

Volume 6 Issue 2 July 2018
Special Issue on Human Rights and
Democratisation

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Kathmandu School of Law Review

ISSN 2091-2110

Volume 5

Issue 2

November 2017

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In Nepal NPR 500/-
Outside Nepal USD 75



www.ksl.edu.np

Kathmandu School of Law Review

Volume 5, Issue 2, November 2017
ISSN 2091-2110



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Protection of Traditional Knowledge: Emerging Issue of Intellectual Property Law

Madhu Soodan Poudyal*

Abstract

Traditional Knowledge and Indigenous Knowledge are the two concepts under intellectual property which in the present context is of major concern of intellectual property law. Since, the term traditional knowledge and indigenous knowledge are quite often used interchangeably but failing to understand at times that they do not carry the same meaning it may lead to confusion. So this paper in general clarifies the distinction between these two concepts of intellectual property highlighting the importance of traditional knowledge. The paper attempts to discuss the areas of scope and significance of traditional knowledge. Furthermore, this paper highlights the impact of failure of registering the traditional knowledge as a patent leading to infringement of violation of intellectual property rights. The paper in conclusion opines that the ongoing debate of need of national and international actions for the protection of traditional knowledge and preservation of the nation's intellectual property should be the interest of all nations.

Introduction

Traditional knowledge (TK) is not limited to only any specific field of technology or the arts. The every branch of human knowledge which is open to inquiry by traditional methods- medicinal and herbal, agricultural and ecological, technological, cultural, literary and artistic knowledge of indigenous communities- and which are generally transmitted orally across generations are called TK^{*1}. The examples of TK are handicrafts, music, dance, folklore, folk tales, folk song, poetry and proverbs, spiritual expressions, agro-technologies, medical and herbal preparations, machineries and equipments like *Chaki, Tuin, Kol etc.*

Indigenous Knowledge (IK) is the technical, artistic, cultural and ecological knowledge owned by indigenous people. Sometimes TK and IK may be used interchangeably. Although IK is generally considered as TK, not all TKs are IKs². Also, TK and folklore do not always carry the same meaning. Their difference is even subtle³ as compared to difference between IK and TK. TK includes expressions of folklore as a sub-set. Folklore is largely the literary, artistic, religious and cultural part of TK. Likewise, the ecological and scientific knowledge

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¹ World Intellectual Property Organisation, WIPO Worldwide Academy, *Collection of Documents on Intellectual Property*, WIPO Publication No. 456 (E), Geneva, WIPO, 2000, p. 218.

² *Ibid*, pp. 218-219.

³ *Ibid*, p. 222.

of genetic resource and bio-diversity, if availed traditionally, is TK. So, TK should be understood in abroad sense as an umbrella term of all three of above.

TK is the part of knowledge established and practised by our ancestors and transmitted orally from generation to generation from hundreds of years back. It constitutes different kinds of socio-cultural practices and technical knowledge, established customs, systems and traditions. So the study of TK teaches us to gain a better understanding of the concept for use, protection and promotion for the benefit of both the users and owners of TKs. They are generally owned by traditional communities, ethnic groups and indigenous societies under collective ownership. They are highly diverse and elusive, but a very important subject in our society. They are also the basis for local level decision making in agriculture, healthcare, food preparation, environmental care, educational exchange, socialisation activities and so forth. They may be characterised as:

- They are being subject to collective ownership and responsibilities.
- They are under community ownership,
- They are constantly evolving.
- They are generally transferred in oral forms.
- They are very old in origin.

Areas and Scope of Traditional Knowledge:

For convenience, TK may be studied under following categories-

Agricultural practices and ecological knowledge: There are so many unique agricultural practices in our country. Some of the examples are contour cultivation, indigenous hand tools, bonding of rice fields, seed storage, granaries, insect and diseases control practices, sowing seeds and transplanting techniques, *Parma* (exchange of work), *Nwaji* (celebration of new harvest) and so on.

Health practices & medicinal knowledge: Such practices are as old as *Paramá*. Examples of these practices are Ayurvedic treatment system, treatment of snake bites, use of different herbs like basil as antibiotic use, aloe-vera as an antacid, *Neem* as an anti-inflammatory, turmeric as a wound healer and lotus seed for jaundice control etc.

Food & Beverage: Different ethnic groups and castes have developed different kinds of foods and beverages, for example, *Yomari* bread of *Newar*, *tomba* and millet liquor of *Sherpas*, *Gurungs*, *Magars*, *Rai* and *Limbu*. Foods like *Gundruk*, fermented pickle, *cell-roti*, rice and *dal* are very traditional and common foods for all tribes of Nepal.

Religion and culture: The traditional religions of Nepal, *Sanatan Hindu* and Buddhist, are being practised from the *Pauranic* era. Hindu texts such as *Vedas*, *Upanishads*, *Mimamsa*, *Bhagbat Gita*, as TK, have become a vast source of knowledge for western countries too. Because of the philosophy of peace and *Nirvana* of Buddhism, Nepal is known as a land of peace and harmony since several years in the past. *Dashain* and *Tihar* are commonly celebrated national festivals of Nepal. There are several feasts specific to localities and ethnic groups,

which are very traditional knowledge agents of our country. Unique *Sanskar* like cremation and marriage system, and dress like *Daura-Suruwal-Topi*, *Guniu-Choli-Patuka* are unique in the world.

Indigenous Technology (IK): Technology is an applied science. It is the application of knowledge for practical use. Certain traditional information and technological practices held by local people are unique to their socio-cultural and economic patterns. They are applied in daily life to maintain their livelihood, including local tools, machinery, equipment, production process and practices. Local devices like *Dhiki*, *Chaki*, *Tuwin*, *Ghatta* (watermill) and local treatment for snake bite are the examples of IK. It is also a part of our TK. The World Intellectual Property Organization (WIPO) has identified TK as highly valuable intellectual property of LDCs and developing countries.

Advantages of Protecting TK

From the experience of others and of our own country, it can be generalised that TK is very advantageous for the social, cultural, technological and economic well-being of the nation, some of which are described below:

- It favours the well-being of TK holding community by ensuring ownership and resource utilisation.
- It provides benefits-sharing opportunities for TK holders from the user-market worldwide.
- It preserves knowledge-base of communities in the community & nation as a whole.
- Its protection is an opportunity for socio- economic and cultural development in the country.
- It creates added value for humankind.
- It enables participation in global markets for local entrepreneurs.
- It provides a base for technological development in the country.
- It provides the best opportunity for the use of local resources and talents.

The Demands and Responses to Protect TK

For any country, TK is not new; it is as old as the history of humankind on earth. After the rise of WTO, LDCs too became aware of IP rights. Among the several IP issues that were raised from different parts of the third world, greater importance is given to TK, folklore, as well as conservation, preservation, management, sustainable utilisation and benefit sharing of these genetic resources⁴. The international policy for the identification, protection and promotion of TK has been shaped by a number of events in international forums. The major responses from international community on the demand of the third world relating to the said issue are reflected in the works of WIPO Fact Finding Mission (FFM) 1998; formation of Intergovernmental Committee on IP & genetic

⁴ World Intellectual Property Organisation, *General Information: World Intellectual Property Organization*, WIPO Publication No.400, 2004, p. 21.

resource (GR), TK & Folklore 2000, WIPO Inter-Regional Meeting for Policy and Action Agenda 2000; and issue based TRIPS Council Meeting 2000.

Based on the study of FFM, a WIPO Intergovernmental Committee on IP, GR, TK and folklore was formed to discuss and handle the IP issues on⁵:

- Access to genetic resource (GR) and benefit sharing
- Protection of TK whether associated or not with these resources
- Protection of expression of folklore

In response to international wave, the Constitution of Nepal also has made some provisions in TK subject matters⁶. Further, the Government of Nepal has also incorporated the provision of its protection in the Industrial Policy⁷ where, though late, the commitment to the protection of TK has been made.

WIPO Fact Finding Mission (FFM)

The mission was formed to carry out a comprehensive study on TK. The FFMs were conducted in 28 countries between May 1998 and November 1999. The result of the mission has been published by WIPO in the form of a large report⁸. For the two years long study, the mission had developed a questionnaire on various aspects of TK and distributed the questionnaire among member countries. After receiving responses from 64 countries, the mission focused its study on the specific situation of 28 countries; it analysed nine periodic missions and prepared a final report which it submitted to WIPO in April 2000⁹. Findings of WIPO FFM disclosed the following¹⁰:

- TK systems are frameworks for continuing creativity and innovation.
- TK is common to all countries but is very important for developing and LDCs.
- TK is a constantly renewed source of wealth (common to all countries).
- All branches of IP law are relevant to TK.

The recommendations of the report were discussed, harmonised and adapted by TRIPS Council Meeting in WTO.

WIPO Inter-Regional Meeting for Policy and Action Agenda

From November 9 to 11, 2000, a WIPO Inter-Regional Meeting on Intellectual Property and Traditional Knowledge¹¹ was organised in Chiangrai, Thailand in

⁵ Ibid, p. 21.

⁶ *Constitution of Nepal*, 2072, art 51 sub-arts C(2), F(4), G(5), H(7) & J(8).

⁷ Ministry of Industry, Government of Nepal, *Intellectual Property Policy*, 2073, p .6.

⁸ World Intellectual Property Organisation, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, WIPO Report on Fact-finding Missions (1998-1999), April 2001.

⁹ World Intellectual Property Organisation, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Final Report on National Experiences with the Legal Protection of Expressions of Folklore*, WIPO Publication No. WIPO/grtkf/ic/3/10, March 25, 2000.

¹⁰ *FFM* (n 8), pp. 209-215.

¹¹ World Intellectual Property Organisation, Inter-Regional Meeting on IP & TK, *Policy and Action Agenda for the Future*, Nov 9-11, 2000, p.1.

order to set up a policy and action agenda for future. Representatives from 28 countries participated in that meeting¹². The meeting identified the responsibilities of both the Governments and WIPO, and made following recommendations to Governments relating to TK policies and actions agenda for future¹³:

- Embark upon national consultation processes to raise awareness about the issues and to involve all stakeholders in the development of national policies and strategies, particularly indigenous and local communities;
- Identify, catalogue, record and document the genetic resources and traditional knowledge including expressions of folklore, held by their countries, communities and people;
- Where appropriate, facilitate the consideration of traditional knowledge in procedures for the grant of intellectual property rights, by inter alia:
 - ✓ assisting in the documentation and publication of traditional knowledge as searchable prior art;
 - ✓ supporting proposals to include traditional knowledge subject matter in the International Patent Classification; and,
 - ✓ assisting with and supporting the inclusion of traditional knowledge databases and digital libraries in existing intellectual property information systems, as well as WIPONet;
- Develop and test, at the national level, policies, plans and mechanisms, including intellectual property-based tools, for regulating access to and benefit-sharing in genetic resources and upgrading the protection of traditional knowledge and folklore;
- Establish appropriate mechanisms at the national level to coordinate the views and contributions of all relevant Government Ministries, Departments and other agencies so that countries may be able to participate effectively and fully in regional and international processes;
- Exchange information and experiences, explore joint solutions to problems of common concern, and strive to develop common positions, policies and strategies in relation to these issues, having importance sub-regionally, regionally and inter-regionally; and,
- Take the lead in developing reasonable and appropriate proposals for model legislation, mechanisms, contractual terms and practices for regulating for the protection of traditional knowledge and folklore, which could contribute to the development of internationally accepted standards.

The meeting also identified the responsibilities of WIPO and made some recommendations to WIPO such as: (i) those relating to technical cooperation in order to execute TK policy and action agenda for future, (ii) to provide assistance to organise national, regional and inter-regional meetings, (iii) to provide support

¹² Namely Bhutan, Bolivia, Brunei Darussalam, Cambodia, China, Ethiopia, Fiji, Ghana, Guyana, India, Indonesia, Iran, Lao people's Democratic Republic Malaysia, Mongolia, Morocco, Nepal, Pakistan, Papua New Guinea, Paraguay, Philippines, Republic of Korea, Samoa, Sri Lanka, Swaziland, Thailand, Venezuela and Viet Nam.

¹³ *FFM*(n 8),p. 3.

to developing and Least Developed Countries for training and exploratory activities, and (iv) to carry out pilot projects and so forth.

TRIPS Council Meeting

In response to the request made by the member states during the TRIPS Council meeting on 5-7 March 2002¹⁴, relating to the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD), the TRIPS Council Meeting identified the general issues of TK and Folklore in harmony with the paragraph 19 of Doha Ministerial Declaration and the WIPO-FFM.

In the meeting, the first concern was on the grant of patents or other IPRs covering traditional knowledge to persons other than those indigenous people or communities who have originated and legitimately controlled the traditional knowledge. The second concern was that the traditional knowledge is being used without the authorization of the indigenous peoples or communities who have originated and legitimately controlled it as well as that such exploitation is being made without proper sharing of the benefits arising from such use. General issues relating to international actions to protect traditional knowledge and folklore were identified as follows¹⁵:

a. Common economic interest.

It has been said that traditional knowledge is a valuable global resource and hence international efforts to secure its protection should be actively supported.

- b. **Equity:** It has been said that given the important economic value of traditional knowledge, the holders of traditional knowledge should share in the economic benefits derived from that knowledge.
- c. **Food security:** Local farming communities have over the years developed knowledge systems for the conservation and sustainable use of biological diversity, including from the selection and breeding of plant varieties.
- d. **Culture:** The traditional knowledge of traditional communities is put into practice in a way which is part of the day-to-day lives of these people and thus part of their culture.
- e. **Environment:** The traditional knowledge of indigenous people and local communities has to operate in the environmentally sustainable way and has to conserve genetic and other natural resources. Protection of traditional knowledge is therefore closely linked to the protection of the environment.
- f. **Development:** Protection of traditional knowledge could contribute significantly to the fulfilment of developmental objectives.

¹⁴ WTO Council for TRIPS, *The Protection of Traditional Knowledge & Folklore: Summary of Issue Raised & Points Made*, Note by the Secretariat: IP/C/W, 370, 8 August 2002, p. 1.

¹⁵ *Ibid*, pp. 2-3.

- g. Coherence of international and national law:** International recognition of traditional knowledge, farmers' rights and practices of indigenous and local communities' rights are provided under Article 8(j) of the CBD. Since TRIPS Agreement considers Intellectual Property Rights as private rights, international understanding is required so that these rights are not undermined.
- h. Grant of patents based on TK:** The meeting suggested that prior art for novelty purpose should be paid due care as the TK already exists in member countries or publicly known or used anywhere in the world. Further, there should be adequate information on prior art, whether in oral form or documented in local language.

Relating to prior consent and benefits sharing, it was expressed that TK is being used without the authorization of the indigenous people or communities who have owned and legitimately controlled it and that such exploitation is being made without proper sharing of the benefits. Following suggestions have been put forward with a view to addressing this concern¹⁶:

- **Use of the existing IPR system:** Starting-point should be to explore possibilities for making more effective use of the existing IPR system for protecting the traditional knowledge of indigenous people and local communities;
- **Disclosure requirement:** Applicants for patents based on TK should be required to (i) disclose the TK and the material based source in their patent applications, (ii) provide evidence that they have obtained necessary prior informed consent from the competent authority of that source country and, (iii) provide evidence that they have entered into appropriate benefit-sharing arrangement;
- **Contracts:** The best way of addressing these concerns would be through systems based on bilateral contracts between holders of traditional knowledge and persons or companies wishing to access and use that knowledge. Such systems could be backed up by suitable national or local legislation;
- **System of protection:** A system of TK protection based on proprietary rights of source country should be ensured that market forces will operate to generate fairness and equity.

Major Challenging Issues & Concerns

Major concerns and challenging issues faced in our society are as follows:

- a. Third world countries are facing many challenges with respect to the protection of TK and have expressed their concern in the following subjects. Nepal too faces such challenges.

¹⁶ Ibid p. 7.

- b. Countries are facing dilution of TK through cultural and religious diffusion. Moreover, Nepal is in danger of cultural disruption among low-income groups due to adoption of imported religion to seek economic leverage.
- c. Young generation trusts modern science and under-estimates TK.
- d. Commercial exploitation of TK through bioprospecting and patenting the TK based resources and processes, without taking prior informed consent, by “foreigners” is rampant.
- e. TK is under the quest of a reliable protection mechanism. Protecting TK by the use of existing IP has become herculean task.
- f. Forms of TKs are heterogeneous and difficulties lie in the application of customary law and practice, and the application of appropriate IP tools for the protection of TK. Exact data on the number of TK assets are unknown and there are not enough ideas to document them.
- g. In addition to its economic value, international protection and dialogue with all stakeholders are among other problems.
- h. For equitable benefit sharing, there is difficulty with appropriate economic valuation of TK.

Conclusion

TK is really a hidden treasure of our nation and its presence is prominent in our country because of the climatic, cultural, topographical, demographical, ethnical, genetic and biotic diversification. It is meaningful from a social and economic development perspective.

Our basic concern with TK is with the identification, protection, and utilisation of TK, Genetic Resources (GR) and Bio Diversity (BD) based patents by ourselves and preventing foreigners from granting patents without prior approval of and benefit sharing to Nepalese communities that have been holding the respective TK, GR and BD from hundreds of years back. We must be aware and be capable of regulating it. The following actions are suggested for the effective protection and utilisation of TK:

- Since the IP policy has recently committed to the protection of TK¹⁷, a separate IP policy regulatory mechanism should be established for TK, GR and folklore protection and implementation as soon as possible.
- A national comprehensive action plan for the identification and documentation of TK, GR and folklore should be designed and implemented. Of course, Ministry of Culture and Ministry of Forest and Ministry of Agriculture can get desirable technical help from WIPO.
- Patent law should be drafted in such a manner that due care of Nepalese communities about the TK can be taken facilitating patent applicant to disclose the material source of TK or GS for registration.

¹⁷ Ministry of Industry, Government of Nepal, *Intellectual Property Policy*, 2073, policy number 8.1 (2).

- For legally recognised TK, conducive system for availability, acquisition, maintenance and enforcement of IP rights should be created.
- While drafting a new law for new plant varieties, and food security, it must be ensured to enable storage, exchange, sharing and replanting of seeds among farmers in order to ensure food security.
- TK relating to cultural part of daily life and originated as knowledge and practices of certain communities such as *Nwagi*, *Tongba*, *Chang*, *Perma* and other traditional and religious practices as well properties must be protected.
- Harmonisation of IP laws must take care of the TK practices of the international community.
- Trade and development policies and their objectives should frame a harmony with TK, GR and folklore policy.
- In order to encourage the talents and their innovative activities, equitable access to community resources on reasonable basis should be provisioned to ensure equitable benefit sharing.
- TK and GR based innovative activities must be enhanced and promoted for local people as well as other scholars.