

Traditional Knowledge Docketing System (TKDS) for protecting rights of indigenous communities

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Abstract

Protection of Traditional Knowledge (TK) has been a challenging issue for many decades owing to its dynamic nature, lack of definition for TK and its completeness, difficulty in establishing ownership and Geographical origin of TK and the conflicts between various protection schemes being formulated around the world. The author highlights Traditional Knowledge Digital Library (TKDL) and its role as a prior art to prevent patenting. The author also cautions against classifying Traditional Knowledge under Intellectual Property Rights (IPR) and creation of statutory registrable rights on TK. Instead, the author proposes the creation of a Traditional Knowledge Docketing System (TKDS) to indicate the location at which the knowledge is available, the community that possesses the traditional knowledge, a short description of the nature of TK and community protocol, if any. One of the major observations made by the author is the lessons learned from IPR Policy of Kerala, 2008.

Keywords: *Protection of Traditional Knowledge, Traditional Knowledge Digital Library, Access and Benefit Sharing.*

Introduction

Traditional Knowledge refers to the knowledge, innovations and practices of indigenous and local communities, developed from experience gained over the centuries and adapted to the local culture and environment. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture forestry etc., and it is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language and agricultural practices, including the development of plant species and animal breeds. Indigenous communities and traditional knowledge practitioners all over the world are very much concerned about the increased biopiracy and private

appropriation of TK through its patenting. One of the solutions formulated by India for addressing biopiracy was Traditional Knowledge Digital Library, which claims to preempt the grant of patents relating to India's TK in foreign jurisdictions. Traditional Knowledge Digital Library (TKDL) contains approximately 2,08,000 formulations based on Ayurveda, Unani, Siddha and Yoga and is prepared based on the logic that documentation of Traditional Knowledge is necessary to prevent its patenting. TK should not be allowed to get patented, since it is existing knowledge and not inventions. TK Digital Libraries are of course the best defensive mechanism in respect of prevention of patenting of TK already written down in ancient texts and manuscripts, though it leaves the scope for private appropriation of TK by making cosmetic improvements on it. India has

signed access agreements with the European Patent Office and US Patents and Trademark Office on the premise that the database shall be used for search and examination only. Of late, there are also attempts to create digital libraries of community-held TK, which are not written down anywhere yet.

According to the author, any attempt to codify community-held TK in the form of Traditional Knowledge Digital Libraries (TKDL) using ‘Prior Informed Consent’ and ‘Access and Benefit Sharing’ concepts would be a gross injustice to those communities if the knowledge were shared with patent offices or even with researchers, as it would affect the livelihoods of Traditional Knowledge practitioners. He also cautions against classifying Traditional Knowledge under Intellectual Property Rights (IPR) and creation of statutory registrable rights on TK. Instead, the author propose the creation of a Traditional Knowledge Docketing System (TKDS) to indicate the location at which the knowledge is available, the community that possesses the traditional knowledge, a short description of the nature of TK and community protocol, if any. Indigenous communities should be educated and empowered to protect their TK through existing legal mechanisms or take patents on the innovations made by them on the TK (if they feel so) and to negotiate with the potential customers by forming societies or trusts of their own. There is no bar for patenting inventions, though it may be based on TK. Section 3(p) of Indian Patents Act, 1970 only prevents patenting of ‘traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components’ and not patenting of any inventions based on TK.

The author strongly oppose the government policy of maintaining TKDL secret from Indian researchers, while sharing it as a ‘prior art’ with foreign Patent Offices. According to the author, secrecy cannot be maintained on something that is classified as ‘prior

art’. ‘Prior art’ is meant to encompass everything that has been published, presented or otherwise disclosed to public on the date of patent and includes documents in foreign languages disclosed in any format in any country. Obviously, confidentiality cannot be maintained on something which is treated as prior art. When a patent office denies patent to someone mentioning it as TK, they are obliged to disclose the entire gamut of TK associated with the invention as prior art citation to the applicant. This encourages persons to undertake a fishing expedition whereby they ‘file patent applications purely on conceptual grounds’ (as if they had performed the invention), only to see that they could fetch the authentic information on a TK practice/product. They could then employ such information for their own commercial use, thereby affecting the livelihood of TK practitioners. Therefore this closed access policy actually enhances biopiracy as it is impossible for the patent offices to maintain secrecy of TK. TK Digital Libraries are to be created only on TK already known to a larger cross-section of people and the same should be made accessible to researchers. The author point out Curcumin Resource Database (CRDB), an open source TK database as a good example for strategy to prevent patenting of TK.

No private appropriation should be allowed in the realm of Traditional Knowledge, since private exclusive rights are operating like monopoly in practice. According to the author, patents create private spaces in the knowledge arena (though for a short duration) and therefore TKDS and ‘*In situ*’ perpetual protection of TK and its sustainable development shall be the appropriate strategy. Since TK is not definitive in terms of its geographical origin, completeness and custodians, the ownership should be attributed to the State only. Given the fact that TK is an accumulated traditional wealth and the long kept preserve of its practitioners, tribal communities and families could be deemed as ‘trustees’ of the State.

Lessons from IPR Policy of Kerala, 2008

IPR Policy of Kerala, 2008 does not support extending 'Trade Secret' protection to TK, and the State is against 'creating monopoly over knowledge'. Hence, the Policy proposes to commit all traditional knowledge, including traditional medicines, to the realm of 'Knowledge Commons' and not to the public domain. Knowledge Commons refers to the knowledge which is the collectively produced sphere of ideas and which is left unencumbered for the greater benefit of all.

The Policy takes refuge in a logic that rights exist on Traditional Knowledge (TK) as per 'Common Law' and its ownership is attributable to the State, given the fact that TK is an accumulated traditional wealth and the long kept preserve of its practitioners, tribal communities and families, wherein all of them acted as deemed 'trustees' of the State. In abstract, the intention of the proposed legislation is "not exactly the creation of rights on TK" but assigning some (not all) of the rights owned by the State to those deemed trustees in lieu of their willingness to put the TK to the realm of "knowledge commons".

Kerala IPR Policy proposes to acknowledge the 'deemed rights' for the Traditional Knowledge holders and to make them aware of their rights. While the Policy envisages 'deemed rights' on traditional knowledge, all the rights holders will be *deemed to be holding their rights under a 'Commons License'*, wherein the rights holders shall permit others the use of the knowledge in their possession for non-commercial purposes.

It is further stipulated that any development made using this knowledge licensed under the above obligation should be put back to the realm of 'Knowledge Commons', say 'Traditional Knowledge

Commons', and hence denying the scope of patenting thereof. (Though the Policy envisages putting the developments made on TK back to the realm of Knowledge Commons, path-breaking inventions like development of a new drug molecule or the process thereof, which involves substantial developmental costs, need not form a part even if TK may form the basis of its origin).

The word 'Commons License' used here is based on the fundamental concept of 'Creative Commons' employed by open source advocates, but its scope varies significantly from that of 'Creative Commons License'. Specific provisions for such 'Traditional Knowledge Commons License' will have to be worked out to ensure free, non-commercial reproduction and codification of the Traditional Knowledge. It shall be a kind of 'deemed license', which immediately applies on the user of TK, the moment the user decides to employ it for any purpose. The provisions for governing the deemed license/community protocols will have to be laid down in the legislation.

In respect of such TK, where it is the livelihood of numerous practitioners strewn across Kerala, the State will be deemed to have the absolute rights over such Traditional Knowledge. Even though State holds the ownership on such TK, all the actual practitioners of this TK will have an autonomous license for right of commercial use from the State. But these Licensees are not empowered to sub-license this right of commercial use to anybody else, and the right for transferring licenses will solely be enjoyed by the State.

Therefore, the ultimate aim of the legislation is not to protect the financial interests of the TK holders but the benefit of the society, as is the case with the fundamental concept of patents.