



INTELLECTUAL PROPERTY RIGHTS OVER TRADITIONAL KNOWLEDGE

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Abstract : *India, as a developing country that is rich in natural resources, arts, and culture, has a variety of traditional knowledge. It requires recognition and legal protection that is able to take care of ownership of traditional knowledge as the creation of a nation that gained international recognition. Regulations in intellectual property rights, especially the Patent Act, aim to provide legal protection for an invention and provide economic benefits for inventors. However, the Patent Act, the adoption of intellectual property rights by developed countries, in its implementation has not been able to give optimal recognition and protection to traditional knowledge. This is caused by differences between the concepts of the Patent Act: an exclusive individual with traditional knowledge that has the characteristics of traditional, communal, and open. Public knowledge of intellectual property rights is still lacking, and inadequate mastery of technology and a low budget are also obstacles to patenting traditional knowledge.*

Keywords: *intellectual property rights, patent rights, traditional knowledge.*

Introduction

Globalization, advances in science, technology, and information As a result, the countries of the world seem to be without barriers. Various developments in knowledge and technology in one country will quickly spread and be easily accessed by people in other parts of the world. This condition encourages the development of intellectual property rights (IPR) as a form of effort to protect inventors through monopoly rights granted by law to benefit economically from their inventions. The protection of IPRs, as property rights due to human intellectual abilities, is designed to protect authors and other parties who obtain permission to utilise the IPR of a person or group.¹

Traditional knowledge falls within the scope of intellectual works that stem from the ideas, notions, or inventions of a country's community. The scope of traditional knowledge itself refers to tradition-based literature, artistic or scientific works, performances, inventions, scientific discoveries, designs, brands, names and symbols, undisclosed information, and all other tradition-based innovations and creations caused by intellectual activities in industrial, scientific, literary, or artistic fields.² Tradition-based ideas refer to systems of knowledge, creations, innovations, and cultural expressions that have generally been passed on from generation to generation, are considered to be associated

¹ Correa, Carlos M. "Traditional knowledge and intellectual property." Geneva: The Quaker United Nations Office (QUNO) 17 (2001).

² Desai, Pranav N. "Traditional knowledge and intellectual property protection: past and future." *Science and Public Policy* 34.3 (2007): 185-197.



with a particular society or region, and have been developed non-systematically and continuously in response to a changing environment. Traditional knowledge thus requires not only recognition of the invention of ideas but also of their dissemination and utilisation by others.³

India is a country that has great potential in terms of traditional knowledge, which includes art, culture, and other forms of local wisdom. This extraordinary potential is essentially an asset of the nation or state that must be protected and preserved so that its existence and development can be of positive benefit to society.

There are many products that are the work of Indian people, such as traditional medicines, arts, and literary works, that have not received legal protection. Various obstacles are the reason why the works and products of the nation's children have not received legal protection in terms of IPR recognition and appreciation, including regulations that do not fully support the implementation of IPR, low public awareness to register their works or thoughts, a lack of data documentation, and the characteristics of traditional knowledge, which is generally communal. The issue of protecting traditional knowledge as a field of intellectual property rights has become a concern for the community and various international organisations. The World Intellectual Property Organization (WIPO), a worldwide IPR organisation based in Geneva, Switzerland, mandates members

to discuss genetic resources, traditional knowledge, and folklore (GRTKF) in international forums. Some countries, especially developing countries, have individually attempted to provide protection for traditional knowledge.⁴

Problem of IPR & TK

Some requirements for legal recognition of works and Many traditional knowledge products are constrained by the characteristics of traditional knowledge that are not in sync with the requirements for obtaining IPR awards or recognition, such as patents.⁵ The concept of IPR recognition originating from developed countries and accommodated in various international agreements such as The General Agreement on Tariffs and Trade (GATT) and Trade Related Aspects of Intellectual Property Rights (TRIPs) is more in favour of the economic and investment interests of developed countries without regard to the sharp disparity between developing countries and developed countries in terms of the ability to master knowledge, technology and information which ultimately creates a monopoly of developed countries, while developing countries as early inventors of traditional knowledge with various limitations do not receive awards and recognition, as well as comparable economic benefits.⁶ India, as a developing country rich in natural resources, arts, and culture, has a variety of traditional knowledge that requires legal recognition and protection that is able to maintain the ownership of traditional knowledge as an

³ Munzer, Stephen R., and Kal Raustiala. "The uneasy case for intellectual property rights in traditional knowledge." *Cardozo Arts & Ent. LJ* 27 (2009): 37.

⁴ Munzer, Stephen R., and Kal Raustiala. "The uneasy case for intellectual property rights in traditional knowledge." *Cardozo Arts & Ent. LJ* 27 (2009): 37.

⁵ Phillips, Freedom-Kai. "Intellectual property rights in traditional knowledge: enabler of sustainable development." *Utrecht J. Int'l & Eur. L.* 32 (2016): 1.

⁶ Downes, David R. "How intellectual property could be a tool to protect traditional knowledge." *Colum. J. Env'tl. L.* 25 (2000): 253.



internationally recognised work of the nation. Based on these problems, the problem formulation that will be analysed in this paper is as follows:

1. How is traditional knowledge legally protected?
2. What are the benefits and constraints of legal protection of traditional knowledge?

This paper aims to find out how legal protection affects traditional knowledge and what the implications of legal protection of traditional knowledge are. Furthermore, this paper is expected to broaden the readers' horizons and become a reference for interested parties to know and understand intellectual property rights in India, especially those related to the recognition and legal protection of traditional knowledge.⁷

Intellectual Property Rights

The term intellectual property rights or intellectual property rights IPR is a translation of the intellectual property rights known in Anglo-Saxon legal literature. IPR refers to goods or rights that can be controlled by property rights. Objects themselves are categorised into tangible and intangible objects. Its tangible objects are material objects, and its intangible objects are immaterial objects in the form of rights. Immaterial property rights can be the object of a property right, where property rights are absolute rights over an object.⁸ IPR is an absolute right whose object is not a thing. IPR concepts, including:

- a) Intellectual property rights, inherent to the owner, are permanent and exclusive;
- b) Rights obtained by others with the permission of the owner (temporary), for example: the right to publish, reproduce, use certain products, or the right to produce certain products.⁹

Intellectual property rights are rights arising from a work produced using human intellectual abilities that are beneficial to people's lives. In this case, the benefit in question is the economic value of the work. Based on international conventions and laws, IPR is classified into two fields: 1) industrial property rights consisting of patents or simple patents; trade secrets; trademarks; industrial designs; plant variety protection; integrated circuit layout designs; and geographical indications and indications of origin; and 2) copyright.¹⁰

The concept of protection of intellectual property rights

The implementation of IPR is inseparable from the globalisation of world trade, which is marked by international conventions and agreements and the formation of international trade organisations such as the World Trade Organization (WTO). In the global order, IPR is seen as a trade issue that has an interrelated relationship between three important aspects, namely intellectual property, commercialization, and legal

⁷ Brush, Stephen B. "Indigenous knowledge of biological resources and intellectual property rights: the role of anthropology." *American Anthropologist* 95.3 (1993): 653-671.

⁸ Schuler, Lindsey. "Modern age protection: protecting indigenous knowledge through intellectual property law." *Mich. St. U. Coll. L. Int'l L. Rev.* 21 (2013): 751.

⁹ Posey, Darrell. "Intellectual property rights: and just compensation for indigenous knowledge." *Anthropology Today* 6.4 (1990): 13-16.

¹⁰ OseiTutu, J. Janewa. "A sui generis regime for traditional knowledge: the cultural divide in intellectual property law." *Marq. Intell. Prop. L. Rev.* 15 (2011): 147.



protection.¹¹ The state provides legal protection for IPR with the aim of avoiding the misuse of intellectual property rights by unauthorised persons. The elements of IPR protection include:

- a) Legal subjects consist of: owners or rights holders; law enforcement officials; IPR registration officials; and law violators.
- b) The protected objects are all types of IPR regulated by law.
- c) Registration of protection is an important element in IPR because protected IPR is limited to IPR that has been registered and evidenced by a registration certificate, unless the law determines otherwise.
- d) Period of protection. Each IPR has a period of protection as specified in the governing law.
- e) Legal action for protection. If there is a proven infringement of IPR, the infringer is subject to criminal and/or civil sanctions.¹²

An act is said to constitute an infringement of IPR if it fulfils the following elements:

Acts prohibited and punishable by IPR-related laws.

- a) Use of IPR without permission or licence from the owner or rights holder.
- b) IPR users exceed the limits set out in the law.
- c) Use of IPR beyond the period stipulated by law, written agreement or licence.

Traditional Knowledge

¹¹ Dagne, Tesh. "Protecting traditional knowledge in international intellectual property law: imperatives for protection and choice of modalities." *J. Marshall Rev. Intell. Prop. L.* 14 (2014): i.

¹² Kariyawasam, Kanchana. "Protecting biodiversity, traditional knowledge and

Definition and Scope of Traditional Knowledge Traditional knowledge is the work of traditional (indigenous) societies that may, according to the definition used by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, be knowledge owned or controlled and used by a particular community, society, or ethnic group that is hereditary and continues to develop in accordance with environmental changes. This definition is almost the same as the definition given by the Convention on Biological Diversity (CBD), which is "knowledge, innovation, and practises of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity."¹³

In the WIPO document, traditional knowledge is not limited to one particular knowledge but refers to a very wide range of knowledge. What separates traditional knowledge from other knowledge is its attachment to a particular community, and it is this characteristic that gives it its traditional nature (passed down from generation to generation). Traditional knowledge is created, maintained, used, and protected in traditional circles and usually refers to knowledge that has been accumulated by the community through a long process of experience and in a specific location. It is not uncommon for traditional knowledge to be important to a community's identity, so it is essentially traditional knowledge.¹⁴

intellectual property in the pacific: Issues and challenges." *Asia Pac. L. Rev.* 16 (2008): 73.

¹³ Brody, Baruch A. "Traditional knowledge and intellectual property." *Kennedy Institute of Ethics Journal* 20.3 (2010): 231-249.

¹⁴ Antons, Christoph. "Traditional knowledge and intellectual property rights in Australia and Southeast Asia." *New Frontiers of Intellectual*



Traditional knowledge is a form of cultural innovation, creation, and expression produced and maintained for generations by indigenous peoples, local communities, or individuals within a country's local communities. Traditional knowledge is often associated with the use and application of genetic, biological, and natural resources or the management and conservation of natural resources and the environment that have economic, commercial, and cultural values. From the definition and scope of traditional knowledge, it is apparent that traditional knowledge is closely related to the communal ownership of indigenous peoples, and the characteristics of traditional knowledge also reflect the concept of ownership of customary law.¹⁵

In general customary law has patterns:

1. Traditional, which is hereditary from the time of the ancestors until now, is still valid and maintained by the community concerned.
2. Magical religious, legal, or existing legal rules are always related to belief in the supernatural or based on the teachings of God Almighty.
3. Communal, customary law prioritises the common interest, where individual interests are overshadowed by common interests and legal relations between community members are based on the principles of togetherness, kinship, mutual aid, and gotong royong.
4. Open and simple, customary law can accept elements from outside

as long as they do not conflict with its customary law. In addition, customary law is also unpretentious, uncomplicated, requires little administration, is mostly unwritten, easy to understand, and is implemented based on mutual trust.¹⁶

Legal protection of traditional knowledge

The concept of IPR management includes two interacting processes in one system, namely the process of developing an idea to obtain an invention and then seeking legal protection, as well as the process of commercialising the invention until it is profitable. In an effort to encourage the increase of invention and innovation, the government places more emphasis on efforts to provide legal protection and commercialization. The protection provided by the government, especially through regulation, is actually motivated by the pressure of globalisation, which is led by developed countries.¹⁷

Globalization is inevitable; therefore, the alignment of IPR laws with various international conventions is a must. As is known, India has ratified the agreement establishing the WTO (Agreement Establishing the World Trade Organization). As a member country of the WTO, India has an obligation to adjust various national laws and regulations relating to the regulation of IPR. The question that arises is whether India, as a developing country, is ready to apply the principles of IPR as stipulated in TRIPs.

Property Law: IP and Cultural Heritage-Geographical Indications-Enforcement-Overprotection'Oxford: Hart Publishing (2005): 37-51.

¹⁵ Kuruk, Paul. "Bridging the gap between traditional knowledge and intellectual property rights: Is reciprocity an answer." J. World Intell. Prop. 7 (2004): 429.

¹⁶ Younging, Gregory. "Traditional knowledge exists; intellectual property is invented or created." U. Pa. J. Int'l L. 36 (2014): 1077.

¹⁷ O guamanam, C. hidi. "Localizing intellectual property in the globalization epoch: The integration of Indigenous knowledge." Indiana Journal of Global Legal Studies 11.2 (2004): 135-169.



The inequality of the initial position between developed and developing countries creates concerns that developing countries cannot play in the global market or even just become spectators to the business conducted by developed countries.¹⁸

Under the TRIPs banner set by developed countries, all member countries are forced to implement an intellectual property system that requires certain standards that are considered high, especially for countries.¹⁹

The conditions and capabilities of countries in the world are not equal or balanced; the application of high standards of IPR recognition on the pretext of providing recognition and protection to parties who have works and intellectual abilities without considering the limitations and conditions faced by developing countries will only benefit developed countries. Furthermore, some criticism of TRIPs is related to TRIPs rules that are not suitable for developing countries, among others: first, protection facilities are provided for developed countries as they wish but do not provide protection for traditional knowledge in developing countries. Second, TRIPs have reduced developing countries' access to knowledge and forced them to pay royalties in large amounts. For example, developing countries are promised to get wider agricultural access, but on the other hand, developed countries reduce their subsidies. The determination of high

standards as a requirement for obtaining IPRs will be difficult to meet by the community or government of developing countries in fighting for the IPR of their traditional knowledge.²⁰

At first glance, IPR registration is a form of concern and appreciation for the existence of the intellectual work of a person or group of people, so that it has benefits or uses that will be obtained by the IPR owner. However, if referred to the requirements that must be met to obtain IPR, such as complicated and lengthy bureaucratic procedures demanding knowledge and understanding of IPR by inventors who will submit their intellectual work, besides that, the cost of filing IPR is also relatively expensive. This can be an obstacle to registering IPRs on inventions resulting from the intellectual work of the nation, especially commodities or products native to India, such as findings in agriculture. When associated with India's original commodities, IPR protection, especially patents and brands, becomes very important, especially if these products can provide high economic benefits.²¹

India's rich natural culture, customs, and diverse tribes are sources of traditional knowledge, so it is not surprising that India is also rich in traditional knowledge. For example, various native Indian plants have long been used as the basic ingredients of cosmetics and traditional medicines, literature, and art creations of the original works of various tribes,

¹⁸ Yu, Peter K. "Traditional knowledge, intellectual property, and Indigenous culture: An introduction." *Cardozo Journal of International and Comparative Law* 11.2 (2003): 239.

¹⁹ O'Connor, Bernard. "Protecting traditional knowledge: an overview of a developing area of intellectual property law." *J. World Intell. Prop.* 6 (2003): 677.

²⁰ Lakshmanan, Pushpa Kumar, and Shanmugamurthy Lakshmanan. "Protecting traditional knowledge: can intellectual property rights help?." *Ancient Science* 1.2 (2014): 30-41.

²¹ Sunder, Madhavi. "The invention of traditional knowledge." *Law & Contemp. Probs.* 70 (2007): 97.



including local community handicraft products, which are now the target of many art collectors, all of which need attention from both central and regional governments so that their existence can be protected and local communities as owners of traditional knowledge benefit from their intellectual property.²² Especially when we realise that traditional knowledge is a source of inspiration for new innovations for researchers to make discoveries or develop them. But in addition to the low awareness in our society of the urgency of IPR to protect the findings, the government's efforts to provide support for the existence and development of traditional knowledge are still not optimal. Policies in the field of IPR are still oriented towards developed countries, so they have not been able to raise and protect national intellectual property, especially traditional knowledge.²³

Application of western IPR concepts without considering the potential conditions National intellectual property, with all its characteristics, will only open up opportunities for countries with high technological capabilities and large budgets to "steal" or at least take over national inventions with inappropriate rewards and then apply as IPRs of other countries. It is the other countries that benefit from the commercialization of these IPRs.²⁴

Referring to the laws, regulations, and conventions in the field of IPR, the legal protection provided for intellectual property includes the protection of patents (including simple patents), trade secrets, trademarks, industrial designs, plant variety protection, integrated circuit layout designs, geographical indications and indications of origin, and copyright. As for traditional knowledge, there is no legislation that specifically regulates it. Thus, if traditional knowledge is to be recognised as an intellectual work, the provisions of the IPR field that are scattered in various laws apply.²⁵

This situation is very unfavourable to local (indigenous) communities as owners of traditional knowledge with various characteristics that exist in local communities to get respect and benefits for their knowledge, especially when viewed from the perspective of IPR, which has different requirements and standards for traditional characteristics or properties of traditional knowledge.²⁶

Although aimed at rewarding inventors or creators of ideas, IPRs for traditional knowledge are difficult to obtain because, in accordance with the nature of customary law, most of the traditional knowledge is common property discovered and used jointly by the community for generations, while the requirements for obtaining a patent for an invention must have the nature of novelty that has not

²² Pushpangadan, P., et al. "Ethnopharmacology, traditional knowledge and intellectual property rights." *Biodiversity for sustainable development* (2017): 97-119.

²³ Haugen, Hans Morten. "Traditional knowledge and human rights." *J. World Intell. Prop.* 8 (2005): 663.

²⁴ McManis, Charles R. "Intellectual property, genetic resources and traditional knowledge protection: thinking globally, acting locally." *Cardozo J. Int'l & Comp. L.* 11 (2003): 547.

²⁵ Younging, Greg. "The traditional knowledge–intellectual property interface." *Indigenous Notions of Ownership and Libraries, Archives and Museums* (2016): 67-74.

²⁶ Kansa, Eric C., Jason Schultz, and Ahrash N. Bissell. "Protecting traditional knowledge and expanding access to scientific data: juxtaposing intellectual property agendas via a "some rights reserved" model." *International Journal of Cultural Property* 12.3 (2005): 285-314.



been disclosed before in any way and in any country.²⁷

Moreover, the requirement that the invention to be patented must contain an inventive step (not foreseeable) and be applicable in industry is difficult to apply to traditional knowledge. The inventive step in traditional knowledge indicates an inventive step that has become a public domain that is discovered and used by all citizens, maintained together, and relatively open for a relatively long period of time so that it is easily accessible by other communities.

The communal, concrete, cash, and open characteristics of traditional knowledge contradict the concept of IPR stipulated in the Act. In practice, the characteristics of traditional knowledge, which, when matched with the western concept of IPR, do not qualify as inventions that can be requested for IPR, are often utilised by other countries that have high expertise and technology to take the traditional knowledge and then modify, specify, and mix it in such a way that it becomes a new invention that meets the criteria for filing IPR. It is certain that if traditional knowledge with a little touch of new innovation is patented, the economic benefits will only be owned and enjoyed by the IPR holder. Even traditional communities, as the original owners, if they want to reuse their traditional knowledge, must go through certain procedures and be burdened with high

costs. For example, the basic ingredients of traditional medicines are derived from indigenous plants.²⁸

A case has occurred in India with regard to the granting of turmeric patents by the United States, which was later cancelled over a lawsuit by the Indian state that claimed the turmeric plant for medicinal purposes was an invention based on traditional Indian knowledge, through a long struggle that was time-consuming and costly. Both India and the US commented on the case from different perspectives. According to India, the case is an example of bad patents, where a patent on turmeric was granted and then cancelled because it was proven that there was nothing new about the invention.²⁹ Besides, the process cost a lot of money and a long time. For example, the turmeric patent had to be challenged in court in the country where the patent was granted. Meanwhile, the United States argues that disclosure obligations and requirements will not prevent bad patents. Moreover, even if there are bad patents, according to the United States, they can be cancelled. Regardless of the debate on the implementation of IPR, the government's concern for providing IPR protection from its country is absolutely necessary, both in the form of formal legislation, enforcement, and supervision.³⁰

Benefits and constraints on the implementation of traditional knowledge protection Within the framework of civil

²⁷ Bala, Anu. "Traditional Knowledge and Intellectual Property Rights: An Indian Perspective." Available at SSRN 1954924 (2011).

²⁸ Duffield, Graham. "Traditional knowledge, intellectual property and pharmaceutical innovation: What's left to discuss?." The sage handbook of intellectual property (2017): 649-664.

²⁹ Ritchie, Mark, Kristin Dawkins, and Mark Valliantos. "Intellectual Property Rights and Biodiversity: The Industrialization of Natural Resources and Traditional Knowledge." . John's J. Legal Comment. 11 (1995): 431.

³⁰ Simon, Bradford S. "Intellectual Property and Traditional Knowledge: A Psychological Approach to Conflicting Claims of Creativity in International Law." Berkeley Tech. LJ 20 (2005): 1613.



law, IPR is included in the scope of It is a law of immaterial objects in the form of ideas discovered or created by a person or group as a result of intellectual work. As with other objects, the utilisation or use of IPRs by their owners or by other parties based on licences can generate economic benefits. Thus, IPR contains economic rights. Economic rights that can be obtained by IPR holders depend on the type of IPR owned by a person. For example, on patent rights, economic rights include the right to use the patent itself and the right to use the patent through a licence, while in copyright, the copyright holder has the right to copy and the right to adapt the copyrighted work through language transfer or other means to convert it into other forms of copyrighted works, distribution rights, broadcasting rights, and performance rights.³¹

The protection of IPR is motivated by the desire to protect inventors or other parties who invest capital when they develop the creative process, and then the inventor receives a return on their investment. In the concept of IPR that originates from the concept of developed countries, the protection given to inventors will create a monopoly that accentuates individuality; that is, the rights can only be owned and used by the inventor or licensee for a certain period of time determined by law. If someone uses someone else's IPR without permission, he or she will be subject to criminal or civil sanctions. For example, in patent ownership, the exclusive rights granted by the state to the

patent owner or licence holder are valid for a period of 20 years. Within the 20-year period, only the patent holder can utilise his rights for commercialization purposes.³² Other parties may only use the patent of a person or entity with a licence through an agreement between the owner and the party seeking the patent. If all traditional knowledge could be formally recognised by the state without any obstacles, then local communities as owners of traditional knowledge would benefit economically as well as be legally recognised both nationally and internationally. On the contrary, facts on the ground show that various obstacles must be faced by traditional knowledge, which, due to its nature and characteristics, cannot apply the requirements for filing IPRs. For this reason, the government needs to make efforts to protect it by imposing exceptions in the IPR legislation, especially in regulating the IPR filing requirements for traditional knowledge.³³

The IPR legislation that currently exists is still very dominant in terms of the concepts of developed countries. This can be understood because, as a member of the WTO, India must comply with and implement the TRIPs agreement, including adjusting IPR legislation according to the TRIPs agreement. However, the government needs to make efforts to protect Indian IPR, especially traditional knowledge that is disadvantaged by the application of IPR concepts from developed countries. Some

³¹ Ramcharan, Robin, and Mpazi Sinjela. "Protecting traditional knowledge and traditional medicines of indigenous peoples through intellectual property rights: issues, challenges and strategies." *International Journal on Minority and Group Rights* 12.1 (2005): 1-24.

³² Karjala, Dennis S. "Sustainability and intellectual property rights in traditional knowledge." *Jurimetrics* (2012): 57-70.

³³ Cross, John T. "Property rights and traditional knowledge." *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 13.4 (2010).



of the principles enacted in the provisions of international conventions related to IPR are also unfair to India, such as the priority rights contained in the TRIPs agreement in the Paris Convention. The right of priority allows a patent holder to register his patent in a convention-party country within a period of one year from the filing date in the country where the invention was first registered. Patent owners from developed countries who register their patents in developing countries and fellow members of the convention allow the cancellation of patents that have been registered by inventors in developing countries if the patents have similarities or similarities in substance. To protect national interests, IPR policies should not merely adopt the applicable TRIPs provisions as standard provisions; they must also be able to provide legal certainty for individual Indians for the inventions or intellectual property works they produce, which will ultimately have an impact on increasing national welfare while improving the national economy.³⁴

Therefore, in addition to making negotiation efforts in various meetings of international organisations that discuss IPR conventions, some WTO provisions can be used as an effort by the government to protect its traditional knowledge.³⁵

Its exclusive nature and being always attached to the owner create a monopoly on IPRs that allows foreign companies

holding IPRs to abuse their position in order to obtain as much profit as possible. This is clearly contrary to the philosophy of patent protection, which is to encourage inventions. The nature of this monopoly is contrary to the concept of communal and social ownership of customary law, so that traditional knowledge is not controlled by a person or community that owns the intellectual property but is open to access by people outside the community. The communal nature of indigenous peoples will always prioritise common interests over their personal interests, which also becomes an obstacle or barrier that complicates the application of IPRs to traditional knowledge. Sharing knowledge, skills, or expertise with others for indigenous peoples is part of the life they live, and it is a matter of pride if the results of their work can be disseminated and used for other people, including other communities.³⁶

The problem of documenting IPR materials is an important issue that needs the attention of various groups, both government and society, especially the documentation of traditional knowledge in accordance with its traditional nature, legal acts, and relationships.³⁷

Legal relationships that occur in traditional societies are cash or contingent, immediately completed at the time the act is performed, and simple. Consequently, actions in traditional societies are generally not documented,

³⁴ Weeraworawit, Weerawit. "Formulating an international legal protection for genetic resources, traditional knowledge and folklore: Challenges for the intellectual property system." *Cardozo J. Int'l & Comp. L.* 11 (2003): 769.

³⁵ Bratspies, Rebecca M. "The new discovery doctrine: Some thoughts on property rights and traditional knowledge." *American Indian Law Review* 31.2 (2006): 315-340.

³⁶ Halewood, Michael. "Indigenous and local knowledge in international law: a preface to sui generis intellectual property protection." *McGill LJ* 44 (1998): 953.

³⁷ Cullet, Philippe, et al. "Intellectual property rights, plant genetic resources and traditional knowledge." *Rights to plant genetic resources and traditional knowledge: basic issues and perspectives.* Wallingford UK: CABI, 2006. 112-154.



even though these actions have accumulated for a very long time and have been maintained for generations in the community. Complete documentation of traditional knowledge can affect the success of formal IPR protection efforts as arguments or evidence if there are claims by other parties to our traditional knowledge. The case of "Use Tumeric in Wound Healing" is evidence of the importance of traditional knowledge documents in the protection of traditional knowledge IPR. The success of The Council of Scientific and Industrial Research-India cancelling the tumeric patent filed by Suman K. Das and Hari Har P. Cohly of the University of Mississippi Medical Centre, who had obtained a patent from the United States government, was based on 32 publication documents submitted by CSIR-India.³⁸

In 2003, WIPO issued a guidance document on measures for the defensive protection of traditional knowledge and genetic resources to prevent the acquisition of IPR of traditional knowledge and genetic resources by parties other than the owners or stakeholders of traditional knowledge and genetic resources. This document is expected to become a reference for traditional knowledge protection programmes, so that traditional knowledge protection programmes at the national level will be aligned with formal traditional knowledge protection programmes at the international level.³⁹

In the formal protection of traditional knowledge, documentation is very important. In every IPR application, a search for documents related to similar patents that have previously existed, commonly called prior art, is an important process that must be carried out before an inventor applies for IPR registration. This is to avoid the existence of IPRs that are the same or have similar elements without any element of novelty. Unfortunately, although developing countries have a lot of intellectual property that has the potential to obtain IPR, generally these countries are not supported by a good data base, so it becomes an obstacle in searching for documents related to pre-existing IPR. Prior art documents are also useful for filing a claim for an IPR that has been issued or vice versa for argumentation in defending an IPR that has been owned. India's success in filing a tumeric patent claim that has been issued by the United States or a patent cancellation case for the use of anti-fungal agents that are the result of neem tree extracts that have been granted to the United States Department of Agriculture and the W.R. Grace Company is because the claim is supported by a good data base.⁴⁰

In many cases, traditional knowledge possessed by developing countries is often exploited by foreign parties through patenting similar inventions as developments of pre-existing inventions. Although it is legally possible to innovate on a previously patented invention as long

³⁸ Taubman, Antony. "New Dialogues, New Pathways: Reframing the Debate on Intellectual Property and Traditional Knowledge." Washburn LJ 58 (2019): 373.

³⁹ Picart, Caroline Joan S., and Marlowe Fox. "Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property,

Human Rights and the Globalisation of Traditional Knowledge and Expressions of Folklore: Part I." International Community Law Review 15.3 (2013): 319-339.

⁴⁰ Verma, Surinder Kaur. "Protecting traditional knowledge: is a sui generis system an answer." J. World Intell. Prop. 7 (2004): 765.



as it fulfils the element of renewal and can be applied in industry, For inventors in developed countries with expertise, technological mastery, and a very supportive budget, it is not difficult to conduct renewal research based on inspired ideas from traditional knowledge. Although, in this case, the owner of traditional knowledge is compensated for the exploration of biological resources, it is necessary to pay attention to the law underlying the agreement between the owner of traditional knowledge and the party that will use local resources. This means that in efforts to protect traditional knowledge, it is not only IPR legal instruments that need to be aligned with the conditions and characteristics that surround traditional knowledge, but also contract law related to agreements in the utilisation of traditional knowledge so that local communities as the original owners of traditional knowledge get respect and commensurate economic benefits.⁴¹

Conclusion

Various traditional knowledge that is the intellectual work of the nation India's traditional knowledge, which has existed since the time of the ancestors and has been developed and maintained from generation to generation as part of intellectual property rights, has not yet received optimal legal protection. In addition to the absence of laws specifically regulating traditional knowledge, the existing laws and regulations in the field of IPR have also not been able to provide protection and provide economic benefits to owners of traditional knowledge. IPR as a form of recognition of rights and appreciation of intellectual work has not been fully applicable to traditional

knowledge. This is due to the difference in concepts between IPR sourced from developed countries and then adopted in Indian IPR legislation and the concept of traditional knowledge itself, which is part of customary law. The concept of customary law that animates traditional knowledge such as communal, hereditary, and cash and open nature is in contrast to the characteristics of the concept of IPR, such as the exclusive nature that creates a monopoly on IPR.

The regulation of IPR in national legislation is intended to provide respect as well as protection for intellectual property in India, but these benefits have not been optimised in traditional knowledge of IPR due to several obstacles, such as a limited understanding of IPR and a lack of documentation. Some of the requirements for obtaining IPR recognition through IPR registration are also obstacles to providing IPR protection for traditional knowledge, such as the obligation of IPRs that have been registered to be applied in the industry.

Recommendation

A view of the importance of traditional knowledge as a national asset As traditional knowledge needs to be protected and developed according to its characteristics, policies are needed that are oriented towards strengthening the existence of traditional knowledge, recognising traditional knowledge as internationally recognised IPR, and having economic potential. Therefore, a comprehensive regulation of traditional knowledge is required by establishing special laws governing traditional knowledge and its protection. In addition, the government, as a member of international organizations, needs to

⁴¹ Bodeker, Gerard. "Traditional Medical Knowledge, Intellectual Property Rights &

(And) Benefit Sharing." *Cardozo J. Int'l & Comp. L.* 11 (2003): 785.



continue to make approaches with other countries to fight for the protection of traditional knowledge from acts of theft and expropriation of IPR that harm local communities.
