caveat that no formal definition had yet been accepted at an international level. It has also stated how traditional knowledge need not be

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<sup>10</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge And Folklore, 2001; **Annexure, Session 17: The document briefly discusses the following forms of TK, and, where possible, endeavors to identify some of the IP implications thereof: ...**

<sup>11</sup> WIPO/GTRKF/IC/1/3; *the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities (traditional knowledge in a general sense or lato sensu).*

<sup>12</sup> Supra Note 2; knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations. Traditional knowledge can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; and biodiversity-related knowledge, etc.

restricted to a particular type but includes within its ambit, the way in which it is used along with the purpose and end result obtained.

Although the definition of traditional knowledge has come a long since the first session, it must be noticed that in the 37 sessions that were held, the Intergovernmental Committee has still not been able to arrive at a universal definition for traditional knowledge.

### CONVENTION ON BIOLOGICAL DIVERSITY 1992

The Preamble of the *Convention on Biological Diversity, 1992* (Hereinafter referred to as the 'CBD') itself states the Member Nations must recognise the traditional dependence of indigenous communities and tribes who thrive on biologically available resources. It further states the importance of benefit sharing from the utilisation of the traditional knowledge and other activities conducted by the local communities to conserve the biological diversity<sup>13</sup>.

Further, **Article 8** states that every member state must respect, protect and help to preserve the traditional knowledge, practices, innovations, etc of the indigenous peoples which are essential to conserve and sustain biological resources and the diversity<sup>14</sup>. As per CBD, prior informed consent of the member providing such resources must be taken while using genetic resources of that member State<sup>15</sup>. It is important to note in case a user wants to use traditional knowledge in his research and/ or product development, then the user is required to seek the prior consent of the relevant indigenous community and has to negotiate mutually agreed terms that encourage the equitable sharing of any benefits that may arise from the use of this knowledge<sup>16</sup>.

While CBD works towards providing equal benefit sharing with such communities; the biggest drawback of CBD is also the lack of efforts on its part to define traditional

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<sup>13</sup> Convention on Biological Diversity 1992, **Preamble**: *The Contracting Parties*

*Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components,*

<sup>14</sup> Convention on Biological Diversity 1992, **Section 8(j)**: In-situ Conservation

*(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices:*

<sup>15</sup> Convention on Biological Diversity 1992, **Section 15(5)**: *Access to Genetic Resources*

*(5) Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.*

<sup>16</sup> Traditional knowledge, Cbd.int, <https://www.cbd.int/abs/infokit/revised/web/factsheet-tk-en.pdf> (last visited Sep 19, 2018).

knowledge. As has been discussed earlier, to define it is categorically important so that the subject matter becomes clear so as to determine if a given traditional knowledge would fall under the Convention or not.

### **TRADITIONAL KNOWLEDGE AND INDIGENOUS PEOPLE**

Indigenous and tribal peoples are one of the most important elements to be considered when defining traditional knowledge. This is because any law made of traditional knowledge is likely to affect them the most. Thus, while drafting any policy regarding tradition knowledge, it is important to take in account the rights of indigenous persons and how to better protect them.

Their structure is built in such a way that the traditional knowledge that they possess can neither come under customs nor norms which can be said to belong to a particular individual, as generally the traditional knowledge that they possess is perceived by the indigenous peoples to rest in the collective ownership.<sup>17</sup> For any work to get protection under Intellectual Property Rights law, the important criterion is that the work should be not just original but also new and novel. The laws that exist in the society have created a system that works towards primarily protecting the rights of individuals as creators as opposed to works that consist of the creativeness of the entire community. That's why, many of the works that have been created by indigenous peoples are so difficult to protect. The vastness of the knowledge they possess also shows us the various facets in which traditional knowledge can be found. For example: Poses in Yoga come under Copyright while knowledge relating to medicine could come under patents.

The major problem with the information possessed is that it lacks proper method to grant protection which in turn has resulted in further exploitation of the rights of Indigenous people. This has then lead to the stigmatization of the culture of indigenous people.

There are many other Conventions at regional levels that deal with protection of traditional knowledge possessed by indigenous people. The Conventions stated above along with the regional Conventions have realised the importance of indigenous people and their involvement in protection of traditional knowledge. However, it is pertinent to note that none of the above-mentioned Conventions have defined traditional knowledge.

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<sup>17</sup> Traditional Knowledge & Indigenous Peoples, Wipo.int, [http://www.wipo.int/edocs/pubdocs/en/tk/1014/wipo\\_pub\\_1014.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/1014/wipo_pub_1014.pdf) (last visited Sep 21, 2018). p 55

## PROTECTING TRADITIONAL KNOWLEDGE IN INDIA

India has an unsaid obligation towards the indigenous and tribal communities and therefore, there is a dire need felt to protect the traditional knowledge. It is essential to provide some basic protection to the holders of traditional knowledge as it is their rights that are state. Furthermore, India is a party to many of the International Conventions and Treaties and there is also a need to comply with those regimes and norms.

One of the most noteworthy features in India towards protection of traditional knowledge is the *Traditional Knowledge Digital Library* (Hereinafter referred to as the 'TKDL'). TKDL is a database containing 34 million pages of formatted information on some 2,260,000 medicinal formulations in multiple languages<sup>18</sup>. It is a collaborative project between the Council of Scientific and Industrial Research and the Department of AYUSH<sup>19</sup>. It has proved to be an effective tool towards combating patents that are infringing upon the traditional knowledge available in India. Due to TKDL, it has become possible for India to protect some 0.226 million medicinal formulations, that too at zero direct costs<sup>20</sup>.

In India, there are many languages that are spoken amongst locals. This would make it very difficult to decipher and collect traditional knowledge. To counter this problem, India came up with an innovative tool called the *Traditional Knowledge Resource Classification System* (Hereinafter referred to as the 'TKRCS'). TKRCS has been modelled keeping in mind the *WIPO's International Patent Classification* which has around 27,000 subgroups such as Yoga, Ayurveda, etc.

Laws regarding traditional knowledge have to be able to protect the holder of traditional knowledge from potential infringers. The *Indian Patents Act, 1970* states that that an invention consisting of traditional knowledge cannot be patented<sup>21</sup>.

Furthermore, in India, the *Forest Rights Act, 2006* has a framework for documentation of traditional knowledge and the nature of evidence required for recognition of the rights of

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<sup>18</sup> Protecting India's Traditional Knowledge, WIPO Magazine, 2011, [http://www.wipo.int/wipo\\_magazine/en/2011/03/article\\_0002.html](http://www.wipo.int/wipo_magazine/en/2011/03/article_0002.html) (last visited Sep 19, 2018).

<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> Indian Patents Act 1970; **Section 3(p)**: *an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components.*

these communities<sup>22</sup>. The provisions of the *Biological Diversity Act, 2002* also provide for a shield for traditional knowledge that is held by the tribal community whereby it further provides respect and protection for the traditional knowledge which is related to biodiversity. However, in the *Biodiversity Act, 2006* traditional practises are acknowledged but not given direct protection.

Another common practice to protect traditional knowledge is via geographical indications. the *India Geographical Indications Act 1999* amply provides for the possibility of protection of handicrafts and such related goods that involve human factors for quality assurance. Also, more importantly, the Act provides for a joint ownership. This way, by registering a product under geographical indication, the authorised persons can easily get protection against infringers. However, this will not stand for all kinds of traditional knowledge. For example, information transferred orally or via demonstrations would not get protection. Also, even for written traditional knowledge, protection is only given towards the product. Therefore, a process cannot be protected and thus, this Act too is not sufficient.

In 2016, Shashi Tharoor also drafted the *Protection of Traditional Knowledge Bill, 2016*<sup>23</sup> (Hereinafter referred to as the '*Bill*'). The Bill has still not been passed but must be looked at to understand the progress made by India to provide protection to the holders of traditional knowledge. *Section 2(ix) of the Bill*<sup>24</sup> defined traditional knowledge.

The definition includes the different kinds of traditional knowledge whether be it oral or in other forms such as written, electronic, in videos, etc. It also acknowledges the dynamic and every evolving nature of traditional knowledge. The above definition also provides a timeline for which information would be considered as traditional knowledge. However, it has a provision for excluding those kinds of traditional knowledge which have already been

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<sup>22</sup> Section 3(1) (k): *Forest rights of Forest dwelling Scheduled Tribes and other traditional forest dwellers: For the purposes of this Act, the following rights, which secure individual or community tenure or both, shall be the forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands, namely:*

*(k) right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity;*

<sup>23</sup> Bill No; 282 of 2016

<sup>24</sup> Section 2(xi), Protection of Traditional Knowledge Bill, 2016: *knowledge and expression of culture, which may subsist in codified or oral or other forms, whether publicly available or not, that is dynamic and evolving and is passed on from generation to generation, for at least 3 generations, whether consecutively or not, which is associated with group or groups who are maintaining, practicing or developing it in traditional cultural context and includes know-how, skills, innovations, practices, learning, medicinal preparations, method of treatment, literature, music, art forms, designs and marks but does not include any traditional knowledge covered by any law for the time being in force providing for its preservation, promotion, management or unauthorized commercial exploitation*

protected under other Acts. This ensures harmonious interpretation with other laws that are already in existence so as to prevent any conflict of interest and decrease any loopholes.

The Bill by far has given the most comprehensive definition of traditional knowledge yet, especially taking in to view the Indian scenarios. The enormous quantity of traditional knowledge stored within the boundaries of the country can easily be exploited and therefore, it is extremely necessary for the Bill to be passed in to a legislation so that the knowledge can be protected not just within local bounds but also internationally.

## CONCLUSION

Traditional knowledge when simply put, is the information that is passed on from one generation to another for a couple of generations relating to an ancient technique, skill etc. Essentially, it is that knowledge that has been present for many years. The subject matter of traditional knowledge can range from medicines to cosmetics.

However, traditional knowledge is often misappropriated or exploited by big corporations to gain profits. While it can be used for innovations, these big corporations deny the holders of this knowledge their share in the profits. Thus, the holders or owners of traditional knowledge are left vulnerable. Laws with respect to Intellectual Property Rights have been established so as to give the owners and/ or authors of the work, their economic right or benefit. If they denied the monetary compensation for utilising their work, then protecting Intellectual Property is a useless process. Thus, similarly for holder of traditional knowledge, lack of protection is depriving them their economic benefits even though many countries around the globe have acknowledged traditional knowledge as a form Intellectual Property.

WIPO has been working on a definition for traditional knowledge since many years. However, till today it has failed to provide a universally accepted definition of the same. There have been many other International Instruments that have been established with an aim to protect traditional knowledge. Not all of them define the term. Some of these Conventions have been discussed in the article at length. The Intergovernmental Committee, in its first session defined traditional knowledge in respect with various other already existing treaties and conventions. However, in its more recent session in 2018, it established a definition for the term. However, on the very same page it also spoke about there not being a single universal definition for the same. To be unable to devise a definition in all these years shows how difficult it is to establish a definition that appeals to every kind of traditional knowledge is every country across the globe.

The CBD also provides protection against biopiracy and thereby protect traditional knowledge held by the indigenous people or other local community. To protect their rights, many regional and international conventions have been established by global leaders. However, most of these conventions too lack a definition. Without a formal definition, those wanting to commercialise traditional knowledge can easily state how their information does not come within the ambit of traditional knowledge protected under the Act. For any benefit to be given to the holders, a long legal battle will ensue. Local communities, tribal persons and indigenous people may not be able to fund the litigation costs; this of course, assuming they are aware of their rights. Most of these conventions do not provide for provisions relating to so reading awareness about the rights to holders of traditional knowledge. A major problem with most of the definitions is the lack of a coherent timeline given for when an information becomes traditional knowledge. Another problem is a lack of inclusiveness towards all types of traditional knowledge. This again leaves gaps that people can take advantage of. Therefore, even though many conventions have defined traditional knowledge; no definition has been universally accepted.

In India it is of utmost importance to protect traditional knowledge. This is because, if one views the statistics, it can be seen that in around the last two to three years, in just Europe alone, India has had to protect its traditional knowledge by filing for cancellation or withdrawal of about 36 applications which aimed at patenting traditionally known medicinal formulations<sup>25</sup>. Of course, the successful withdrawals and cancellations has to be accredited to the TKDL which has been designed as a tool to assist patent examiners in different part of the world to carry carrying out a prior art search which includes the traditional knowledge found in India. The Bill of 2016 provides a definition of traditional knowledge that is best suited for Indians. In fact, it should be considered by other international instruments whilst defining traditional knowledge.

In conclusion, no amount of laws can protect traditional knowledge unless the legal instrument seeks to define the term. It is a very difficult task but if not undertaken quickly, it may lead to even more misappropriation of the same. Thus, to prevent that WIPO along with other international bodies must work towards providing a universal definition for traditional knowledge.

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<sup>25</sup> Supra Note 34