
INDIGENOUS KNOWLEDGE AND INTELLECTUAL PROPERTY: ADDRESSING CULTURAL APPROPRIATION AND PROTECTION

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ABSTRACT

Preserving old knowledge is really important for taking care of nature and making sure we can keep using its resources without harming it. Indigenous people, who have lived in harmony with nature for a long time, know a lot about how to protect plants, animals, and the environment.

We need to understand and protect the special things found in plants and animals, like their genes, so that we can keep them safe and use them wisely. In some places, like India, the knowledge about natural products is super valuable because there are so many different plants and animals there, and people have known about them for a really long time.

It's crucial to stop other countries from taking advantage of this knowledge for their own gain. India is trying to improve its rules about giving patents for traditional knowledge to make sure it stays safe. This article talks about different ways we can keep traditional knowledge safe, like using digital libraries to record it.

Some people try to steal this knowledge and misuse it, which shows that our current rules to protect it aren't good enough. That's why we need to make new rules that fit better with the unique needs of traditional knowledge to stop this from happening.

Introduction of Intellectual property rights

Intellectual Property rights refer to the legal rights that protect creations of the human mind. These creations can include inventions, literary and artistic works, symbols, names, images, and designs used in commerce. The primary purpose of intellectual property rights is to provide creators and innovators with exclusive rights over their creations, thereby incentivizing innovation and creativity while allowing them to benefit from their work.

These intellectual property rights are granted and enforced through legal mechanisms such as patents offices, copyright agencies, and trademark registries. Violations of IP rights can result in legal action, including injunctions, damages, and in some cases, criminal penalties.

Indigenous intellectual property refers to the traditional knowledge, cultural expressions, and innovations that are created, developed, and maintained by indigenous communities. This encompasses a wide range of tangible and intangible heritage, including traditional medicines, agricultural practices, folklore, music, arts, designs, and language systems.

Indigenous communities possess a wealth of traditional knowledge passed down through generations. This knowledge often relates to sustainable resource management, medicinal plants, agricultural techniques, and ecological stewardship. Indigenous cultures have unique forms of artistic expression, including music, dance, storytelling, visual arts, and crafts. These cultural expressions are deeply rooted in indigenous identity and spirituality. Indigenous communities have sacred sites, cultural landscapes, and heritage sites that hold spiritual, cultural, and historical significance. These sites are often central to indigenous identity and worldview. Indigenous peoples have traditional cultural practices, rituals, ceremonies, and social structures that are integral to their way of life and community cohesion.

Defensive protection strategies are designed to prevent external entities from acquiring intellectual property rights over traditional knowledge. For instance, India has established a searchable database of traditional medicine, serving as evidence of prior art for patent examiners. This initiative was prompted by a notable case where the US Patent and Trademark Office granted a patent (later revoked) for the use of turmeric in wound treatment, a practice long known to Indian traditional communities and documented in ancient Sanskrit texts. Defensive measures may also safeguard sacred cultural elements, such as symbols or words, from being registered as trademarks by third parties.

On the other hand, positive protection involves granting and exercising rights that empower communities to promote their traditional knowledge, control its usage, and benefit from its commercial exploitation. While existing intellectual property systems can facilitate this, several countries have enacted specific legislation. However, protection afforded under national laws may not extend to other jurisdictions, prompting calls for an international legal instrument to address this gap.

Indigenous Intellectual Property

Indigenous intellectual property (IP) is indeed a concept that has emerged to address the innovations. This term is used in both national and international legal forums to recognize and protect the collective knowledge and heritage of indigenous communities. The promotion of indigenous intellectual property rights has gained momentum in recent years, with organizations like the World Intellectual Property Organization (WIPO) and the United Nations (UN) advocating for the protection of indigenous cultural heritage. These efforts aim to address the historical and ongoing misappropriation and misuse of indigenous knowledge and cultural expressions, often by external entities without the consent or benefit of indigenous communities.

By recognizing and valuing indigenous intellectual property rights, policymakers, legal experts, and international bodies seek to foster respect for indigenous peoples' rights, promote cultural diversity, and support the sustainable development of indigenous communities. This includes efforts to strengthen legal frameworks, promote community-led initiatives for documenting and protecting indigenous knowledge, and ensure that indigenous peoples have control over their intellectual property and receive fair and equitable benefits from its use.

The current international framework for safeguarding intellectual property rights originated during the era of enlightenment and industrialization, primarily catering to the needs of technologically advanced nations. However, in recent times, there has been a growing call from indigenous communities, local groups, and governments, particularly in developing countries, for comparable protection of traditional knowledge. Member states of the World Intellectual Property Organization (WIPO) are engaged in discussions within the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC) with the aim of crafting an international legal instrument or instruments to effectively safeguard traditional knowledge, genetic resources, and traditional cultural

expressions (folklore). This instrument could take various forms, ranging from recommendations to WIPO members to a binding treaty for ratifying countries. The active participation of representatives from indigenous and local communities, supported by the WIPO Voluntary Fund, is essential for achieving a successful outcome in these negotiations.

Traditional knowledge is not merely ancient; rather, it is a dynamic repository of wisdom that evolves, thrives, and is transmitted across generations within communities, often constituting a fundamental aspect of their cultural or spiritual identity. Consequently, it eludes straightforward protection under the existing intellectual property framework, which typically focuses on granting rights for a finite period to novel inventions and original creations by individuals or entities. The fluid nature of traditional knowledge further complicates its definition. Acknowledging these traditional forms of creativity and innovation as eligible for intellectual property protection could empower indigenous communities, local groups, and governments to assert control over their utilization by external parties. This recognition may facilitate the safeguarding of traditional remedies, artistic expressions, or musical compositions from unauthorized exploitation, thereby enabling communities to collectively manage and derive benefits from their commercial use. While discussions within WIPO are primarily driven by the interests of developing nations, the division does not neatly align with traditional "North-South" distinctions. Stakeholders, including governments and communities, hold diverse perspectives, and involvement extends beyond developing countries. Notably, certain developed nations, particularly those with indigenous populations, actively participate in these negotiations.¹

Criteria to qualify as Traditional Knowledge

Traditional knowledge is a reservoir of wisdom accumulated over centuries through cultural customs. It involves the continuous adaptation and enhancement of practices to meet evolving societal needs. These innovations not only expand current knowledge but also become integral components of the knowledge passed down to future generations, shaping the essence of traditional knowledge collectively.

The core elements of traditional knowledge can be summarized as follows:

¹ https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_4.pdf

- a) Development of new practices or processes to address specific needs.
- b) Transmission of these practices or methods across generations through cultural customs.
- c) Limited to specific groups or communities, bound by shared values and customs.

An exemplary illustration of traditional knowledge is the case of the neem tree in India. Neem's versatile applications were documented in Indian texts over 2000 years ago and have been utilized for centuries in various fields such as agriculture, medicine, toiletries, cosmetics, and pest control. This example underscores the depth and breadth of traditional knowledge embedded within cultural practices and historical texts, contributing significantly to various aspects of life and society.²

Reason for protection of traditional knowledge³

The term "protection" encompasses various definitions, contributing to a lack of clarity regarding its justification. Some interpret it within the realm of Intellectual Property Rights (IPRs), where protection primarily involves excluding third parties from unauthorized use. Others view protection as a mechanism to safeguard traditional knowledge (TK) from actions that may erode it or negatively impact the lives and cultures of the societies that have cultivated and utilized it. Nevertheless, the primary reasons for granting security to TK include:

- a) Equity considerations.
- b) Conservation objectives.
- c) Preservation of traditional customs and communities.
- d) Prevention of unauthorized appropriation of TK components.
- e) Promotion of its utilization and significance in development.

Equity: Many arguments for TK security are rooted in considerations of equity. TK often generates value that remains inadequately acknowledged and compensated under existing

² https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_4.pdf

³ <https://study.unimelb.edu.au/study-with-us/professional-development/blog/how-to-protect-indigenous-knowledge-and-creative-ip-from-exploitation>

requisition and compensation schemes. For instance, traditional farmers preserve and utilize plant genetic resources, enhancing their value through selective breeding and exchange. However, they often receive inadequate recognition or compensation for their contributions.

Conservation: Another rationale for TK security lies in its importance for biodiversity conservation within agricultural systems. IPRs can generate revenue to sustain activities crucial for maintaining biological diversity. For instance, protecting TK encourages traditional farmers to continue cultivating and breeding diverse varieties, preventing biodiversity loss.

Preservation of Traditional Lifestyles: Some view TK security as essential for preserving traditional lifestyles and expertise. Unlike IPRs, which focus on exclusion, TK protection supports the continuation of traditional cultures and identities. It safeguards the right to self-identification and plays a vital role in preserving humanity's cultural heritage.

Avoiding Bio Piracy: TK security aims to prevent unauthorized appropriation or "bio-piracy" of traditional knowledge, ensuring equitable benefit-sharing. For example, India has proposed aligning patent issuance with the Convention on Biological Diversity (CBD) to prevent patents conflicting with CBD provisions.

Promoting Use and Development: Encouraging wider utilization of TK is a significant goal of its protection. By safeguarding TK from loss and offering incentives to TK holders, broader applications of this knowledge can be stimulated. TK protection can also foster local innovation and contribute to sustainable development by tapping into underutilized resources and promoting local resilience.

TK protection serves multiple purposes, including equity, conservation, cultural preservation, prevention of exploitation, and promotion of development. Incorporating TK security measures into existing frameworks can help address these diverse objectives and support the sustainable management of traditional knowledge resources.

The TRIPS agreement of the World Trade Organization (WTO) predominantly emphasizes patent rights, often neglecting the rights of traditional knowledge (TK) holders. However, there is potential to interpret and enhance Intellectual Property Rights (IPRs) authentically and justly, leveraging them as tools for TK security. Despite inherent shortcomings in the current IPR

regime, certain fundamental aspects can serve as both constructive and defensive measures for preserving traditional knowledge.

Significance of Intellectual Property Rights in Safeguarding Traditional Knowledge

To protect the rights of indigenous peoples and their knowledge about nature, we need to make strong laws both in our own countries and across the world. In India, there are several important laws that help with this:

A. Biological Diversity Act, 2002:

This law is like a big rulebook designed to protect nature and make sure everyone shares its benefits fairly. It prevents people from taking things from nature, like plants or animals, without asking and profiting from them without giving back. It also sets up special groups to make sure indigenous communities have a say in how their knowledge about nature is used. These groups work to ensure that communities are involved in decisions about their resources.

B. Patent Act, 1970:

This law is all about guarding new and smart ideas. It's like giving someone a special certificate to say, "This idea belongs to you." This includes things created using traditional knowledge. It stops others from stealing or using these ideas without permission, giving the creators a chance to benefit from their hard work.

C. Copyright Act, 1957:

This law protects the work of artists and creators, like musicians, writers, and painters. It's like putting a shield around their creations to stop others from copying or using them without asking first. For indigenous artists, this is crucial because it helps them keep control over their cultural heritage and ensures they get recognition for their contributions.

D. Protection of Plant Varieties and Farmer's Rights Act, 2001:

This law is focused on safeguarding different kinds of plants. It ensures that farmers and indigenous communities are treated fairly when they share their plant resources.

It's like making sure everyone gets a fair share of the fruits of their labor, whether it's growing crops or discovering new plant varieties.

E. Geographical Indications of Goods (Registration and Protection) Act, 1999:

This law protects products that come from specific places. It's like saying, "This special food or craft item is from here, and it's unique." This helps maintain the quality and traditions of products made by indigenous communities, ensuring they're not copied or imitated unfairly.

F. The Patents Act, 1970:

Traditional knowledge, which is often passed down through generations within communities, can't be patented under regular laws because it's not seen as something new or owned by one person. This makes it vulnerable to being taken without giving credit. The challenge is finding ways to protect this knowledge without disrupting how it's traditionally shared among communities.

Global Framework for Safeguarding Traditional Knowledge⁴

People all around the world are starting to realize how important it is to protect the knowledge, creativity, and culture of indigenous and local communities. Way back in 1978, two big organizations, WIPO and UNESCO, joined hands to start a special project within the rules about intellectual property. This project aimed to keep traditional knowledge safe. By 1982, this effort led to better protection for cultural traditions and stories against being unfairly used or harmed. Then, in 1992, countries came together to sign the Convention on Biological Diversity (CBD). This agreement highlighted the urgent need to protect traditional knowledge even more. It made sure that people paid more attention to preserving this valuable heritage.

A. World Health Organization (WHO)

The World Health Organization (WHO) was formed on April 7, 1948, as part of the United Nations. It's all about making sure people everywhere stay healthy. When it comes to old

⁴ <https://www.sonisvision.in/blogs/safeguarding-heritage-the-legal-framework-for-the-protection-of-traditional-knowledge-genetic-resources-and-traditional-cultural-expressions>

knowledge, especially about traditional medicine, the WHO pays a lot of attention. Its main job is to help everyone be as healthy as possible.

As time has passed, people have realized that traditional knowledge, like how to use plants for medicine, can also be good for making money. Because of this, more and more countries in the WHO are worried about making sure this knowledge is kept safe and that everyone gets treated fairly when it's used.

Policy: This part is about making official rules and plans to include traditional medicine alongside modern healthcare in each country. The WHO helps countries figure out how to do this smoothly so that people can choose to use traditional medicine if they want to. For example, in some places, traditional healers might work with doctors in hospitals to help patients.

Safety, Competence, and Excellence: The WHO wants to ensure that traditional medicine is practiced safely and with skill. They provide guidance and support to countries to regulate traditional medicine practices effectively. This includes making sure that traditional healers have the right training and knowledge to treat people safely. By doing this, they make sure that when people use traditional medicine, they can trust that it's reliable and won't harm them.

Access: This part is about making sure that everyone who needs traditional medicine can get it easily, without it being too expensive. The WHO wants to ensure that traditional medicine, along with complementary and alternative medicine (CAM), like herbal remedies, is available and affordable for everyone. This means making sure that traditional medicines are accessible in hospitals, clinics, and pharmacies, as well as in local communities where people might rely on them more.

Rational Use: Here, the WHO is encouraging both healthcare providers and patients to use traditional medicine wisely and effectively. They want to make sure that traditional medicine is used in ways that make sense medically and that provide the most benefit to patients. By promoting the rational use of traditional medicine, the WHO aims to maximize its positive effects while minimizing any potential risks or side effects.

B. Convention on Biological Diversity (CBD)

On June 5, 1992, a big agreement called the Convention on Biological Diversity (CBD) was finalized during a meeting in Rio de Janeiro, organized by the United Nations Environment Programme (UNEP). The CBD is like a set of rules that countries agree to follow to take care of nature and also make sure they can use its resources in a way that doesn't harm it. It focuses on protecting different plants and animals, using natural resources wisely, and making sure everyone gets a fair share of the benefits.

The CBD understands that people who have been living with nature for a long time, like indigenous communities, know a lot about how to take care of it. It says that countries, especially those that are still developing, should be able to get access to resources like plants and animals for their own use. At the same time, it also says that efforts to protect nature shouldn't get in the way of people's rights to own their ideas and inventions.

Moreover, the CBD encourages the use of traditional knowledge and techniques from indigenous communities to help protect nature better. This fits with its main goals of keeping nature safe and making sure we can keep using its resources for a long time.

C. World Intellectual Property Organization (WIPO)

WIPO, which stands for the World Intellectual Property Organization, started getting involved with protecting traditional knowledge (TK) and folklore back in 1978. They teamed up with UNESCO to come up with a special way to protect national folklore. Later, in 1998, WIPO started a new project to learn more about how intellectual property (IP) and traditional knowledge overlap. They visited 28 countries to understand the needs of people who have traditional knowledge.

Realizing that it's important to deal with issues related to traditional knowledge, WIPO's big meeting, called the General Assembly, created a special group called the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC). Since then, WIPO has been working hard in this area. They've made many documents to help protect traditional knowledge. For example, they've created sample clauses for contracts about genetic resources and made a toolkit for documenting traditional information safely. They've also been working on ideas for a special way to protect traditional

knowledge. WIPO is committed to making sure traditional knowledge and folklore are protected and preserved by doing lots of different projects in this field.

Traditional Knowledge and Indigenous People⁵

Traditional knowledge is all about the wisdom, ideas, and practices that indigenous and local communities have been using for a long time. It's like a treasure chest of information that covers lots of things like farming, staying healthy, taking care of nature, and even spiritual beliefs. This knowledge gets passed down from grandparents to parents to kids, and it's deeply connected to the culture, history, and environment of these communities.

Indigenous people from all over the world have this amazing traditional knowledge that has helped them survive for ages. They know a lot about their land, plants, and animals, and they've figured out smart ways to grow food and protect nature. For example, they might have special ways of farming that keep the soil healthy or know which plants are best for different kinds of weather.

But nowadays, traditional knowledge faces a lot of problems. Things like losing their land, damaging the environment, and being taken advantage of by others can put this valuable knowledge at risk. Indigenous communities often struggle to keep their traditions alive, especially when modern ways of doing things don't respect or understand their rights.

Thankfully, more and more people are starting to realize how important it is to protect traditional knowledge and support indigenous communities. There are efforts happening all around the world to help indigenous people keep their rights and protect their knowledge. By respecting and learning from traditional knowledge, we can find smart solutions to big problems like climate change and make sure our world stays healthy for future generations.

Meaning of Indigenous Peoples in the context of Intellectual Property Law

In the world of intellectual property law, "indigenous peoples" are the original inhabitants of a certain place who have lived there for a long time, often for many generations. They have a special connection to their ancestral lands, which shapes their culture, society, and way of life. This includes their unique knowledge, innovations, and practices that have been passed down

⁵ UN permanent forum of Indigenous issue: who are indigenous people?

through their community over time. This knowledge covers things like plants, medicines, farming methods, stories, and other parts of their culture and environment.

However, regular intellectual property laws don't always fit well with the needs of indigenous peoples. These laws might not properly protect their rights over their traditional knowledge and cultural creations. Sometimes, outsiders might take advantage of this knowledge without asking permission or sharing any benefits.

Thankfully, there's been a growing understanding of the importance of including indigenous perspectives and rights in intellectual property laws. People are working on creating new legal systems that respect indigenous intellectual property rights. These might include special rules for protecting traditional knowledge, agreements on how to share benefits fairly, and recognizing that indigenous communities have collective rights over their creations.

GENERAL ISSUES RELATING TO THE PROTECTION OF TRADITIONAL KNOWLEDGE

Several things make it easy for people to steal traditional knowledge about plants and natural resources. These include when power is spread out, when people take over land that belongs to others, when everyone tries to quickly find and use new plants or resources, when there aren't strong laws to protect this knowledge, and when different systems of knowledge clash.

This traditional knowledge is often linked to things like plants and natural resources. It's valuable because it can help make new products or medicines that are useful for people. But the people who originally knew about these things often don't get treated fairly when others use their knowledge to make money. Some countries have laws to protect this kind of knowledge, while others rely on different laws that might not do a good job of protecting it. Right now, India is working on making new laws specifically to protect this kind of knowledge.

There have been cases where people took advantage of this traditional knowledge without giving credit or compensation. For example, there's a tree called Neem that's been used for centuries in India for medicine and pest control. Even though people have known about it for a long time, others have patented products made from it without recognizing its traditional use. Similar things have happened with turmeric, a spice used for healing wounds, and Basmati rice,

a special type of rice. These cases show why it's important to have strong laws to make sure that people who know about these things get treated fairly when others want to use them.

Traditional knowledge is often used without permission from the indigenous peoples or communities who originally created and manage it, and without giving them a fair share of the benefits. We can start by looking into how we can use the existing intellectual property rights (IPR) system more effectively to protect the traditional knowledge of local communities.

Strategies for Safeguarding Traditional Knowledge Effectively

Establishing Guidelines to Safeguard Traditional Knowledge

- a. We need to set up rules both at home and around the world to ensure that everyone can use natural resources and traditional skills in a fair and legal way.
- b. It's important that the laws we make can change and adapt easily so that we can create effective rules that protect traditional knowledge.
- c. We should involve everyone, especially indigenous groups and local communities, in discussions and decisions about how we use natural resources and traditional knowledge. Their input is crucial to making sure we're being fair and respectful.

To safeguard traditional knowledge effectively, we can follow some key steps. First, we need strong laws to protect it, both nationally and internationally. Second, we should involve the communities that hold this knowledge in decisions about how it's used. Third, we must record and keep this knowledge safe for the future. Fourth, we can use things like patents and copyrights to legally protect it. Fifth, we should make sure that when this knowledge is used commercially, the people who own it get a fair share of the benefits. Sixth, we need to teach people about why it's important to protect traditional knowledge. Seventh, we should help these communities build their skills and resources to manage and protect their knowledge. Eighth, countries should work together to share ideas and solutions. Ninth, we must always use this knowledge ethically and respect the rights of the communities that own it. And finally, we should encourage research and innovation that honors traditional knowledge and involves these communities in the process.

Conclusion

After examining different aspects of Traditional Knowledge (TK), it's evident that TK not only serves as the cultural foundation of any nation but also represents a valuable resource for driving economic growth. However, it's crucial to maintain a careful balance between safeguarding the rights of indigenous communities and reaping the benefits from commercializing TK to ensure socio-economic harmony.

In India, where significant steps have been taken to protect TK, there exists a vast potential for economic development given the country's growing needs and limited investment opportunities. While respecting the rights of indigenous peoples and preserving India's cultural heritage, it's advisable for commercial entities to gradually leverage the untapped wealth of TK to address the increasing demands of the population.

Furthermore, with existing laws promoting both community rights and fostering a patent-friendly environment, it's important to encourage benefit-sharing agreements strategically. This approach aims to uphold the equilibrium between TK holders and innovators, ensuring fair and equitable outcomes for all involved parties."