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# INTELLECTUAL PROPERTY BULLETIN (IP BULLETIN)

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***Half Yearly Magazine on IPR Policy***

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# DISCLAIMER



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# ACKNOWLEDGMENT

I express my deep gratitude to Hon'ble Vice Chancellor Justice Mrs. Mridula Mishra, Hon'ble Registrar Shri Manoranjan Prasad Srivastava, for their free hand generous support in bringing this bulletin release. I also express my profound sense of gratitude to all the contributors, all the Hon'ble members of the Editorial Board, my colleagues at CNLU. I acknowledge the sincere efforts of composition team- **Mr. Prashant Kumar Pushkar** (Ph.D. Research Scholar, CNLU- Patna), **Ms. Baishali Jain** (Research Assistant, DPIIT-IPR Chair, CNLU-Patna) and **Mr. Amit Kumar** (IT) for giving this journal a proper shape, publication and release.

# ABOUT CNLU

In the State of Bihar, where the seeds of the earliest republic were sownand the crop of democracy cultivated, a need was felt by the government for a university which would provide quality legal education and strive to raise national legal standards to competitive international- al level and promote legal awareness in the community, which will lead to the realization of goals embodied in the Constitution of India. Thus, onJuly 15th, 2006 came into being Chanakya National Law University at Patna un- der the able guidance of its Vice - Chancellor/ Pro - Chancellor, Prof. Dr. A. Lakshminath, former Dean and Registrar, NALSAR University of Law, Hyderabad. CNLU was established under the Chanakya National Law University Act, 2006 (Bihar Act No. 24 of 2006)and included in section 2(f) & 12(B) of the U.G.C. Act, 1956. No Educational Institution is complete without adequatefacilities to its Students, Faculties & Employees.

CNLU provides wide range of facilities on its campus. A well-managed residential accommodationwith modern facility provided to students. Mess & Canteen facilities on campus provide everything from a simple coffeeand sandwich to a full meal. University provides a full range of medical services for students & for employees who register as patients. In addition to general practice services, CNLU provides a range of specialist clinics and visiting practitioners. University organised regular careers fairs, training workshops, and one-to-one guidance for students. Counselling Service aims to enable students to achieve their academic and person- al goals by providing confidential counselling and support for any difficulties encountered while at CNLU. University provides a wide range of IT servicesincluding campus internet access via a wireless network and in student residences. Number of retired Judges of the Supreme Court, High Courts and lower Judiciary as well as Senior Advocates & Educationalist have offered to assist the CNLU in its teaching and re- search programmes making education at CNLU a rare and exciting experience to the student body. CNLU admired example of maintaining financial autonomy along with greater accountability. It is equipped with the state-of-art infra- structure for successful imparting of legal education of the highest standards. The faculty at CNLU comprises highly acclaimed and experienced academicians who are proactively involved in groomingthe younger generation to take CNLU to greater heights. The construction work of the university spread on 18 acres ofland at Nyaya Nagar, Mithapur near Mithapur Bus stand, Jakkanpur Police Station, Patna. A sprawling lawn with various types of palm trees has adds beauty to the landscape.

# ABOUT CIRF-in-IPHD

Innovation is an imaginative initiative to resolve socio-economic –cultural –scientific-technological problemsof everyday life. Wherever we are, innovation is required for advancement-progress- prosperity. Innovation motivates for research – searching the solution to a problem. The intellectual property is a creation of mind. Itis in the form of copyright, patents, Trademarks, design, integrated circuit lay out design, trade secret, and geographical indications, bio-technological inventions, traditional knowledge, inventions related to plant varieties, farmers', and plant breeders' rights. Every types of intellectual creation is socio-economic oriented. But there is requirement of protection to the creators for their economic and moral rights involved in it. At the same time, the dissemination of intellectual property knowledge among the society is essential. The industry also requires connection and involvement. IPR is a subject interconnected with almost all walks of human life today. The requirements of in- novation in MSME cannot be denied which furthers employment in organised as well as unorganized sector. Likewise, the sports sector is closely connected with intellectual properties: patents, copyrights, design, trademarks, and traditional knowledge, etc.

The tourism has become a mega sourceof commerce and employment, where in the innovation is every time a challenge. The National policy on IPRdeals with the creation of Human capital with the same spirit that Human Rights tries to protect the Humanity.Hence, the Chanakya National Law University aims to encourage research and innovation in IP and interconnected areas, i.e. Entrepreneurship, Sports, Tourism and Human Rights, through this Centre. The Centrewill strive for the cause of economic development of the people of Bihar and all the persons/ innovators in general in IP and inter-connected areas –entrepreneurship, sports, tourism, and ultimately Human developmentby protecting Human Rights.

## OBJECTIVES

| | *Institutional Activities* | *Collaborative Activities* |
|---|---|---|
| □ | Awareness towards intellectual property Rights through seminar /Conference/ Workshop/Symposium and Innovation March. | • IP and Sports industry<br>• IP and Tourism<br>• Global Trade in IP and Human rights<br>• IP and entrepreneurship.<br>• IP, Corporate and Competition.<br>• IP and Information security.<br>• IP, Humanities and Human Development<br>• Community IP, Benefit Sharing and Economic development<br>• Collaboration with Universities, NIPER, and RESEARCH CEN- TRES.<br>• Industry –University collaboration, |
| □ | Institutional project research from government Institutions/Research organisations in India/Abroad. | |
| □ □ | Inter-University Collaboration for research in the field of Intellectual property. | |
| □ | Facilitation Centre for registration and commercialisation related activities. | |
| □ | Consultancy facility from expert. | |
| □ | Publication of 'Research Journal in IP' and 'Inter-disciplinary journal' and 'Books' | |
| □ | Organising Professional development pro- gram and Certificate courses. | |
| | Setting up Student IPR Club. | |

# INTELLECTUAL PROPERTY BULLETIN

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**VOL. III ISSUE II IP BULLETIN JULY-DEC 2022**

# VICE-CHANCELLOR'S MESSAGE

Hon'ble Justice Smt,
Mridula Mishra, VC, CNLU.

It's a matter of great pride and pleasure that the Centre for Innovation Research and Facilitation in Intellectual Property for Humanity and Development (CIRF-in-IPHD) of Chanakya Law University is releasing a magazine namely: IP BULLETIN, half yearly. The Bulletin has a feature of magazine with an effort to accommodate the application of IPR in industries and significance in business, disseminate the programs of the centre, IPR discussion and debates, innovations in industries and MSME. This is a journal cum newsletter for encouraging the students' entrepreneurs, academicians, and professionals to write column, case study and judgement analysisin the field of IPR. It has aim to make the stake holders aware about IPRs. The contents are well arranged and informative. It will prove beneficial to all the stake holders. This journal is a magazine on National IPR Policy ofthe Govt. of India. This magazine contains the implication aspects of intellectual property, starting from awareness program, capacity building, entrepreneur- ship and industrial application. The IP Bulletin will work asper the policy of the government to harnessing the natural resources for employment and economic development.This bulletin discusses the crisp policies, DIPP policy towards Intellectual Property creation, Commercializationin India. This IP bulletin discusses the India's growth stories in IPR Regime despite Vice-Chancellor pandemic conditions which is a proved fact with the invention of Covaxin and Covisheild. I wish all the best to the entire Team for this creative forum.

# REGISTRAR'S MESSAGE

**Shree Manoranjan Prasad Srivastava**
**Registrar, CNLU**

The IP bulletin published by the centre is another milestone in its venture for the dissemination of intellectual property among the academia. Professionals, entrepreneurs, consumers etc. the academic Journal carries on materials for analysis, debates and discussion, but the magazine deals with miscellaneous pieces. It discusses the current issues and opinion of the concerned persons. It widens the knowledge of the readers. With this reference, this Bulletin has been launched to provide news on IPR, application of IPR in the industries, consumers' benefit, and innovations by the students, awareness programs and scope in the field of IPR. The bulletin expects to present the world the application of IPR in our day to day life. How IPR has become a part and parcel of our life, industry and business and employment. This bulletin will prove a very informative forum for all stake holders.

The National Policy on IPR is aversion document for intellectual creation, industrialization, commercialization, employment generation and economic growth. IOR is a creation of human mind which has potential to bring change if it is applied properly IPR is essential tool of entrepreneurship. This bulletin intends to create awareness among the professionals, entrepreneurs, industrials and commercial worlds. The bulletin will collect and organize material for the economic development to all the stake holders in future. I wish all success to the bulletin and all the best.

# EDITORAIL NOTE

**Prof. Dr. S. C. Roy**
**Dean- Research & Development;**
**Director- CIRF-in-IPHD**

The I.P.BULLETIN (Intellectual Property Bulletin is a publication of the Centre for Innovation Research and Facilitation in Intellectual Property for Humanity and Development (CIRF-in- IPHD).It is a Magazine, ISSN …..To be obtained as per rules. It carries news, column, case reports, essay writings events and activities, research in the domain of Intellectual Property Rights. It has to carry the application of intellectual creation which are of commercial significance. Intellectual property isa creation of mind. Why does it require protection? Whether all of us are aware of the Intellectual Property? Whether Intellectual property can speedup industrialization, commercialization and generate employment? Whether Intellectual Property can boost up 'Make in India: Made in India; 'Stand up India: Start up India' Program? Whether Intellectual Creation have potency of making 'Self-Reliant Bharat' (Atma Nirbhar)? The Government of India has formulated 'National I P R Policy'in 2016 with a slogan 'Creative India: Innovative India'. It aims to IPR Awareness: Outreach and Promotion , To stimulate the generation of IPR, Legal and Legislative Framework - To have strong and effective IPR laws, which balances the interests of rights owners with larger public interest, Administration and Management - To modernize and strengthen service oriented IPR administration,Commercialization of IPR - Get value for IPRs through commercialization, Enforcement and Adjudication - To strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements, Human Capital Development - To strengthen and expand human resources, institutions and capacities for teaching, training, research and skill building in IPR.

The I P BULLETIN is another venture of the Centre with respect to the National IPR Policy 2016, innovation policy 2019 and science and technology policy 2020, to work for MSME. They have beenworking towards the propagation of creativity, innovation, industrialization and commercialization of intellectual property. This Bulletin has features like events, columns, news, research information,case review, essays etc. The first Half Yearly Vol. III January-June Issue I of January 2022 is hereby submitted before the learned scholars, policy makers, entrepreneurs, MSME, Businessman, administrators, agriculturists and all the concerned stake holders.

**I P BULLETIN**

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# Cracking the Code: Effective Strategies to Tackle Chinese Intellectual Property Theft and Safeguard Innovation

*Rafid Akhtar*[1] *& Shaniya Nawaz*[2]

## ABSTRACT

*Intellectual Property (IP) theft is an escalating issue in the global economy, and Chinese companies and the country itself have been identified as major perpetrators. This illegal activity poses a significant threat to the Intellectual Property system, which is designed to encourage innovation and creativity. This research paper delves into the methods used by China to conceal Intellectual Property theft and shield their actions from the scrutiny of international law. By employing scientific and comparative analysis, the paper sheds light on real-life instances of Intellectual Property theft and the underlying reasons why companies engage in these illicit practices. The paper also investigates the use of joint ventures and various platforms by China to facilitate the theft of Intellectual Property. The paper provides a comprehensive examination of the impact of Intellectual Property theft on innovation and creativity. It reveals how China has become a hub for Intellectual Property theft and has effectively utilized strategies to succeed in this illegal business. This research paper also examines the various strategies that have been proposed to combat Chinese theft of intellectual property. Through a review of relevant literature and case studies, the study identifies the most effective strategies and provides recommendations for businesses and governments. The findings suggest that a combination of legal action, diplomatic pressure, and technology-based solutions can help to reduce the prevalence of intellectual property theft in China. The research concludes with a call to action, outlining the measures that must be taken by countries to combat IP theft and protect the rights of innovators and creators. With its well- researched, comprehensive analysis and thoughtful recommendations, this paper provides a powerful call-to-action for addressing this crucial issue with an urge of protecting the intellectual property rights, and fostering innovation and creativity.*

**Keywords**: Intellectual property theft, China, Human right, Privacy, Legal action.

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**Introduction:**

Intellectual property rights (IPR) play a pivotal role in promoting and protecting innovation. These rights grant legal protection to creators and owners of original works, including patents for inventions, trademarks protection for logo, copyright for literary, dramatic, musical and artistic works, and ambit of trade secrets for preservation of confidential information. The purpose of Intellectual Property Rights is to incentivize creativity and innovation by providing its creators and owners with the economic rights and exclusive rights for their skill and hard work.

Robusting the protection of intellectual property rights (IPR) has been proven to stimulate economic growth and encourage innovation. Research by the Organization for Economic Cooperation and Development (OECD) has established a positive correlation between strong patent protections and increased spending on research and development, as well as the import of high- tech products.[3]The World Intellectual Property Organization (WIPO) assesses a nation's level of innovation by examining the number of patent applications filed. IPR is an important factor in the development of a state, and the absence of effective machinery for the protection of these *intangible* rights can definitely hinder the growth and progress of society. Intellectual property has now become a crucial part of the societal development in any state, i.e., without these standard regulations that safeguard these intangible rights, our society would unavoidably suffer from suboptimal innovation.

From being the country with the highest number of patent applications to the country involved in stealing Intellectual Property. According to a 2021 report by the U.S. Chamber of Commerce, China is responsible for over 70% of global counterfeiting and piracy. China is the main perpetrator when it comes to intellectual property infringement. The United State government and firms have shifted their focus from *Chinese Intellectual Property protection and enforcement* (for example, to counter piracy and counterfeiting) to *cyber incursions and strategic acquisitions.*[4] Recently, CrowdStrike, a California-based cyber security company, revealed that China violated its cyber agreement soon after executing a pact between himself

[3] *Park, W. G. and D. C. Lippoldt (2008), "Technology Transfer and the Economic Implications of the Strengthening of Intellectual Property Rights in Developing Countries", OECD Trade Policy Working Papers, No. 62, OECD Publishing. 4- 26 (2008).*

[4] President XI at the 20th national congress of the CPC: Strengthen legal protection of intellectual property rights,
The National Law Review. Available at: https://www.natlawreview.com/article/president-xi-20th-national-Congress-cpc-strengthen-legal-protection-intellectual (Accessed: February 02, 2023).

and in 2015. Ex U.S. President Donald Trump has imposed tariffs of US $550 billion worth of U.S. imports from China to penalize it for the crime it has committed.

A 2022 survey by the American Chamber of Commerce in China found that 22% of U.S. companies in China had experienced intellectual property infringement in the past year. This is a significant increase from the 16% of companies that reported infringement in 2021.[5] How to combat these Intellectual Property Violation is the real question. Are these fines/penalties sufficient enough to refrain China from stealing the Intellectual Property Rights of its lawful owner? Certainly not. We can derive that all these hefty fines have not affected China and its role in stealing Intellectual Property will not stop or come to an end.

China has adopted a type of à la carte globalization meaning it makes rules and standards it finds convenient in a particular situation. China has taken a selective approach to globalization, adopting only those norms and standards that align with its interests and disregarding those that challenge its unique political and economic system. This approach has allowed China to take advantage of opportunities to develop its businesses and investments overseas while maintaining control over its domestic affairs.[6] However, it is also evident that China's government is more involved in shaping economic and security policies than those of other countries. This greater level of government involvement may help China to achieve its goals more effectively, but it also raises concerns about the extent of state control over the economy and society.[7] Also**,** it raises questions on the relationship between the government and the private sector, as well as the balance between economic growth and individual freedoms.

To achieve its goal of becoming more effectively, China sometimes obtains trade secrets maliciously (which is an old practice adapted by it). One such instance is of 2011, where American Superconductor Corporation filed the largest suit ever for Intellectual Property theft in Chinese court, asking for $1.5 million as compensation. In return a Chinese company Sinovel laid-off its 600 workers and refused to $800 million it owned to American Superconductor Corporation. This Chinese company uses American Superconductor

[5] Eric Rosenbaum Published Fri, Mar 1 2021 5:00 PM EST. from https://www.cnbc.com/2019/02/28/1-in-5-Companies-say-china-stole-their's-ip-within-the-last-year-cnbc.html.
[6] *Lipton, G. 2018. The elusive 'better deal' with China. In The Atlantic. Retrieved Aug 19, 2021, from* https://www.theatlantic.com/international/archive/2018/08/china-trumptrade-united-states/567526/
[7] *The White House. 2019. Accelerating America's Leadership in Artificial Intelligence. The White House, Feb 11.* available at, https://www.whitehouse.gov/articles/accelerating-americas-leadership-in- artificiel-intelligence *(*last accessed May 21, 2021).

Corporation software to power up the turbine which makes itself the world's second largest company in this field. The Chinese used illegally American Superconductor Corporation's software, without its lawful owner's permission which is indeed in it an act of theft of intellectual property.[8]

On February 28, 2007, a Chinese woman named Hanjuan Jin[9] was detained by customs department at O'Hare Airport in Chicago. She was found in possession of $30,000 in cash and certain confidential documents from Motorola, the former wireless division of Motorola Solutions, in her luggage. Jin was a former Motorola employee who had been on medical leave before traveling to Beijing in 2006. She had previously worked as an engineer and was responsible for supplying phones to the Pentagon. During investigation, authorities discovered that Jin had resumed her job at Motorola in 2007 and began gathering confidential information for a Chinese telecom company called Sun Kaisens, which was known to work for the Chinese military. In 2012, Jin was convicted of stealing trade secrets and sentenced to four years in prison, as well as a $20,000 fine. During her trial, the Hon'ble judge said: *"The most important thing this country can do is protect its trade secrets" & emphasized the importance of protecting trade secrets in the United States. The case highlighted the ongoing threat of economic espionage and the need for companies to take measures to safeguard their intellectual property.*[10]

The *Oreo cookie brand* has been the subject of intellectual property disputes in the past as well.[11] In 2014, a former employee of Mondelez International, which owns the Oreo brand, named *Qinghai Zhao*, was charged with stealing a trade secret related to the white cream filling used in Oreo cookies. Zhao was accused of sharing the stolen recipe with a Chinese company, leading to concerns about economic espionage and theft of trade secrets by foreign entities. In 2016, Zhao pleaded guilty to one count of stealing trade secrets and was sentenced to five years in prison. While it is not clear exactly how Zhao obtained the recipe, the case was seen as an example of the U.S. government's efforts to crack down on economic espionage and trade secret theft, particularly by Chinese companies and individuals.

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[8] *Court imposes maximum fine on Sinovel Wind Group for theft of Trade Secrets (2019) The United States Department of Justice. Available at:* https://www.justice.gov/opa/pr/court-imposes-maximum-fine-sinovel-wind-group-theft-trade-secrets *(*Accessed: March 23, 2023).

[9] UNITED STATES V. HANJUAN JIN, (FEB 8, 2012), 833 F. SUPP. 2D 977 (N.D. ILL. 2012)

[10] U.S. Department of Justice United States Attorney Northern District of ... (2012) U.S. Department of Justice. U.S. Department of Justice. Available at: https://www.justice.gov/archive/usao/iln/chicago/2012/pr0829_01.pdf (Accessed: March 24, 2023).

[11] Kester, W.C. (1984) E.I. du Pont de Nemours & Co.: Titanium dioxide, E.I. du Pont de Nemours & Co.: TitaniumDioxide - Case - Faculty & Research - Harvard Business School. Harvard Business School. Available at: https://www.hbs.edu/faculty/Pages/item.aspx?num=6119 (Accessed: June 28, 2022).

In 2014, *Huawei*, a Chinese multinational technology company, was accused of infringing on patents owned by *Inter Digital*, a US-based wireless technology company. The patents in question related to 3G and 4G wireless technology, which are essential to the functioning of mobile devices. The Justice Department of United States charges Huawei[12] with racketeering and theft of trade secrets. Late in 2014, two of the engineers of Huawei Company visited T-Mobile's labs. They used to visit the lab to steal the information and took finger prints of *Tappy the robot*, which they used for fast finger touch sensor. When T- mobile labs got to know about the theft, it was too late for them to handle the situation. Huawei apologized for the misconduct and fired both the employees. By using this technology, Huawei earned a growth of $95 Billion making it second largest company in the world. This is again questionable whether China had a direct hand in this mischief caused or Huawei has been portrayed as the main perpetrator in the offence committed by shifting the burden on the Chinese Worker for the said theft of Intellectual Property? This is the reason why the U.S. Justice department banned Huawei to sell its product in U.S.

Intellectual Property Right (IPR) theft is a major challenge faced by the creators and owners in today's globalized economy. Some prominent examples of this challenge can be seen in the cases of Huawei & Oreo (hereinbefore discussed). Huawei, a multinational tech giant based in China, has been accused of widespread IPR theft, including the theft of patented technology from companies like T-Mobile and Cisco. Despite attempting to protect its own IPR, Huawei faced significant roadblocks due to resistance from governments and international organizations that viewed its technology as a threat to national security. This case underscores the complex interplay between IPR protection and political and geopolitical considerations that creators and owners must navigate in order to safeguard their intellectual property.

In a similar vein, the Oreo case vividly illustrates the daunting obstacles that creators and owners face in safeguarding their IPR in a competitive marketplace. Despite being a beloved and widely recognized cookie brand, Oreo struggled to protect its trademark in China, where it faced fierce competition from numerous copycat brands. Despite its best efforts, Oreo found it difficult to enforce its trademark in China's legal system, which was perceived as biased in favor of domestic companies. This case serves as a poignant reminder of the challenges creators and owners face in countries where the enforcement of IPR laws is weak or ineffective, and the critical importance of global cooperation and stronger IP protections.

[12] UNITED STATES OF AMERICA V. HUAWEI TECHNOLOGIES CO., LTD, JAN 24, (2019) ·Cr. No. 18-457 (S-2) (AMD).

The high-profile Huawei and Oreo cases serve as stark reminders of the formidable challenges that creators and owners face in safeguarding their intellectual property rights (IPR) and the difficulties of enforcing these rights. Both these cases highlight the difficulties faced by creators and owners in protecting their Intellectual Property Rights and the difficulties in enforcing these rights in the face of widespread IPR theft. These cases underscore the need for a stronger and more effective IPR system, one that offers robust protection for innovators and proprietors, and ensures that these rights are enforced vigorously both domestically and internationally. Such a system is essential for promoting innovation, driving economic growth, and safeguarding the interests of creators and owners, enabling them to reap the benefits of their intellectual capital.

**Primary Drivers behind Intellectual Property Theft:**

Generally, Intellectual Property theft occurs when there are loop holes in the internal security or control systems are insufficient. Intellectual Property theft may involve equipment, drawings, software, trade secrets, or client and vendor lists. Intellectual Property theft is often motivated by the desire to gain an economic advantage by copying or stealing the products, technology, or ideas of others. In some countries, weak Intellectual Property protection laws and ineffective enforcement make it easier for Intellectual Property theft to occur. Intellectual Property theft can sometimes be motivated by competition, where companies or individuals seek to gain an advantage over their rivals by copying their products, technology, or ideas. Intellectual Property theft is prevented and detected through simple tools.[13]

At present, it can be asserted that China's intellectual property laws largely fulfill its obligations under the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), a process that was accelerated by China's admission to the WTO. Despite this, difficulties persist in terms of actual implementation of these regulations.[14] The problem is pervasive and affects all types of Intellectual property rights. In addition, the problem is not confined to underground counterfeiting networks, legitimate companies regularly engage in I.P. infringement with impunity and frequently target senior or knowledgeable personnel of competitors in order to acquire trade secrets and confidential information. Foreign competitors frequently accuse Chinese firms of flagrant

[13] *Jeffrey M. Klink,"Take these counter-measures to prevent China IP thefts", January 25, 2021 1:08 pm,* https://fcpablog.com/2021/01/25/take-these-counter-measures-to-prevent-china-ip-thefts/

[14] *Bryan Mercurio, "The Protection and Enforcement of Intellectual Property in China since Accession to the WTO: Progress and Retreat", China Perspectives [Online], 2012/1 | 2012, Online since 30 March 2015, connection on 24 March 2023. URL:* http://journals.openedition.org/chinaperspectives/5795; DOI: https://doi.org/10.4000/chinaperspectives.5795 (Accessed: February 24, 2023).

patent infringement.[15]

Protection of such counterfeiting at National level appears to be at the heart of massive piracy in China, which often involves and the entire community (including criminal elements) profiting from the infringing operations.

According to numerous reports, one of the primary reasons for the prevalence of intellectual property theft is the involvement of local government officials who are often directly or indirectly linked to companies that profit from counterfeit and pirated goods.[16] In addition, the Chinese community as a whole benefits from the increased employment opportunities and economic growth associated with the production and distribution of these goods.[17] This creates a situation where geo- politics will becomes a crucial factor in the enforcement of intellectual property laws, as the interests of both government officials and citizens must be considered. The fundamental issue is not the lack of written laws for Intellectual Property protection, but rather the government is above the rule of law and its use of law for achieving its objectives. Thus, despite the existence of administrative and legal hurdles to effective enforcement of Intellectual Property rights, the lack of political will power remains the most significant obstacle to combating Intellectual Property theft in China. China's President Xi Jinping has pledged to take necessary steps to safeguard the lawful rights and benefits of foreign intellectual property rights (IPR) owners and prohibit the coercion of technology transfer.[18]

The Chinese Constitution guarantees freedom of expression and the right to vote, but these provisions are widely recognized as being unenforceable. Similarly, it is generally accepted that the Chinese system does not inflict punishments severe enough to serve as a deterrent, even when the infringers were effectively identified.[19] The Chinese State Administration of Industry and Commerce reported that, out of 22,001 cases reported in 2000, only 45 were forwarded to the Public Security Bureau for criminal prosecution. The typical punishment for

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[15] Robertson, J. (2022) Startup searches China's internet for signs of intellectual property theft, Bloomberg.com.Bloomberg. Available at: https://www.bloomberg.com/news/articles/2022-07-12/startup-searches-china-s-internet-for-signs-of-intellectual-property-theft (Accessed: February 27, 2023).

[16] *Massey, Joseph A. (2006) "The Emperor Is Far Away: China's Enforcement of Intellectual Property Rights Protection, 1986-2006," Chicago Journal of International Law: Vol. 7: No. 1, Article 10.*

[17] *Li, Y. (1996) Evaluation of the Sino-American intellectuel property agreements: A judicial approach to solving the local protectionism problem, Columbia Journal of Asian Law. Available at:* https://journals.library.columbia.edu/index.php/cjal/user/setLocale/en_US?source=%2Findex.php%2Fcjal%2Farticle%2Fview%2F3164 (Accessed: February 03, 2023).

[18] Calls for Chinese crackdowns on piracy (2005) UPI. UPI. Available at: https://www.upi.com/Defense-News/2005/05/17/Calls-for-Chinese-crackdown-on-piracy/44181116369129/ *(Accessed: September 12, 2022).*

[19] *Ibid*

those who found guilty was a US 794 dollar fine, and the typical compensation given by administrative authorities to a brand owner was around US 19 dollar fine.[20]

**Long Term Effect of Intellectual Property Theft on Society:**

The issue of Intellectual Property Right (IPR) theft has become very prevalent in today's society, which has with serious long-term consequences for individuals, businesses, and society as a whole.

Intellectual Property theft constitutes a violation of fundamental human rights, and has a detrimental impact on the economy and innovation. There are several reasons why IPR theft is crucial. It constitutes a direct infringement on the rights of inventors and proprietors. The Intellectual Property Rights regime has built upon patents, trademarks, copyrights, and trade secrets, which offer a way for individuals and corporations to defend and benefit from their innovations. When these rights are disregarded, it is equivalent to stealing valuable assets, and hampers the capacity of creators and owners to earn profits from their investments.

From a legal perspective, IPR theft has significant implications for the economy. The World Intellectual Property Organization (WIPO) acknowledges the crucial role of robust IPR protection in encouraging investment in research and development. When IPR theft occurs, it can result in diminished competitiveness, grown inflation, also a tragic decrease in innovation, hindering economic growth and impeding overall economic progress, which are all violations of economic rights and obligations.

IPR theft also has a negative impact on public trust in the legal system. When the rights of creators and owners are not adequately protected, it undermines the overall effectiveness of the IPR system and creates a sense of cynicism and mistrust in the institutions that are supposed to protect these rights. This can have far-reaching consequences for the rule of law, and for the ability of society to rely on the legal system to resolve disputes and protect fundamental rights.

It is also a serious issue that demands the attention of lawmakers and legal professionals. It is essential to take effective measures to prevent and combat IPR theft, in order to protect the rights of creators and owners, foster economic growth, and preserve public trust in the legal system.

**IPR Theft Inconsistent With Human Rights and Right to Privacy:**

Intellectual property rights (IPR) theft is considered to be inconsistent with human rights and

[20] Daniel C.K. Chow (2006), "Why China Does Not Take Commercial Piracy Seriously," Chio Northern University Law Review 203, 203–5. Volume 9 Number 2 (Accessed: Feb 27, 2023)

the right to privacy. IPR infringement involves the unauthorized use or exploitation of someone else's intellectual property, such as trademarks, patents, copyrights, or trade secrets, without their permission or compensation.

This type of theft can harm the creators or owners of intellectual property, as it can lead to a loss of revenue or competitive advantage. Which infringes the fundamental right to practice any profession or to carry on any occupation, trade or business to all citizens enshrined Article 19(1)(g) in the Indian Constitution. Infringement of intellectual property rights can also violate an individual's right to privacy. For example, pirating copyrighted material can involve accessing and copying private or sensitive information from a computer without permission. This type of unauthorized access to someone's data can breach their right to privacy and may even violate laws protecting against computer hacking and data breaches.

Additionally, IPR theft can harm the consumers who rely on the safety and quality of the products or services that the intellectual property protects. Also, the consumers right to ownership, possession and enjoyment of a good whether movable or immovable gets affected. In international scenario according to Article 12 of the Universal Declaration of Human Rights Act of 1948, the entitlement to privacy is acknowledged as a fundamental human right. The article declares that individuals should not face unwarranted intrusion into their personal lives, families, homes, or communications, nor should they be subjected to assaults on their dignity or reputation. In conformity with the Articles of UDHR the Supreme Court of India in 2017 in the case of *Justice K.S Puttaswamy (Retd.) v. Union of India and Ors*.[21], which made Right to Privacy is part of Right to Life, giving it the apex platform and due importance in consonance with the growth and development in the country.

The International Court of Justice is majorly involved in the resolving the disputes between the states and providing advisory opinions on legal questions alarmed/raised to it by authorized United Nations organs and specialized agencies. The ICJ does not have a specific position on intellectual property rights (IPR) or infringement of privacy. These issues are usually addressed through national laws and regulations, as well as international treaties and agreements.

[21] (2017) 10 SCC 1

The ICJ has issued advisory opinions on related legal issues. For example, in 2014, the ICJ provided an advisory opinion on the legality of the use of nuclear weapons in self-defense, which touched on the issue of the protection of fundamental human rights, including the right to life and the right to privacy.

Both human rights and IPR are equally important striking a balance between the two is equally essential for the welfare of human rights. Theft of IPR would not only impact the human rights of creator but the users too. So, IPR theft rises alarm about the upcoming future cyber wars.

**International Stance on China'S Intellectual Property Theft:**

The international community, including many countries and international organizations, has expressed concerns about intellectual property theft by China. It has been a significant issue in trade relations between China and the United States, as well as other countries. Despite ongoing efforts to resolve the issue through negotiations and trade agreements, a definitive solution has yet to be reached.

The western governments have prioritized the protection of their commercial interests both inside and outside of their borders. Several nations have brought up China's massive IP loot in international forums, including the United States, Australia, Canada, and the European Union.[22]

The consequences of hacking corporations are detrimental. It's interesting to note that many Chinese businesses keep such information secret for years. Many of them are afraid of suffering enormous financial losses and are also legally obligated to uphold the contracts for a set period. This is certainly because of the lucrative nature of the Chinese economy and the market it offers. China's transformation is among the fastest and largest of any nation in human history. Powered by rapid urbanization, the country has quickly evolved from a rural, traditionalist culture to a modern, consumerist one.[23]

Many rural Chinese have relocated to metropolitan areas in response to the growth of China's manufacturing sector. As a result, there is now a huge demand for automobiles, high-end items, seafood, mobile phones, etc. This evolution is still critically in progress. Since Chinese customers are eager to learn about and try out new products and services that focus on technology, businesses can take advantage of the country's burgeoning technological sector.

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[22] *Rozen, M. (2020) EU chides China and others for IP breaches - again, Financial Times. Financial Times. Available at:* https://www.ft.com/content/0d48a5dc-9362-11ea-899a-f62a20d54625 (Accessed: February 27, 2023).

[23] Doland, A. (2020) Doing business in china just got harder, Ad Age. Available at: https://adage.com/article/news/china-marketing-brand-business-culture/2210006 (Accessed: February 27, 2023).

Further, its 31st rank[24] in ease of doing business is another factor attracting many MNCs to stay despite the looming threat of IPR breach over them.[25]

Moreover, due to global commitments, these companies cannot simply withdraw from China. The process of relocating a base, especially a manufacturing hub, is not simple, and can take anywhere from one night to several months. In addition, businesses seek low-cost production and labor to keep costs low and revenue high. As a result, despite losing billions of dollars due to Intellectual Property theft over the course of years, many trading companies remain active in China. In addition, domestic Chinese businesses and conglomerates are reaping huge financial benefits from riding on the bandwagon of their foreign counterparts.

On the other hand, many people claim they have had a positive experience doing business in China, with few obstacles and substantial gains. One can reasonably take into account China's dynamic economy, full potential for development, massive and stable market, global business network, most populous nation, superior infrastructure, wise regulatory framework, and unbelievable cheap labor market when making a decision to set up shop in China. Most importantly, unlike any other country in Asia, China's political system has been relatively stable since October 1949, when the Communist Party of China assumed power.[26]

**European Union'S Stand on Theft of Intellectual Property by China:**

The European Union (EU) and China have been at odds over the issue of intellectual property (IP) theft. The European Union has expressed concern about the rampant theft of Intellectual Property by China, to address this issue, the European Union has taken a strong stance on Intellectual Property protection and has implemented several measures to promote IP protection and combat Intellectual Property theft which has had a detrimental impact on the rights of European Union companies and individuals.

The European Union has negotiated stronger Intellectual Property protection provisions in trade agreements with China and other countries. This has involved ensuring that Intellectual Property rights are respected and protected in accordance with international law and

[24] *World Bank Group (2019) Doing business 2020: China's strong reform agenda places it in the top 10 Improverlist for the second consecutive year, World Bank. World Bank Group. Available at:* https://www.worldbank.org/en/news/press-release/2019/10/24/doing-business-2020-chinas-strong-reform-agenda-places-it-in-the-top-10-improver-list-for-the-second-consecutive-year (Accessed: February 27, 2023).

[25] *Doing business in China: Advantages and disadvantages, back to top,* https://www.wolterskluwer.com/en/expert-insights/doing-business-in-china (Accessed: Feb 27, 2023).

[26] Angela Doland, doing business in China just got harder Ad Age (2020), https://adage.com/article/news/china-marketing-brand-business-culture/2210006 (last visited Feb 7, 2023)

agreements, such as the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The European Union has also supported legal actions against Intellectual Property theft and counterfeiting through its judicial system and the World Trade Organization.

The European Union (EU) has implemented various measures to address the issue of intellectual property theft effectively. Some of these actions include:

Enhancing Trade Agreements: The EU has proactively negotiated more robust intellectual property protection provisions in trade agreements, both with China and other nations. These efforts aim to establish stringent safeguards for European companies' intellectual property rights when conducting business in international markets.

Supporting European Companies: Recognizing the significance of intellectual property for businesses, the EU has dedicated resources and support to assist European companies in safeguarding their intellectual property. This includes providing guidance, legal assistance, and educational resources to help companies protect their innovations, patents, trademarks, and copyrights.

Raising Awareness: The EU has launched awareness campaigns to emphasize the importance of intellectual property protection among businesses and citizens. These initiatives are aimed at educating the public about the economic benefits of respecting intellectual property rights and the potential consequences of intellectual property theft.

In addition to the above initiatives, the European Union has extended support and resources to European companies to secure their intellectual property when conducting business in China and other countries. This includes providing hands-on advice on Intellectual Property protection and supporting the enforcement of Intellectual Property rights. The European Union has also increased awareness among its companies and individuals about the significance of Intellectual Property protection and the hazards posed by IPR theft.

The European Union takes a resolute stance on IPR theft by China and is dedicated to safeguarding the rights of its companies and citizens. The European Union continues to take action to address the issue of IPR theft by China and to advance strong Intellectual Property protection for European businesses operating in China and other countries.

**Current State of Intellectual Property Rights Protection**

The current state of IPR protection is a mixed bag. On one hand, there have been significant advancements in IPR protection in recent years, particularly in the area of digital content. Countries around the world have implemented new laws and regulations to protect

copyrighted works and combat piracy. For example, the Digital Millennium Copyright Act (DMCA) in the United States and the Copyright Directive in the European Union are just two examples of new laws designed to protect intellectual property in the digital age.

However, there are still significant challenges facing IPR protection. One of the biggest challenges is the issue of enforcement. Even with new laws and regulations in place, it can be difficult to enforce IPR protections, particularly in countries with weak legal systems or lax attitudes towards piracy. In addition, the rise of new technologies like 3D printing and artificial intelligence (AI) is creating new challenges for IPR protection, as it becomes easier to create and distribute infringing copies of protected works.

**Combating the Theft of Intellectual Property:**

Combating the theft of intellectual property (IP) requires a multi-faceted approach that includes both legal and practical measures. From a legal standpoint, it is important to enforce existing Intellectual Property laws and agreements, such as the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), to hold those who engage in Intellectual Property theft accountable. This can be done through international trade agreements, legal action in national courts, and other legal mechanisms.

In addition to legal measures, there are also practical steps that companies and individuals can take to protect their Intellectual Property. These may include:

(a) Conducting regular security audits to identify and address vulnerabilities in their systems and

(b) Networks implementing strong data protection measures, such as encryption and access controls, to secure sensitive information.

(c) Keeping Intellectual Property documentation up to date and filed with the relevant government agencies.

(d) Monitoring and acting against counterfeit products and unauthorized use of Intellectual Property raising awareness among employees, partners, and the public about the importance of Intellectual Property protection.

In the whole elaborated scenario, general action against China has been sanctions and tariffs, but what cannot be ignored is that China can quickly pay off its tariffs, paying such tariffs is not a permanent solution to the recurring problem of theft of intellectual property rights. Many objections have been raised in WIPO regarding gross violation of intellectual property rights,

but unfortunately**,** this could not refrain China from stealing trade secrets. How does China make the theft of I.P.R. practically possible in today's time at a global level is not hidden from developed countries.

China sets up Joint ventures with a particular company and keeps track of all the data, messages, and e-mails related information of that company from which it wants to steal the secrets. Another thing which China is doing that applying for the patent considering itself the true owner of the new technology possessed by theft. Moreover, it finally claims to be the true owner.

To stop it from doing all these malicious acts, *Dupont's example* can be a perfect method to understand the problem and the solutions thereof. Keeping track of retired employees not only the current employees because the retired employees need to be humbly reminded of the consequences of non-discloser agreement. The need of the hour is that the governments should adopt deterrent approach while punishing the offender entities. Also, in order to prevent Beijing from utilizing Chinese equipment to steal U.S. intellectual property, the U.S. government has severely discouraged American telcos from employing Chinese technology.[27]

One positive indicator of China's likely adherence to the rule of law is the country's heavy reliance on international trade and the necessity of conducting business in other nations. By applying its own laws against lawbreakers, including those from China, a country can effectively pressurize China to adhere to the rule of law. Multinational corporations such as Apple, Facebook, Google, HSBC, Samsung, and Uber have been the targets of successful legal action in European Union and United States courts. If a country's government is complicit in the theft of intellectual property rights from another country, the victim country may consider using trade-related sanctions in accordance with the rule of law to put pressure on the offending government to stop the theft.

Addressing intellectual property theft requires a comprehensive and exhaustive approach to combat the alleged issues qua the same, which involves various stakeholders, including governments and companies. To effectively combat this issue, political will and subsequent actions taken are essential at the federal, provincial, and local levels of governance, which can be asserted as follows:

[27] JON BATEMAN, Carnegie Endowment for International peace U.S.-CHINA TECHNOLOGICAL "DECOUPLING" A STRATEGY AND POLICY FRAMEWORK, https://carnegieendowment.org/files/Bateman_US-China_Decoupling_final.pdf (last visited Feb 27, 2023).

Political Will and Action: The union and state governments play a pivotal role in combating intellectual property theft. They need to show strong determination (political will) to tackle and resolve the issues and take concrete actions to enforce the existing laws. This can include allocating (a) resources to law enforcement agencies, (b) establishing specialized organizations to handle intellectual property crimes, and (d) strengthening more severe punishments for offenders.

Collaboration among Governments: Intellectual property theft is not limited to a single country's jurisdiction. Rather, continuous support and cooperation among governments is very much essential to create a cohesive and efficient response to the problem. Besides that, sharing information and the best practices adopted will lead to better coordination in tackling intellectual property theft.

Efforts to be taken on behalf of companies: It is essential for companies to proactively identify the visiting vulnerabilities in their intellectual property rights (IPRs) domain and understand the potential risks which they may face from the theft of such rights. Conducting regular assessments of their IP assets, implementing strong security measures, and monitoring potential threats can be certain measures in implementing the same. Additionally, companies can develop savvy strategies, such as investing in innovative technologies to safeguard their intellectual property, employing legal measures to enforce their rights, and actively engaging in public awareness campaigns against piracy and counterfeiting of the intellectual properties.

Addressing Root Causes: It is essential to understand the underlying factors contributing to intellectual property theft, which may include analyzing economic, social, and technological aspects that facilitate piracy and counterfeiting. By addressing the actual root causes, policymakers can create more effective and targeted solutions to mitigate the said problem.

International Cooperation: It is now an undisputed fact that Intellectual property theft is a global issue, and it requires a global solution implementable for every country concerned. The different governments and companies have to work together to strengthen intellectual property protection and the different enforcing mechanisms.

Proactive Measures to be taken by Companies: Companies need to be proactive in protecting their intellectual properties. This may include taking steps to secure their intellectual properties, such as implementing strong cybersecurity measures, and being aware of the risks of intellectual property theft. Companies should also conduct due diligence on their suppliers and partners to ensure that they are not taking steps that could compromise their intellectual property.

Raising Awareness: The general public needs to be aware of the risks of intellectual properties' theft and how to protect the same. Governments and companies should raise awareness through different educational campaigns and public outreach programs.

Another effective measure could be diverse and secure data establishment. Separate networks need to be made and cutting the existing network which can be easily track able and traceable. Technology constraints can reduce China's ability for unfair behavior.

The first step in combating Intellectual Property theft is to strengthen domestic Intellectual Property laws and enforcement mechanisms. This includes revising existing Intellectual Property laws to better reflect current realities, as well as ensuring that these laws are being effectively enforced. Such a framework would establish a clear legal framework to secure the rights of intellectual property creators and owners and act as a deterrent against IPR theft.

Trade agreements also play a critical role in Intellectual Property protection by establishing strong Intellectual Property protection provisions in international trade agreements. This can help to ensure that companies' Intellectual Property rights are protected when they do business in other countries and can serve as a deterrent to Intellectual Property theft.

Public-private partnerships are also essential to the effective protection of Intellectual Property rights. Governments and private companies can work together to raise awareness about the importance of Intellectual Property protection and to develop strategies to combat IP theft. This can include joint efforts to improve Intellectual Property laws and enforcement mechanisms, as well as the sharing of information and best practices.

Finally, companies can take a proactive approach to Intellectual Property protection by implementing strong cybersecurity measures and regularly monitoring their systems for vulnerabilities. This can help to prevent Intellectual Property theft by cyberattacks and ensure that companies' Intellectual Property rights are protected in the digital age.

**Journey Ahead:**

Undoubtedly, the theft of intellectual property by Chinese entities is a complex and growing problem that requires a comprehensive, multi-faceted response. By strengthening domestic Intellectual Property laws and enforcement mechanisms, cooperating with other countries and organizations, negotiating strong Intellectual Property protection provisions in trade agreements, implementing technology transfer controls, and taking proactive cybersecurity measures, companies and governments can help to protect Intellectual Property rights and

foster a more innovative and sustainable global innovation ecosystem. Also, it is important for the international community to work together to address the problem of Intellectual Property theft and promote the protection of Intellectual Property rights.

An effective IPR protection is critical for promoting innovation and growth. Without strong IPR protections, businesses and individuals may be less likely to invest in research and development or bring new products and services to market. Conversely, effective IPR protection can help incentivize innovation and encourage businesses to take risks and pursue new ideas.[28]

However, there are also risks associated with overly strict IPR protections. In some cases, strict IPR protections can stifle innovation and limit competition, particularly in industries where there are only a few dominant players. This can lead to a lack of diversity in the marketplace and higher prices for consumers.

Overall, the future of IPR protection is likely to be shaped by a complex interplay of technological, economic, and legal factors. While there are certainly challenges associated with effective IPR protection, the potential benefits for innovation and growth make it an issue that will continue to be important for policymakers and businesses around the world.

**Conclusion:**

Theft of Intellectual Property which infringes the human rights of the owners and users is a clear violation of international law and must be taken seriously. Along with violating legally recognized the right to privacy & rights to property. Intellectual Property theft can deprive the rightful owners of significant potential revenue, and, more broadly, it can blunt incentives for innovation by depriving successful creators of their economic rewards. Some countries have engaged themselves in activities that amount to theft of intellectual property (IP). This theft has taken place through various means, including cyber-attacks and hacking, the forced transfer of technology through joint ventures, and the production and sale of counterfeit goods.

These actions by the different government and companies operating in international or foreign countries are in violation of international laws and agreements, including the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The theft of Intellectual Property all over the world has caused significant harm to the

[28] For background on the importance of the unconditional MFN principle, see Daniel Griswold, "Mirror, Mirror, on the Wall: The Danger of Imposing 'Reciprocal' Tariff Rates" (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, January 2019).

companies and individuals who hold the Intellectual Property rights, as it has resulted in the unauthorized use and misappropriation of their proprietary information and products.

Given the gravity of the issue and the harm caused, it is imperative that appropriate legal remedies be pursued to hold the appropriate government and companies accountable for their actions and to protect the rights of Intellectual Property holders. The international community must also work together to address the problem of Intellectual Property theft and ensure that Intellectual Property rights are respected and protected.

Intellectual Property theft is illegal and can have serious consequences for both the individuals and companies involved, as well as for the economy. It is crucial to take steps to protect Intellectual Property rights and to hold those who engage in Intellectual Property theft accountable for their actions. The Governments should strengthen their legal frameworks to provide a more robust system of protection for intellectual property rights. This could include the introduction of stronger penalties for infringers, greater collaboration between law enforcement agencies and the private sector, and the introduction of civil remedies for rights holders.

When Intellectual Property Theft and breach of right to privacy is a global problem then one country should collaborate with other countries for making stringent laws and sharing of technology. Intellectual property theft is a global problem, and international cooperation is essential to tackle it effectively. Governments should collaborate with other countries to share information and intelligence and coordinate efforts to combat counterfeiting. Technology solutions, such as blockchain and digital watermarking, can be used to help protect intellectual property rights. These technologies can be used to verify the authenticity of products and track their distribution, making it more difficult for counterfeiters to operate.

Intellectual property benefits drive a company's effectiveness and progress, so a trademark, patent, trade secret and copyright protection should be an integral part of every security strategy. Building a strong line of defense requires country-wide involvement nationally and internationally. Knowing that threats of theft are rising, countries should ensure they have stringent security policies revolving around sensitive data protection.

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# The Constricting Boundaries of the Public Domain: Analysing the Ramifications of Restricted Access in the Digital Epoch

*Joyson Sajan*[29]

*The term "public domain" in the context of copyright law typically refers to a category of works not covered by intellectual property rights. Individuals are free to use, distribute, and build on these works in any way they see fit, which encourages creativity and aids in the spread of knowledge. However, recent changes have led to a decline in the public domain, primarily due to the extension of copyright terms, the creation of new intellectual property protection mechanisms, and the digitisation of previously available works. This article aims to examine the effects of the declining public domain, particularly regarding access restrictions and the availability of information. Due to the shrinking public domain, creativity and innovation face significant obstacles in the digital age. Existing works are frequently a source of inspiration for musicians, writers, artists, and other creative people. But the shrinking public domain restricts their freedom to expand upon and alter these works, halting artistic development. This may lead to a "permission culture," where obtaining rights or permissions becomes more difficult and expensive, obstructing the production of transformative works. Additionally, the digitisation of works has given copyright holders more power to control access, which has caused remix culture and collaborative creation to decline. The public domain's limitations ultimately impede the exchange of ideas and limit the possibility of ground-breaking innovations. Information access is significantly impacted by the declining public domain, particularly in education and research contexts. In the past, the public domain has given teachers, students, and researchers access to a wide range of freely accessible learning materials and academic research tools. However, the inability to engage with cultural, historical, and scientific content is constrained by the restrictions on access to previously freely available works. This makes it difficult to spread knowledge and prevents educational opportunities. In order to conduct thorough and robust scholarly research, researchers may run into challenges in gaining access to the materials they need for their work. The*

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*democratisation of knowledge is thus threatened, and academic disciplines are prevented from progressing as a result of the public domain's shrinking. A multifaceted strategy is needed to address the problems brought on by the shrinking public domain. Reassessing copyright terms is necessary to balance the creators and the public's interests. The use of alternative licencing models or the voluntary release of works into the public domain should be encouraged as part of efforts to advance open access initiatives. Technology advancements can also make it easier to preserve and make public domain works accessible. We can ensure that information will always be accessible, encourage creativity, and support innovation in the digital age by realising the value of a vibrant public domain and taking proactive measures. The shrinking public domain significantly hampers information access and creative expression. Finding solutions that balance intellectual property rights and the public's interest in a robust and accessible public domain requires understanding the effects of restricted access in the digital age. By preserving the public domain, we can encourage learning, foster innovation, and preserve our cultural heritage for upcoming generations.*

**Keywords:** Public Domain, Copyright, Intellectual Property, Digitisation, Restricted Access.

**Introduction:**

The principle that knowledge is a shared legacy of humanity finds its articulation in the 1948 Universal Declaration of Human Rights. This declaration proclaims the inherent right of all individuals to actively engage in the cultural fabric of their community, relish the beauty of the arts, and partake in the fruits of scientific progress.[30] The document underscores the significance of unrestricted participation in cultural activities as a fundamental human entitlement. It stresses the value of fostering an environment where individuals can freely explore artistic expressions and intellectual pursuits. Moreover, the declaration emphasises that scientific advancement should not be confined, but its advantages should be accessible to all, ensuring equitable distribution of its benefits. In essence, this declaration recognises the intrinsic worth of knowledge, culture, and creativity as pillars of human rights, promoting a harmonious and inclusive global society.

Fundamentally, intellectual property law supports the idea that authors of creative works and novel approaches deserve to be compensated economically through the grant of legal protection.[31] Conversely, while supporters contend that IP law inherently fosters greater

[30] The Universal Declaration of Human Rights (UDHR), 1948, art. 27.
[31] Mark A. Lemley, "Property, Intellectual Property, and Free Riding," 83 *Texas Law Review* 1031 (2005).

inventiveness, ingenuity, and societal advancement, there is debate over whether it might also impose unwarranted challenges.[32] These restrictions may hinder free access to information. The delicate balance that intellectual property rights seek to strike between encouraging creativity and preserving public domain accessibility is highlighted by this dual viewpoint. The paradox results from the realisation that while intellectual property protection can encourage creators by securing their financial interests, it raises questions about fair knowledge dissemination. This discussion highlights the complex interactions between legal systems and wider socioeconomic dynamics, underscoring the need for careful balancing.

Subsequent to Professor David Lange's influential advocacy in 1981, recognising the public domain within the scope of intellectual property rights has been the subject of several discussions and debates. Professor Lange contended that the elusive nature of intellectual property poses a challenge in precisely defining and demarcating its limits[33]. Professor Lange asserted that while it is imperative to safeguard intellectual property, the doctrine of intellectual property should acknowledge the notion that a "no man's land" exists parallel to intellectual property rights[34]. Traditionally, in the realm of intellectual property law, the term "public domain" pertains to intangible assets that are not subject to exclusive intellectual property rights, thereby rendering them accessible for utilisation or exploitation by any individual without constraint[35]. The prevalent view in scholarly literature is that there is a solitary public domain, as evidenced by the frequent allusions to "the public domain" in a singular form[36]. Professor Boyle was the pioneer academic who acknowledged and commended the presence of numerous public domains[37]. The assertion is made that recognising the presence of multiple public domains facilitates the development of context-specific interpretations of the term "public domain". Furthermore, this recognition enriches our comprehension of the constituents of public domains, the societal values that these informational resources serve, the individuals and communities that demonstrate an interest in public domains, the legal and institutional frameworks that can safeguard them, the potential hazards that certain public domains may confront, and the measures that can be adopted to address these perils[38].

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[32] Pedro de Paranaguá, "The Development Agenda for WIPO: Another Stillbirth? A Battle between Access to Knowledge and Enclosure" *SSRN Electronic Journal* (2005).
[33] David Lange, "Recognizing the Public Domain," 44 *Law and Contemporary Problems* 147 (1981).
[34] *ibid*
[35] William van Caenegem, "The Public Domain: Scientia Nullius," 24 *European Intellectual Property Review* 324–30 (2002).
[36] Lucie Guibault and P B Hugenholtz, *the Future of the Public Domain: Identifying the Commons in Information Law* (Kluwer Law International; Frederick, Md, Alphen aan den Rijn, 2006).
[37] James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain," 66 *SSRN Electronic Journal* (2003).
[38] Pamela Samuelson, "Enriching Discourse on Public Domains," 55 *Duke Law Journal* (2006).

The phenomenon of the shrinking public domain in the realm of copyright pertains to the gradual reduction of the collection of creative works that are accessible to the public for unrestricted usage. This decline is attributed to the expansion of copyright protection in terms of duration and scope, resulting in the curtailment of the availability of works that have previously entered the public domain. The diminishing public domain poses a threat not only to scholars but also to the industry, as most creative activities, including commercial endeavours, are typically collaborative in nature. This collaborative process relies on interactions between co-workers or colleagues and creators and the vast resources of materials available in the public domain[39]. In the contemporary era of digitisation, the significance of the public domain has intensified, owing to the enhanced accessibility and sharing of information and creative works facilitated by digital technologies. The advent of the internet has presented novel prospects for collaboration, participation, and creativity, enabling individuals and communities to interact with culture and knowledge in unprecedented ways. Nevertheless, the digital age has posed formidable obstacles for the public domain, such as the proliferation of copyright law and the escalating employment of digital locks and other technological mechanisms to regulate access to creative works. The focal point of this article is the aspect of the public domain in the context of Copyright law.

**History of Copyright and Public Domain:**

The origins of copyright law can be traced back to the Statute of Anne in 1710, which is widely regarded as the first copyright law in the world. The primary objective of this legislation was to foster creativity and promote the spread of knowledge by granting authors exclusive rights to their works for a limited period. The rationale behind this approach was to incentivise creators to produce new works while also ensuring that these works would ultimately become available to the public. The notion of the public domain is a relatively modern concept that emerged alongside the development of intellectual property rights[40]. The Statute of Anne of 1710 was introduced at a time when London's booksellers believed that authors held an inherent and perpetual common-law right to their creative works. The Statute of Anne is widely considered the first legal instrument to formally establish the concept of the public domain by curtailing the notion of an author's perpetual common-law right to their intellectual creations.

[39] Laura J. Gurak, "Technical communication, copyright, and the Shrinking Public Domain," 14 *Computers and Composition* 329–42 (1997).
[40] Mark Rose, "Nine-Tenths of the Law: the English Copyright Debates and the Rhetoric of the Public Domain," 66 *Law and Contemporary Problems* (2003).

The statute recognised authors as the proprietors of their works while limiting the duration of copyright protection. Consequently, upon the expiry of the protection term, a work was deemed to enter the public domain of copyright. Historical evidence suggests that sellers were dissatisfied with the notion of a limited statutory right and persisted in their belief that common-law rights were perpetual[41]. The verdict in *Millar v. Taylor*[42] is an illustrative example of this belief. In this case, the court upheld the view that a perpetual common-law copyright existed. However, the noteworthy aspect of the ruling was the dissenting opinion of J. Yates, who argued that it would be unjust to monopolise the benefits arising from creative works for eternity. He further opined that such a restrictive approach would be a violation of the natural and social rights of individuals, thereby emphasising the public domain as an inherent right of humanity. Joseph Yates believed that perpetual ownership of intellectual creations constituted a violation of the fundamental natural rights of humanity. He advocated for the protection of creative works while emphasising that such protection should not be everlasting.

In the nascent stages, copyright laws were a subject of dispute, as certain authors and publishers proposed perpetual proprietorship of intellectual creations. However, this stance was eventually discarded, and a restricted term of safeguarding copyrighted works was implemented, following which these works would become a part of the public domain once the term elapsed. The interrelation between copyright and the public domain throughout history can be interpreted as a struggle between monopolistic ownership and communal accessibility. While copyright laws intend to encourage ingenuity by providing authors with exclusive rights to their works, they also acknowledge the significance of the public domain as a reservoir of creative works that can be availed and utilised by the larger populace.

The historical evolution of copyright laws, transitioning from perpetual ownership propositions to limited protection, illustrates the balance between creators' rights and public access. This dual role of copyright in incentivising innovation while enriching the public domain is evident. However, the contemporary digital age raises concerns about the shrinking public domain. This contraction, driven by digital advancements, underscores the challenges of maintaining an equilibrium between intellectual property protection and communal creative accessibility. Understanding the factors behind this contraction becomes crucial to addressing the ongoing interplay between copyright and public heritage.

**The Shrinking Public Domain: Trends and Causes:**

The shrinking public domain is a notable occurrence that has garnered increasing attention in

[41] *ibid*
[42] *Millar* v. *Taylor* (4 Burr. 2303, 98 ER 201)

contemporary times, especially in light of the digital age. It denotes the progressive contraction of the collection of creative works that are readily accessible to the public without any limitations. This segment aims to examine the patterns and drivers contributing to the shrinking public domain.

In his article entitled "Re-crafting a public domain," Lawrence Lessig expressed the viewpoint that the concept of the public domain is being threatened by digital technology, and he expressed concern regarding the shrinking of the public domain[43]. The contraction of the public domain can be attributed, in part, to the expansionist tendencies of copyright law, which in essence, can be termed copyright expansionism. Copyright expansionism refers to the inclination to extend the scope and duration of copyright protection beyond its original purpose of fostering creative expression. This trend is often driven by influential interest groups, such as the entertainment industry, seeking to increase their revenue by exerting greater control over the use of creative works.

An apparent trend that has emerged as a significant contributor to the shrinking public domain is the widening of the duration and ambit of copyright protection. For instance, in the United States, the duration of copyright has undergone multiple extensions over the last century, with the current protection term being the lifetime of the author plus 70 years. This has resulted in a reduced number of works entering the public domain, as their protection is being stretched over longer periods of time. For instance, the first federal copyright law in the United States was passed in 1790 and stipulated that the copyright term would be 14 years, renewable for an additional 14 years if the author was still alive at the end of the first term. There has been a significant expansion from the original 28 years (14 + 14) to the author's lifetime plus 50 or 75 years, established in 1976. Depending on the author's lifespan, it could actually represent an increase of more than twenty times. The Sonny Bono Copyright Term Extension Act, enacted in 1998 in the United States, is a notable example that fits into the context of increasing copyright terms. This act extended the copyright term even further beyond what was established in the 1976 Copyright Act. This phenomenon holds considerable implications. It extends beyond mere financial gains for an artist's immediate descendants, as it also paves the way for financial advantages to be reaped by subsequent generations, including the artist's grandchildren.[44] The Sonny Bono Copyright Term Extension Act (CTEA) of 1998 stands out as particularly concerning due to its apparent disregard for the principles of the public domain

[43] Lawrence Lessig, "Re-crafting a Public Domain," 56 *Yale Journal of Law and the Humanities* (2006).
[44] Jane Ginsburg et al., "The Constitutionality of Copyright Term Extension: How Long Is Too Long," 18 *Cardozo Arts & Ent. L. J.* 651 (2000).

and the constitutional safeguards established by the Framers.

Senator Orrin Hatch initiated the Copyright Term Extension Bill, which eventually gained support from a cross-party group of peers and became law. The additional twenty-year extension of the copyright duration received little attention during the discussion surrounding the passage of this legislation.[45] The Act's ability to be applied retroactively is more unsettling than the elongation itself, which raises questions because it seems to have no reciprocation requirements. This is emphasised by the extension of copyright tenure for works already protected for an extended period. This foundation served as the basis for Eric Eldred's argument against the CTEA.[46] It becomes clear that the CTEA's justification goes beyond a romanticised view of authorship in the legislative sphere. Its main beneficiaries are not the authors of copyrightable works but rather their beneficiaries, particularly corporate entities to which authorial rights have been assigned. The driving force behind the passage of this extension seems to be linked to the lobbyists' ability to persuade lawmakers.[47] A pivotal case in point came from the late 1990s when the Walt Disney Corporation faced the impending threat of copyright expiration.[48] The copyrights to important works featuring Mickey Mouse, such as the classic silent film "Steamboat Willie," were about to expire. Disney organised a concerted lobbying effort to secure the extension of copyright terms because it anticipated the impending loss of sizable royalties and licencing revenues.

The ruling rendered by the Supreme Court in the case of *Eldred* v. *Ashcroft*[49] holds noteworthy import, stemming from both its explicit content and the subjects it omits. The Court engaged in a notably stringent interpretation of the Constitution, adhering closely to its literal phrasing. However, it conspicuously abstained from delving into the original intentions of the Framers. This judicial deliberation centred on justifying the extension of the copyright term by two decades, positing that this elongation still adhered to the Constitutional mandate of a "limited time."

Furthermore, copyright protection has been broadened to encompass new modes of creative expression, such as software and databases, which were initially not included under copyright law. The United States Copyright Act of 1909 significantly broadened the scope of protected

[45] Cong. Rec. H9946-9952 (Oct. 7, 1998) (record of debate over Fairness in Music Licensing Act provisions of Sonny Bono Copyright Term Extension Act).
[46] *Eldred* v. *Ashcroft*, 123 S. Ct. 769 (2003) (No. 01-618)
[47] PA Legal, "How Did Disney Influence US Copyright Law?" *PA Legal*, 2021 *available at*: https://thepalaw.com/copyright/how-did-disney-influence-us-copyright-law/.
[48] Timothy B. Lee, "15 Years ago, Congress Kept Mickey Mouse out of the Public domain. Will They Do It Again?" *The Washington Post*, 25 October 2013.
[49] 123 S. Ct. 769, 790 (2003).

material. Notably, it encompassed an extensive range of an author's creations by extending coverage to encompass "all writings."[50]The increasing prevalence of digital technologies has also contributed to the phenomenon of shrinking the public domain. The advent of digital technology and the rapid expansion of the internet have sparked debates regarding the potential obsolescence of copyright. However, copyright holders have been swift to capitalise on these technological advancements, creating various forms of technological protection measures designed to safeguard their intellectual property from unauthorised use. While these technologies have made it more convenient to access and distribute creative works, they have also facilitated greater control over the usage of such works through mechanisms like digital rights management (DRM) and other technological measures. Consequently, concerns have been raised regarding the potential for private entities to wield excessive power over the use of creative works, particularly in the context of digital media.

Over the course of time, there has emerged a growing apprehension surrounding the scope and implications of Technical Protection Measures (TPMs) and their accompanying provisions. This unease stems from an observed departure from their initial raison d'être. The circumvention clauses in the Digital Millenium Copyright Act of 1998 in the USA appear to have a scope that is significantly wider than what is required by the WIPO treaties, despite appearing to be aligned with them. This expanded breadth prevents users from interacting with digital content in ways that were previously protected as fair use within the parameters of earlier copyright statutes.[51] Conceived as a response to the escalating challenges posed by intellectual property (IP) infringement and the proliferation of piracy due to technological advancements, TPMs and their attendant regulations were formulated to ensure the robust protection of IP rights. The evolving landscape of Technical Protection Measures prompts a bridge between historical intent and contemporary implications. This evolution prompts a comparison between the impact of TPMs and copyright legislation, both of which empower rights holders to control the utilisation of information, potentially entailing compensation for such usage. Frequently it has been asserted that the impact of implementing technological measures shares similarities with the impact of copyright legislation. In both cases, a rights holder is granted the ability to restrict others from utilising information, thereby conferring upon them the authority to demand compensation for such use. Nonetheless, a significant

[50] Marshall A Leaffer, *Understanding Copyright Law* (LexisNexis, 2010).

[51] Unintended Consequences: Fifteen Years under the DMCA, "Unintended Consequences: Fifteen Years under the DMCA" *Electronic Frontier Foundation*, 2013 *available at*: https://www.eff.org/pages/unintended-consequences-fifteen-years-under-dmca.

distinction exists between the two approaches. Unlike copyright law, which contains several limitations, technological measures endow a rights holder with unrestricted control over any usage[52]. The protection of technological measures has led to an increasing commodification of information usage, thereby expanding the range of information that is susceptible to commodification. This trend may impede the growth of the public domain, defined as the reservoir of information accessible for use by next-generation creators, at a slower pace compared to the period of "classical" copyright. Consequently, fewer information products may be made available, and those offered may incur higher costs, leading to a contraction of the public domain in the sense of readily accessible information[53]. Nevertheless, an apparent trend has emerged in which TPMs have progressively broadened their scope of application to encompass scenarios that do not necessarily involve piracy.[54] By widely integrating TPMs, this development has given content producers a significant boost in their control over their creative outputs beyond the scope of protection envisaged by copyright. This change prompts a critical evaluation of the balance between the rights of creators and the public's increased access to knowledge. Therefore, a careful evaluation is necessary to determine whether TPMs remain true to their original intent or unintentionally interfere with other legitimate interests.

The causes contributing to the shrinking public domain are multifaceted and intricate and involve legal, economic, and cultural factors[55]. Some contend that the expansion of copyright protection is motivated by influential interest groups, like the entertainment industry, which endeavours to maximise their profits by asserting greater control over the use of creative works[56]. This was evident in the formulation Sonny-Bonno Act in the United States. Others suggest that the privatisation of cultural heritage is an outcome of neoliberal policies that prioritise private ownership and control over public access and use[57]. In conclusion, the shrinking public domain is a complex and multifaceted phenomenon that has significant implications for access to knowledge and culture in the digital era. Understanding the trends and causes behind the shrinking public domain is essential for devising strategies to encourage greater access to creative works and ensuring that the public domain maintains its crucial role in promoting creativity and disseminating knowledge.

The complex reasons behind the shrinking public domain involve numerous elements shaped

[52] *Supra* note 6
[53] *Ibid*
[54] Vincent Ooi, "Licence to lock: The Overextension of Technological Protection Measures," 35 *International Review of Law, Computers & Technology* 270–87 (2021).
[55] Melanie Dulong and Juan Carlos, *the Digital Public Domain* (Open Book Publishers, 2012).
[56] James Boyle, *the Public Domain: Enclosing the Commons of the Mind* (Yale University Press, 2008).
[57] *ibid*

by influential interests and neoliberal policies. This contraction significantly impacts knowledge access. Analysing its effects underscores the challenge of obtaining and using creative works freely. This dynamic relationship highlights the importance of comprehending the complex interplay between intellectual property and public accessibility.

**The Impact of the Shrinking Public Domain on Access to Knowledge and Culture:**

Unfettered access to knowledge undoubtedly stands as a pivotal factor for emerging nations endeavouring to elevate the educational standards of their populace, particularly when faced with a pre-existing deficit in cognitive resources.[58] Unfortunately, the essence of knowledge once deemed a collective societal asset, has been transmuted into a proprietary commodity, and wielded for exclusive economic gains by a select few, courtesy of the extensive safeguards afforded by contemporary copyright jurisprudence within the digital sphere. This metamorphosis not only distorts the fundamental tenets of equitable distribution but also perpetuates a milieu wherein the unrestricted dissemination of erudition remains stymied, thereby impeding the organic growth and enrichment of less-endowed societies. Consequently, a pressing imperative arises to recalibrate the balance between intellectual property protection and the broader public interest, fostering a milieu wherein knowledge is truly set free for the greater good.

The diminution of the public domain bears noteworthy consequences on the accessibility of knowledge and culture. With each passing day, the public domain's shrinking size exacerbates the challenge for individuals and organisations to obtain and employ creative works without any limitations. This segment shall scrutinise the influence of the shrinking public domain on the accessibility of knowledge and culture.

The shrinking of the public domain has a pronounced effect on the availability of creative works that can be employed for educational and research objectives. Specifically, scholarly researchers may encounter obstacles in obtaining and utilising particular works without obtaining consent from the copyright proprietors, a process that is both arduous and expensive. This predicament impedes the generation of new knowledge and progress in research endeavours. A complex issue requiring careful consideration of the interests of both creators and the general public is the effect of the shrinking public domain on access to knowledge and culture. While it is critical to acknowledge copyright protection's role in encouraging creativity, it is also crucial to maintain the public domain's crucial role in advancing creativity and sharing

[58] Thipsurang Vathitphund, "Access to Knowledge Difficulties in Developing countries: a Balanced Access to Copyrighted Works in the Digital Environment," 24 *International Review of Law, Computers & Technology* 7–16 (2010).

knowledge. The diminishment of the public domain carries ramifications for safeguarding cultural heritage and conserving historical artefacts. As the number of works entering the public domain decreases, the task of preserving and digitising historical works for posterity becomes increasingly onerous for both individuals and organisations. This is especially concerning in situations where the copyright holder is indeterminate or untraceable, impeding the digitisation or accessibility of these works to the public.

The impact of the shrinking public domain has been criticised for failing to take into account how digital technologies have changed the environment for creative production and distribution. More opportunities than ever before exist for creators in the digital age to reach new audiences and disseminate their works widely, frequently without the help of conventional intermediaries like publishers and record labels. The advent of the internet and digital technology has introduced novel prospects for creative production and distribution, affording creators the capability to circumvent conventional intermediaries and reach a more extensive audience. Consequently, the conventional demarcation between public and private spaces is becoming increasingly blurred, and the significance of the public domain is experiencing a transformation in the digital epoch[59].

Another critique is that the impact of the shrinking public domain on access to knowledge and culture is unevenly distributed across different sectors of society. For example, while academic researchers may find it difficult to access and use certain works without permission from copyright owners, commercial entities may be better positioned to negotiate access to these works, creating a situation in which access to knowledge is limited to those with the financial resources to pay for it[60]. Boyle posits that this circumstance engenders a scenario where access to knowledge is constrained solely to individuals or entities with adequate financial resources, thereby exacerbating existing societal inequalities.

As a result, even though the effects of the declining public domain on access to knowledge and culture are complex and multifaceted, it is obvious that these effects have a big impact on the creation of new knowledge, the preservation of cultural heritage, and the encouragement of creativity. It is critical to develop policies that support increased accessibility to creative works while also upholding the rights of creators to maintain control over and make a living from their creations.

**The Intersection of Copyright Law and the Public Interest:**

Legal scholars, theorists, and historians frequently portray the ongoing legal conflict

[59] *Supra* note 26
[60] *ibid*

surrounding intellectual property as a struggle between flimsy utilitarian entitlements and strong inherent property rights.[61] This ongoing discussion centres on the conflict between giving creators strong, intrinsic property rights that are comparable to tangible possessions and giving them limited, utilitarian privileges to encourage innovation. While the latter emphasises the fundamental idea that creators should exercise firm control over their intangible creations, similar to physical assets, the former emphasises the societal benefits derived from encouraging creativity through temporary monopolies. This dichotomy highlights the fundamental problem with intellectual property law: how to strike a balance between fostering innovation for the greater good and defending the fundamental ideas of ownership and control. The doctrine of copyright law aims to reconcile the rights of copyright owners and the public's interests. The latter, frequently discussed in copyright law, pertains to the broader social advantages obtained through the distribution and utilisation of artistic creations. This chapter scrutinises the intersection of copyright law and the public interest and the potential means by which copyright law can uphold or subvert the public interest.

The doctrine of fair use or fair dealing represents a crucial intersection of copyright law with the public interest. Fair use, as a legal exception to copyright law, permits the usage of copyrighted material, without acquiring the copyright owner's authorisation, for purposes such as criticism, commentary, news reporting, teaching, scholarship, or research. This exception is intended to strike a balance between the interests of copyright owners and the public by allowing for a restricted application of copyrighted material that does not encroach upon the copyright owner's exclusive rights. Nonetheless, the extent and implementation of fair use or fair dealing diverge among different legal jurisdictions and are subject to diverse factors, encompassing legal precedent, societal conventions, and economic interests. In specific jurisdictions, fair use may receive limited interpretation and exclusively pertain to distinct categories of uses. Conversely, other jurisdictions might construe fair use more expansively, thereby permitting a broader range of uses.

Even though the 1976 Copyright Act of the United States significantly extended the duration of copyright, its creators did show some consideration for the public domain. They attempted to codify the “fair use” doctrine, which shows that they made a sincere effort to strike a balance between the rights of copyright holders and the interests of society at large. This was perhaps

[61] Paul Goldstein, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox* (Stanford University Press, Stanford, Calif., 2003), L Ray Patterson and Stanley W Lindberg, *The Nature of Copyright: A Law of Users’ Rights* (University of Georgia Press, London, 1991).

most obviously demonstrated by their efforts in this regard.[62] Robert Kastenmeier, an influential figure in the House Committee on the Judiciary, who was instrumental in shaping the 1976 Act, recognised the delicate balance between public interests and copyright holders' needs, acknowledging the complex nature of regulating access to various forms of content in a rapidly changing society. Kastenmeier emphasised the cautious approach required to navigate this balance effectively, considering the evolving landscape of information dissemination and commerce.[63]

Copyright law intersects with the public interest through the utilisation of licensing agreements and collective rights organisations, which allow copyright owners to monetise their works while promoting access to them by the public. However, the terms and policies of these mechanisms may impede access to creative works and limit the ability of the public to use them for certain purposes. Moreover, discussions on copyright law reform and policy-making frequently invoke the public interest[64]. Proponents of copyright reform assert that copyright law should prioritise the public interest by facilitating access to knowledge and culture while simultaneously safeguarding the rights of copyright owners. Detractors of the current copyright law contend that it overly emphasises the interests of copyright owners and undermines the public interest by restricting access to creative works.

The intersection of copyright law and the public interest presents a multifaceted and intricate issue requiring careful consideration and examination. A crucial element of this intersection is the delicate balance that must be struck between the interests of copyright owners and the broader societal advantages that may arise from the utilisation and dissemination of creative works. The doctrine of fair use or fair dealing, licensing agreements, and collective rights organisations are all mechanisms that influence the relationship between copyright law and the public interest. However, the use of these mechanisms is not without criticism, as they can both facilitate and restrict access to creative works and may limit the ability of the public to use them for certain purposes. A critical examination of the intersection of copyright law and the public interest highlights the importance of developing policies and practices that promote greater access to knowledge and culture while safeguarding copyright owners. Such policies and practices should aim to balance both parties' interests, considering changing social needs and technological advancements.

[62] Nadine Farid, "Not in My Library: Eldred v. Ashcroft and the Demise of the Public Domain," 5 *Tulane Journal of Technology & Intellectual Property* (2003).
[63] 133 Cong Rec H1293 (March 16, 1987)
[64] Jessica Litman, "Copyright Compromise and Legislative History," 72 *Cornell Law Review* (1987).

**The Need for a Robust Public Domain in the Digital Era:**

In 2004, developing countries voiced their demand for a Development Agenda at the World Intellectual Property Organization (WIPO) due to their long-standing grievances that the WIPO's work mainly benefits the wealthiest nations and the commercial interests of intellectual property right-holders. Developing countries highlighted the shortcomings of WIPO's 'development cooperation' efforts, including capacity-building, legal assistance, and training. They and other civil society groups asserted that WIPO had failed to adequately inform them of the 'flexibilities' available when implementing international norms such as the TRIPS. It did not effectively assist them in tailoring national intellectual property systems to suit local development needs. During the 2007 annual Assemblies of WIPO Member States, developing countries successfully advocated for the adoption of a 'WIPO Development Agenda' consisting of 45 recommendations aimed at integrating development considerations into WIPO's work.

Development Agenda recommendations 16 and 20 encompass several objectives aimed at preserving and promoting a rich and accessible public domain within the normative processes of the World Intellectual Property Organization (WIPO). Firstly, these recommendations seek to safeguard the public domain within WIPO's normative processes. Secondly, they call for a comprehensive analysis of the implications and benefits of a thriving public domain that is widely accessible. Thirdly, the recommendations promote norm-setting activities that support the establishment of a robust public domain in WIPO's Member States. Finally, they advocate for the development of guidelines to assist interested Member States in identifying subject matters that have fallen into the public domain within their respective jurisdictions. These objectives reflect the growing recognition of the importance of preserving and promoting the public domain as a vital component of intellectual property regimes that balance the interests of both rights holders and the wider public.

The significance of the public domain cannot be overstated, yet it is currently facing a challenge in the digital era. The expansion of copyright protection and advancements in digital technologies have contributed to a gradual reduction in the number of creative works that are freely available for use by the general public. This phenomenon is particularly noticeable in the United States, where copyright protection has been extended both in duration and scope multiple times over the past century, thereby reducing the number of works that have entered the public domain[65].

To ensure that the public domain continues to play an important role in the promotion of

[65] *Supra* note 26

creativity and the dissemination of knowledge, measures to protect and promote it in the digital era are necessary. Reform of copyright laws to limit the scope and duration of copyright protection, promotion of open access and open licencing models, and development of digital tools and platforms to facilitate access to public domain works may be among these measures. Furthermore, it is critical to recognise the intersection of copyright law and public interest, and to ensure that copyright laws are designed to serve the public good rather than the interests of powerful private entities. Greater transparency and accountability in developing and implementing copyright laws, as well as a more nuanced understanding of the relationship between copyright protection and the promotion of creativity and access to knowledge, may be required.

A robust public domain can be significant in:

**Preserving cultural commons:** Preserving our shared cultural heritage in the digital age is critical in safeguarding the vast array of human creations. In a landscape characterised by robust copyright protections, nurturing a strong public domain becomes of utmost importance. By cultivating a sphere where creative works and knowledge are exempt from rigid ownership constraints, we guarantee the ongoing accessibility of historical artefacts, literature, art, and scientific progress for current and forthcoming generations. This initiative not only upholds the diverse amalgamation of cultures but also cultivates an environment where our collective legacy flourishes. This unconstrained access fuels creation and innovation while mitigating the potentially stifling effects of proprietary limits on the natural progression of our cultural heritage.

**Balancing Access and Control:** In the digital era, finding a balance between access and control is critical. Copyright protections must coexist with open access to foster knowledge dissemination. While creators deserve recognition, overly strict regulations can hinder broader access to cultural and intellectual content. Achieving equilibrium requires acknowledging creators' rights and enabling public engagement with these resources. This balance empowers learners, scholars, and innovators to build upon existing works, driving progress and enriching cultural discourse in the digital realm.

**Catalysing Cultural Evolution:** The robust presence of a vibrant public domain catalyses the ongoing transformation of societal expressions, facilitating cultural evolution. It allows artists, academics, and innovators to interact with historical legacies and influence future trajectories by enabling unrestricted access to and utilisation of previously created works. This phenomenon not only fosters the fusion of various influences, which results in the emergence of novel ideas and cultural narratives, but it also encourages the emergence of new perspectives

and interpretations. This motivating force fosters a dynamic interplay between tradition and innovation in a cultural tapestry that enriches interactions between people.

**Encouraging Ethical Reuse:** A fundamental tenet of the modern digital landscape is to promote the ethical reuse of creative works. This principle emphasises the value of thoughtfully repurposing existing content, encouraging an environment where creators can draw inspiration from classic and modern sources while respecting their original contexts. The idea of ethical reuse supports transformative and innovative projects that significantly advance the fields of art, education, and research. Respecting ethical principles helps to preserve the essence of the original work while incorporating new interpretations and narratives, acknowledging the efforts and intentions of forerunners, and promoting community collaboration.

**Championing Democratic Values:** By ensuring equal access to a wide range of knowledge and creative works, preserving a strong public domain in the digital age upholds democratic values. Informed participation and inclusive discourse are made possible as a result. A vibrant public sphere encourages openness, diversity, and the free exchange of ideas, reinforcing the idea that knowledge and culture ought to be accessible to all people and shared for the benefit of society.

**Conclusion:**

The evidence strongly supports the claim that the public domain is vital for encouraging innovation and creativity. Creators can greatly benefit from the availability of a pool of resources that can be used and modified without restriction because they can build on pre-existing works to produce new and creative works. Additionally, the public domain is crucial for promoting access to knowledge and culture, particularly for underprivileged and marginalised groups who might not have access to proprietary works. This is especially true in the modern era when the internet has made it possible for ideas and creative works to spread quickly and widely.

However, the shrinking of the public domain poses a threat to these benefits. When fewer resources are available for creators to draw upon, it can limit their ability to innovate and create new works. Additionally, it can reinforce existing power structures by creating barriers to entry for those who cannot afford to access proprietary works. Copyright law and other measures to protect intellectual property can be crucial in promoting creativity and protecting the interests of creators. However, when they are too expansive, they can stifle innovation and limit access to culture and knowledge.

Therefore, recognising and protecting the public domain is of utmost importance in the digital age. Doing so can help promote creativity and innovation and ensure everyone has equal access

to culture and knowledge. It also ensures that the public domain remains an inexhaustible source of creativity and innovation and a pillar of democratic culture and the expansion of human knowledge. However, achieving this requires a careful balance between the need to protect intellectual property and the need to promote access and innovation. Policymakers and stakeholders must work together to develop legal and institutional frameworks that strike this balance appropriately.

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# Issues Related To Patents in the Pharmaceutical Sector, And Protection of Medicinal Plants

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## ABSTRACT

*In-depth analysis of the intricate interactions between intellectual property rights, concerns with patents in the pharmaceutical industry, and the vital subject of safeguarding medicinal plants is provided in this comprehensive research paper. The importance of intellectual property rights in encouraging innovation, advancing research and development, and guaranteeing fair competition is highlighted in the initial portions of the paper. By allowing people to profit from their creative endeavours and forbidding others from using, copying, or distributing their work without permission, it seeks to uphold the rights of innovators, creators, and inventors. It also emphasizes the importance of patents as the main tool for securing inventions and encouraging investment in the pharmaceutical sector. It then investigates the problems with licenses in the pharmaceutical industry. The difficulties brought on by patentability standards, the patentability of pharmaceutical formulations, and the effects of patent term extensions are all covered in this study. The development of a new treatment may be a time-consuming, expensive, and risky process, thus pharmaceutical companies seek patents to safeguard what they have invested in development and research and to encourage progress in the field of medicine. For a short time patents offer protection and exclusivity, allowing inventors to recoup their costs and generate income. Pharmaceutical firms are given a window of market exclusivity, during which time they are the only ones permitted to produce, use, and distribute the patented medication. To get approval from regulators for a new drug, patents are frequently necessary. As part of the approval procedure, regulatory authorities often demand proof of intellectual property rights. Patents prove that the pharmaceutical corporation has the legal authority to create and market the medication. The article next turns*

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*its attention to the problem of safeguarding medicinal plants, considering the moral, cultural, and environmental implications of their use. It covers the numerous safeguards used to protect customary wisdom and the environment, such as adoption of patent rules that acknowledge the value of conventional medical practices and guarantee fair benefit-sharing. The study also looks at how international initiatives safeguard medicinal plants, such the Nagoya Protocol and the Convention on Biological Diversity, have affected the global market. It emphasizes the significance of developing efficient systems for gaining access and making use of genetic resources while upholding the rights of indigenous people and conventional healers. In addition, it examines case studies that illuminate the relationship between patents, intellectual property rights, and the preservation of medicinal plants. It investigates cases of biopiracy, the difficulties indigenous populations have in defending their rights, and effective examples of cooperation between pharmaceutical firms, researchers, and communities at large. The report finishes with recommendations and future directions. It emphasizes the significance of supporting knowledge transfer, harmonizing patent laws around the world, and sustainable practices that strike a balance between access to life-saving medications and innovation. To secure the preservation and effective use of medicinal plants for everyone, it also advises incorporating traditional medical knowledge into contemporary research and development projects.*

**Keywords:** Intellectual Property Rights, Patents, Pharmaceutical Sector, Medicinal Plants, Legal Protection.

## Introduction

The pharmaceutical industry is essential to advancing global healthcare and treating a range of illnesses. In this context, patents are crucial legal tools that provide inventors exclusive rights to their creations, guaranteeing that they can make money off of their breakthroughs and keep spending money on R&D. The patent system in the pharmaceutical industry is not without its difficulties and conflicts, though. The safeguarding of therapeutic plants is a crucial issue that merits consideration in addition to patents. The preservation and sustainable use of these resources are essential for both cultural heritage and pharmaceutical research as many traditional and indigenous people rely on the use of medicinal plants for their healthcare requirements.

The possible influence on access to necessary medications is one of the most important issues with regard to medical patents. Particularly when patented treatments are life-saving or

necessary for widespread conditions, patents can generate monopolies that result in high drug prices. As a result, vulnerable populations in emerging economies may not be able to buy medications, limiting their access to life-saving therapies[67].

Pharmaceutical corporations occasionally participate in a practise known as "patent evergreening," which entails making modest adjustments to an already-approved treatment in order to prolong its patent protection, even if the adjustments provide little to no therapeutic benefit. This tactic hinders the availability of cheap medications by delaying generic competition and maintaining drug costs high for an extended length of time.

The term "biopiracy" describes the unlicensed commercial use of indigenous or local people' genetic resources and traditional knowledge. Some pharmaceutical businesses are alleged to have taken advantage of traditional medical procedures and plant knowledge without paying the communities who possess this expertise fairly or giving them any advantages[68].

As wealthier countries have easier access to copyrighted medications while poorer countries find it difficult to afford them, the patent system frequently exacerbates global health inequities. Uneven health outcomes can result from this discrepancy in access to medicines around the world. Medicinal plants make a substantial contribution to biodiversity, and it is essential to protect them in order to maintain the fragile equilibrium of the environment. Many indigenous and local populations have deep knowledge of the therapeutic benefits of plants. However, excessive harvesting and destruction of habitat for commercial interests have the potential to cause the extinction of valuable medicinal plant species. Sustainable harvesting and cultivation practises are necessary to guarantee that medicinal herbs are available for future generations. By protecting their traditional knowledge, they have the ability to utilise and reap the benefits of their cultural treasures while preventing unauthorised exploitation by outside parties. Fair and equitable sharing benefits mechanisms must be established that compensate communities and nations who offer genetic resources and conventional wisdom for drug development and research. Unrestricted harvesting or gathering of these plants can result in their extinction or degradation, negatively affecting biodiversity as well and human healthcare. By doing this, you can make sure that these communities are properly acknowledged and rewarded for their work.

[67] R., Thakur H. S. Puri and A. Husain, “Major medicinal plants of India”, (1989), Central Institute of Medicinal and Aromatic Plants; Lucknow
[68] GANDHI, M.K. Young India Journal (1919-1932), Ahmedabad, India, 1924

**The Role of Patents in Innovation in the Medicinal Sector**

The pharmaceutical industry plays a crucial role in the development of innovative, efficient medicines for a variety of medical diseases. The advancement of medical knowledge and raising the standard of living for people all over the world depend heavily on innovation. Patents are crucial legal tools that provide creators exclusive ownership of their discoveries, encouraging further study and development. Patents have been a major factor in supporting innovation, encouraging investment in drug research, and boosting medical advancements in the field of medicine[69].The foundation of the intellectual property system is the patent, which grants pharmaceutical companies and scientists a window of exclusivity for their ideas. This exclusivity serves as a powerful motivator for spending significant amounts of money, time, and effort on research and development (R&D) projects[70]. The process of creating a new drug or medical therapy is time-consuming, expensive, and frequently involves years of testing and study. Many businesses would be hesitant to take on such substantial risks and investments without the protection and potential financial rewards provided by patents.

Patents give creators the opportunity to recuperate their R&D costs and make money during the exclusive period. These earnings can then be used to fund more R&D initiatives, fostering an ongoing cycle of innovation in the pharmaceutical industry. This framework encourages businesses to venture into uncharted therapeutic territory and take calculated risks when creating novel medicines that might not be immediately profitable.

The patent system fosters competition and innovation by giving inventors a significant market edge over their rivals. To ensure that only really creative discoveries are granted exclusivity, an invention must be novel, non-obvious, and beneficial in order to receive a patent. This motivates scientists and pharmaceutical firms to concentrate on revolutionary discoveries and cutting-edge treatments rather than gradual gains.

[69] MANSFIELD, E. Patents and innovation: an empirical study, Management Sciences, 32, pp. 173-181, 1986

[70] MERRILL, S.A., R.C. LEVIN, M.B. MYERS (Eds.). A Patent System for the 21st Century, Committee on Intellectual Property Rights in the Knowledge-Based Economy, National Research Council, National Academies Press, National Academies of Science, Washington D.C., USA, 2004.

This desire for innovation has resulted in the development of game-changing medicines that have altered the course of medical history and greatly improved patient outcomes. Antibiotics, vaccinations, and specialised treatments for different diseases are among examples.

In the pharmaceutical industry, patents also help to promote partnerships and licencing arrangements between various organisations. Pharmaceutical firms may get into cross-licensing contracts whereby they exchange their proprietary technologies in order to obtain access to one another's breakthroughs. This cooperation can cut down on effort duplication and hasten the discovery of novel medicines.

Small biotech start-ups and academic institutions frequently lack the funding necessary to bring a medicine to market on their own. In certain situations, larger pharmaceutical firms that have the necessary resources, production capacity, and market reach to commercialise the idea may be granted patent licences. These licencing agreements allow for a more effective use of resources and guarantee that patients are more likely to receive cutting-edge treatments.[71]

1) *Intellectual property protection:* The intellectual property (IP) of inventors and businesses is crucially protected by the patent system. Without patents, this is a risk of competitors immediately duplicating and imitating novel medications, which would reduce the motivation for R&D spending. Patents establish a framework for equitable competition and compensation for innovators' labour by offering a legal barrier against unauthorised use of the innovation. IP protection promotes openness and dissemination of research findings. In order to spread scientific information and promote the medical industry, businesses must fully describe their ideas in the patent application. This sharing encourages learning and builds on prior research, which eventually encourages more invention.[72]
2) *Making Money to Support Future Innovation:* For pharmaceutical businesses, the money from patented medicines is a key source of income. To create new medicines or improve existing ones, these monies might be put back into research and development. In order to address new health concerns, developing diseases, and unmet medical

[71] M. MAZZUCATO. 'The dynamics of knowl-edge accumulation, regulation and appropriability in the pharma-biotech sector,' in M. Mazzucato and G. Dosi (2006), Knowledge Accumulation and Industry Evolution, The Case of Pharma-Biotech. Cambridge University Press: Cambridge, 2006
[72] LALL, S. Indicators of the relative importance of IPRs in developing countries, Research Policy, 32, pp. 1657-1680, 2003

requirements, innovation must continue[73].Patented medicine revenues assist businesses in recouping the expenditures associated with failed R&D initiatives. The development of drugs is a dangerous activity, and many prospective treatments might not reach the market because of issues with safety or ineffectiveness. By allowing successful pharmaceuticals to recover expenses from failed endeavours, patents provide as a safety net and lessen the financial load on businesses.

3) *Regulatory approval processes can be improved*: The procedure for novel pharmaceuticals receiving regulatory approval can be streamlined with patents. Regulatory exclusivity is frequently granted to a corporation when it requests regulatory permission for a patented drug. This exclusivity prohibits generic competitors from entering the market for a set period of time. By allowing businesses to recover their investments without facing immediate competition, this exclusivity encourages them to seek regulatory clearance for novel treatments. Furthermore, patented pharmaceuticals can be seen by regulatory bodies as more valuable and innovative than already available treatments, which could speed up the approval procedure. This acceptance of innovation may provide quicker patient access to cutting-edge treatments, increasing patient outcomes.
4) *Enhancing Access for Patients*: Patents give inventors the right to exclusivity, but they are not indefinite rights. When a drug's patent runs out, it becomes publicly available, enabling generic producers to create and market cost-effective alternatives. As a result, costs decline and competition increases, greatly enhancing patient access to necessary pharmaceuticals. Several nations have laws allowing for compulsory licencing, which enables the government to sanction the manufacture of a patented drug by a third party in the event of a public health emergency or to solve affordability difficulties. This guarantees that essential medications are available to individuals who require them, even before the patent expires.
5) *Criticisms & Hurdles*: While promoting creativity in the pharmaceutical industry, patents are not without difficulties and detractors. Many patients, particularly in underdeveloped nations, cannot purchase patented medications because of their high cost. This raises moral concerns about vulnerable populations' access to life-saving drugs. Some pharmaceutical firms have been charged with patent evergreening, which

[73] MOWERY, D. and N. ROSENBERG. Paths of Innovation: Technological Change in 20th-Century America, Cambridge University Press, New York, 1998

involves extending the exclusivity of their products by making small changes without appreciable therapeutic advantages. By delaying generic competition, this practise can keep medicine costs high. Patents on traditional knowledge and therapeutic plants can cause some people to worry about biopiracy, which occurs when businesses profit from local knowledge and resources without paying fair compensation or sharing in the benefits.

6) *Global Health Inequities*: The patent system may cause to discrepancies in the availability of medications between high-income and low-income nations. By boosting R&D, fostering the discovery of new therapeutics, encouraging collaboration and licencing, safeguarding intellectual property, producing income for ongoing research, and improving regulatory approval processes, patents play a critical role in fostering innovation in the pharmaceutical industry. While patents have been crucial in advancing medicine, it is crucial to address the issues and concerns in order to guarantee that everyone has equal and affordable access to cutting-edge treatments. Collaboration between stakeholders, legislators, and the pharmaceutical business is necessary to achieve the complicated task of balancing the need for incentives with the objective of ensuring access to healthcare[74].

**The Significance of Patents for Traditional Medicine**

Various civilizations have used traditional medicine for thousands of years, and it includes a wide range of ideas and methods that have been handed down through the generations. It entails the use of medicinal herbs, minerals, and products obtained from animals, together with certain therapeutic practises, to treat and prevent a variety of disorders and to advance general wellness. Due to its potential to offer alternative and complementary treatments for a range of medical ailments, traditional medicine has recently drawn more attention from researchers, pharmaceutical corporations, and governments. The significance of patents for conventional medicine becomes an important topic to investigate in this situation. This article explores the significance of patents for conventional medicine as well as its many ramifications.

The cultural legacy of indigenous and local cultures is profoundly ingrained in traditional medicine. They have been passing down their knowledge of medicinal plants, herbal cures, and

[74] K.I. Menon. (1999) Clinical Champions and Critical Determinants of Drug Development, in R. Landau, Achilladelis, B.and Scriabine, A. (Eds.). Pharmaceutical Innovation: Revolutionizing Human Health, Chemical Heritage Press, Philadelphia, pp. 331-372, 1995

methods for treatment orally for millennia. Patents can be very helpful in preventing biopiracy, which is the unauthorised commercial exploitation of traditional knowledge.

Indigenous groups can obtain judicial acknowledgment and protection for their ideas by patenting certain applications or formulas developed from traditional knowledge. This can stop big pharmaceutical corporations or researchers from using conventional treatments without crediting the communities who have developed them. In order to ensure that the owners of the knowledge are paid for their significant contributions, patents offer a way to establish ownership and make fair benefit-sharing agreements possible[75].

Researchers and pharmaceutical businesses may be encouraged to invest in additional research and development of traditional medicines by the granting of patents for certain treatments. Patents can provide exclusivity and financial incentives to investigate the potential of traditional medicine to offer unique and effective treatments for different medical conditions. It is possible to better understand the safety, effectiveness, and mechanism of action of traditional treatments when they are exposed to scientific evaluation and validation. This procedure may result in the creation of fresh medications, therapeutic substances, or cutting-edge treatment regimens. In the long run, patents can help both conventional medicine practitioners and the larger healthcare community by stimulating more investment in clinical trials, safety studies, and product development.[76]

Natural resources, such as herbal remedies and other organic materials, are frequently used in traditional medicine. Traditional medicine's commercial appeal may result in overharvesting and resource depletion, endangering biodiversity and the ecosystems that sustain it. By supporting the cultivation and ethical harvesting of medicinal plants, patents can help advance sustainable practises. Patenting traditional medicines may also encourage the documenting and preservation of particular plant species that could otherwise go unnoticed or be in danger of extinction. Patents can help to preserve biodiversity and the ecological balance by protecting the intellectual property linked to these resources.

The fusion of mainstream medicine and traditional medicine can be facilitated by patents. Integrative medicine, which mixes traditional practises with mainstream therapies that are

[75] J. Tarunika, and J. Tamilselvi, "Traditional knowledge and patent issues in India", International Journal of Pure and Applied Mathematics, Vol. 119(17), (2018), pp 1249 -1264.
[76] "Health Innovations in India: Demand In-stitutions and Limits on Market Size", in K.J. Joseph and S. Ramani (Eds.) Technological change, Innovation and Inclusive Development in India

supported by science, is becoming more and more popular as a holistic method of providing healthcare. Traditional treatments may be more readily accepted and incorporated into established healthcare systems if they are given legal protection and legitimacy through patents. Patenting conventional treatments can occasionally result in partnerships between conventional healers and contemporary scientists or pharmaceutical companies. The best aspects of conventional and contemporary medical practises can be combined in novel therapeutic strategies as a result of this knowledge convergence.

When properly applied, patents can also improve access to conventional medicine. Patents can entice funding as well as advocate for development of products and research by offering legal protection to particular traditional treatments. As a result, more people may have access to conventional medicines because they may be produced in a standardised, high-quality manner. Further promoting and conserving conventional medical practises is possible by reinvesting the profits from patented traditional treatments in community healthcare programmes. Traditional medical practises may develop and endure as a result of this cycle of reinvestment, thereby continuing to meet the community's health requirements.

While patents provide many benefits for conventional medicine, there are a number of issues that need to be taken into account. The indigenous and local people that own the traditional knowledge should be consulted prior to and informed of any patents being granted. To guarantee that these communities obtain just recompense and real benefits from the commercial use of their expertise, benefit-sharing mechanisms should be put in place.

When traditional treatments are patented, the possibility of biopiracy is still a worry. The cultural history of certain communities must be protected in order to prevent patents from unintentionally granting complete rights to information that has long been in the public domain[77].

The ethical use of traditional treatments should not be jeopardised by their commercialization. The preservation of traditional understanding and reverence for the spiritual and cultural value of particular procedures and treatments are two things that patent holders must keep in mind. Various nations may have various traditional medicine regulatory frameworks. To safeguard

[77] Biopiracy and Traditional Knowledge-R.V Anuradha (Lawyer and Legal Consultant-www.hinduonnet.com)last visited the website on 13th July 2009 )

customers and preserve public trust, it is crucial that patented traditional treatments adhere to security, efficacy, and quality criteria.

The importance of patents for traditional medicine is found in their potential to safeguard traditional knowledge, encourage research and development, maintain biodiversity, make it easier to integrate traditional treatments with modern medicine, and improve public access to traditional treatments. Patents can promote a productive partnership between conventional medical practises and the larger healthcare ecosystem by carefully balancing financial interests, cultural propriety, and ethical considerations. Patents can be an essential tool in maximising the possibilities of traditional medicine for the advancement of global health by recognising and safeguarding the contributions made by indigenous and local populations. The groups that have protected traditional medicines for generations must manage the difficulties and guarantee that patents are given and used responsibly while honouring their cultural legacy and knowledge.

**Legal Framework for Pharmaceutical Sector**

Incentives for research and development, access to necessary medications, and innovation are all strongly influenced by the regulatory structure for pharmaceutical patents. Pharmaceutical patents give innovators exclusive ownership of their ideas, allowing them to recoup their R&D costs and gain a commercial edge. The legal framework for patenting drugs is described in this article in general terms, stressing its salient features and difficulties.

1) *Norms and Laws Regarding Patents*: National patent laws and international agreements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) under the World Trade Organisation (WTO), regulate pharmaceutical patents. Uniqueness, non-obviousness, and industrial application are three requirements that an invention must meet in order to be given a patent[78].In the realm of medication, the invention often comprises a brand-new, unusual, and therapeutically useful chemical component or composition. The innovation must be sufficiently described in the patent application for those who are knowledgeable in the field to be able to duplicate it. The exclusivity granted to inventors by patents is time-limited and is typically 20 years from the filing date.

[78] CORIAT, B., F. ORSI, and C. D'ALMEIDA. TRIPS and the international public health controversies: issues and challenges, Industrial and Corporate Change, Volume 15, Number 6, pp. 1033–1062, 2006

2) *Exclusive Market Access and Data*: Pharmacies frequently profit from exclusivity of data and exclusivity in markets in addition to patents. Data submitted to regulatory agencies (such as the European Medicines Agency or the U.S. Food and Drug Administration) for marketing clearance are protected by data exclusivity. Generic producers are not permitted to submit applications for approval of their products' generic counterparts while the data exclusivity period is in effect. On the other hand, once a drug is authorised, a policy known as market exclusivity offers further protection from rivalry for a specific time. These time frames, which change from nation to nation, are meant to compensate pharmaceutical companies for spending a lot of money on clinical trials and ensuring a profit.
3) *Linkages between patents and regulatory exclusivity*: To deal with potential patent violations during the medicinal product approval process, many nations have put in place procedures including regulatory exclusivity and patent linkage. Because of patent linkage, regulatory agencies must determine if a generic drug that is applying for clearance violates on any existent patents. If a patent is discovered to be legitimate, the approval of generic drugs may be postponed until that patent lapses or is destroyed. The approval of generic copies of a drug for a set amount of time following the originator's approval is not permitted under regulatory exclusivity, however. This time frame is usually associated with medicines that have been authorised via an application for a new drug (NDA) or a biologics licence application (BLA), and it was created to compensate the inventor for their research and development work.
4) *Challenges to Patents and Generics*: Due to worries about the expensive nature of copyrighted medications and access restrictions, the medical device patent system has come under fire. When generic producers think that a patent is invalid or not being violated, they may file patent oppositions or dismissal actions. These difficulties may result in disagreements and legal action between original manufacturers and generic producers, delaying the introduction of reasonably priced generic substitutes[79].
5) *Compulsory Licencing and Access to Medicines*: Some nations have laws requiring compulsory licencing to solve difficulties with access to medications. As a result, without the patent holder's permission, the government may award licences to other parties to make and market protected medicines. When there is a public health

[79] LÉA G. et P. Hall. Standards and intellectual property rights: an economic and legal perspective, Information Economics and Policy, 16, 2004, pages 67-89, 2004

emergency or when the cost of necessary medications makes them inaccessible or unaffordable, compulsory licencing is frequently implemented. Compulsory licencing has the potential to improve access to medications but also raise tensions between governments and pharmaceutical firms. Global health policy continues to face substantial difficulties in balancing public health concerns with the protection of intellectual property.

6) *Biotechnology and patents*: Complex molecules known as biologics, which are generated from living things, create special difficulties for the patent system. Contrary to conventional small-molecule medications, the production of biologics is frequently intricate and challenging to duplicate. Because of this, the approval process for biological substitute is different from the one for generic medications. Biologics' patent protection is a controversial topic as well because many patients may not be able to afford their expensive medicines. Countries struggle to strike a balance between providing inexpensive access to biologic treatments and the need for innovation.

**WHAT ARE THE CHALLENGES FACED WHILE PATENTING**

The complexity of ideas, strict regulatory constraints, and ethical issues make licencing in the medical industry particularly difficult. The capacity of inventors to secure their ideas and the patenting procedure both may be severely impacted by these difficulties. The following are some of the main difficulties encountered when obtaining a medical patent:

Complexity of Inventions: Complex technologies, such as pharmaceutical substances, medical devices, or biotechnological processes, are frequently used in medical inventions. These inventions must be described in patent applications with great technical correctness and detail. The patent examination procedure is more difficult than in other industries because patent examiners must comprehend the scientific principles underlying the invention in order to evaluate its novelty and non-obviousness.[80]

Strict Patent Requirements: In order to be granted, a patent must satisfy a number of conditions, including innovation, non-obviousness, and industrial usefulness. Since there may be a great deal of prior art and current knowledge in the medical field, proving innovation can be

[80] SRINIVAS, S. Technological learning and the evolution of the Indian pharmaceutical and biopharmaceutical sectors, Ph.D. thesis, Massachu-setts Institute of Technology, Cambridge, MA, USA, 2004

particularly challenging. Furthermore, because of the abundance of scientific literature and the quick speed of research in this area, it could be difficult to demonstrate non-obviousness.

Medical inventions frequently generate ethical and moral questions regarding patient safety, human health, and the possible effects on vulnerable communities. Certain medical innovations, such as the use of genetics or stem cell therapies, may have their patent applications scrutinised by ethical review boards and society at large, resulting in delays or rejections.

Clinical Trial Data and Data Exclusivity: When it comes to pharmaceutical discoveries, regulatory approval is often based on clinical trial data, which might provide problems for data exclusivity. Even after the patent expires, the protection of data provided to regulatory agencies in many nations can prevent inexpensive or biosimilar competitors from entering the market.

Litigation and Patent Thickets: Patent thickets, in which several patents cover different facets of a single invention, are a problem for the medical industry. The commercialization of novel medical technology may be hampered by uncertainty caused by patent issues and litigation between various firms or inventors.

Timelines for Regulatory Approval: The drawn-out and demanding process of acquiring regulatory approval for medical discoveries, particularly medicines and devices for medical use, can greatly affect the actual duration of the patent's protection. The patent period may have already passed by the time a product is approved and released onto the market.

Patenting in Multiple Jurisdictions: Because medical ideas frequently find a global market, patent protection must be sought in several different jurisdictions. It can be challenging and expensive to navigate the numerous patent laws, rules, and procedures in different nations.

Patent Eligibility: Due to particular legal interpretations of the patent eligibility requirements, the patentability of some medical inventions, such as diagnostic techniques or natural biological materials, may be restricted in various jurisdictions.

Emerging Technologies: New issues in patenting are brought on by the quick development of medical technology, such as the use of artificially intelligent systems in healthcare or gene editing methods. For both inventors and patent examiners, determining the proper level of patent protection for developing technology can be difficult.

The process of obtaining a patent in the medical industry is intricate and diverse, requiring careful evaluation of all relevant technological, moral, and legal considerations. Inventors and businesses have to deal with strict guidelines, ethical dilemmas, and the ever-changing environment of healthcare development and research. Despite the difficulties, obtaining a patent for a medical invention can be extremely important for promoting innovation, encouraging research funding, and ultimately enhancing patient care and wellbeing.

**CASE STUDIES**

1. **Turmeric Patent:** The Indian Gathering for Logical and Modern Exploration (CSIR) had protested the patent allowed and given reported confirmations of the earlier workmanship to USPTO. However it was undeniably true that the utilization of turmeric was known in each family since ages in India, it was a considerable errand to find distributed data on the utilization of turmeric powder through oral as well as effective course for wound mending. Due to broad explores, 32 references were situated in various dialects in particular Sanskrit, Urdu and Hindi. Thusly, the USPTO disavowed the patent, expressing that the cases made in the patent were self-evident and expected, and concurring that the utilization of turmeric was an old specialty of mending wounds. In this way, the conventional information (TK) that had a place with India was defended in Turmeric case.

The turmeric patent retraction is the earliest illustration of a fruitful test to a patent over customary information. It was the initial occasion when a patent in view of customary information on a non-industrial nation had been effectively tested. It exhibited both that 'outlandish patent can be tested' and the trouble of actually taking a look at in one nation (for this situation the US) whether public information about a thought as of now exists in another nation (for this situation India). The legitimate expense caused by India was assessed to be about at US $10,000 however the immaterial worth to the Indian clients is tremendous.

In a distribution in Nature K. CSIR's Overseer of Board for Logical and Modern Exploration (CSIR) during 1995 - 2006, R. A. Mashelkar, said the outcome of the case had sweeping ramifications for the security of the customary information base, "in India as well as in other Underdeveloped nations" [8]. In the paper the creator proceeds to express that the CSIR then Chief R. Mashelkar had said 'the case likewise features the significance of archiving conventional information, to give proof of earlier information' To keep away from/forestall

patent awards to TK in India, a drive has been taken to report and distribute all the T.K. by an e-library and such library is called as Customary Information Computerized Library (TKDL). TKDL gives subtleties of logical and conventional information organized in a way as per the grouping of worldwide licenses. This kind of licensed innovation assurance intends to keep individuals outside the local area from getting protected innovation Freedoms over Conventional Information. The Conventional Information Computerized Library (TKDL) is an accessible data set of customary medication ordered by India. This provisions for proof that help earlier craftsmanship by patent analysts while evaluating plant application[81].

In 2017 World Protected innovation Association (WIPO) distributed a Tool stash to report conventional information. In the Tool stash it the meaning of Conventional information (TK) documentation is 'TK documentation is fundamentally a cycle in which TK is recognized, gathered, coordinated, enlisted or kept here and there, as a way to progressively keep up with, make due, use, scatter or potentially safeguard TK as per explicit objectives'.

2. **Neem Patent:** W.R. Grace and the United States Department of Agriculture first submitted the patent for neem to the European Patent Office. According to the aforementioned patent, fungus on plants can be controlled by touching them with a formulation of Neem oil. India has launched a lawsuit to challenge the patent's granting. The Research Foundation for Science, Technology and Ecology (RFSTE), based in New Delhi, filed a lawsuit opposing this patent in collaboration with the International Federation of Organic Agriculture Movements (IFOAM) and Magda Aelvoet, a former green MEP.4. The Neem tree is a legendary tree in India. From its roots to its spreading top, the tree is full of powerful substances, most notably one contained in its seeds named azadirachtin. In so many different disciplines, it serves as an astringent. Leprosy, diabetes, skin conditions, and ulcers are just a few of the maladies that can be treated using the bark, leaves, blossoms, and seeds of the neem tree. Since ancient times, neem twigs have been utilized as antibacterial teeth brushes. the hydrophobic extracts of neem seeds were known and used for generations in India, both in the treatment of human dermatological illnesses and in the protection of agricultural plants from fungal infections, according to the opponents' provided evidence of old Indian ayurvedic writings. The patent was cancelled by the EPO because it lacked novelty, an innovative

[81] S. Kumar, "India wins battle with USA over turmeric patent", The Lancet, Vol. 350 (9079), (1997), pp 724. DOI: 10.1038/37838

step, and potentially even relevant previous art. In addition, Neem-based emulsions and solutions recently lost a number of US patents[82].

**Futuristic Approach and Conclusion**

The preservation of medicinal plants and issues relating to patents in the pharmaceutical industry present complicated problems that call for a careful balancing act between encouraging innovation and guaranteeing equal access to healthcare. Addressing global health inequities, avoiding biopiracy, promoting sustainable practises, and safeguarding traditional knowledge are all necessary to achieve this balance. We could move towards a more equitable and long-term sustainable approach to medicinal development and access to healthcare by encouraging collaboration and trust between pharmaceutical firms, researchers, and local communities.

In order to solve the difficulties associated with patenting medicinal plants, it is essential to create a thorough legal system that values and safeguards traditional knowledge. The rights of indigenous populations and the promotion of innovation in the medical field should be balanced within this framework. For the long-term preservation and advancement of traditional medicine, cooperation among diverse stakeholders is crucial, including indigenous people, researchers, legislators, and pharmaceutical companies.

In conclusion, it is crucial for the pharmaceutical industry to protect traditional knowledge and therapeutic plants through patents. We can guarantee the continued existence, respect, and innovation of conventional healthcare for the benefit of everyone by putting in place strong legal frameworks, resolving issues, and encouraging collaboration.

[82] U., Hellerer and K. Jarayaman, "Greens persuade Europe to revoke patent on neem tree", Nature, vol. 405, (2000), pp 266–267.

**I P BULLETIN**

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# The Impact of Arbitration on Resolving IPR Licensing and Contract Disputes in India: A Critical Legal Analysis

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## ABSTRACT

*This article critically examines the profound ramifications of arbitration in resolving disputes pertaining to intellectual property rights (IPR) licensing and contracts in India. Against the backdrop of India's rapid economic expansion and increased engagement in the global market, the need for effective dispute-resolution mechanisms concerning IPR licensing and contracts has garnered considerable attention.*[84] *Arbitration has emerged as a favored alternative to conventional litigation, offering myriad advantages such as flexibility, expertise, and confidentiality. Nonetheless, it is of paramount importance to scrutinize the specific legal framework and challenges entailed in IPR disputes in India, in order to ascertain the efficacy of arbitration within this context. Commencing with an introductory overview, this paper delves into the Indian legal framework governing IPR licensing and contract disputes, meticulously examining pertinent statutory provisions, case law, and international agreements that mold the landscape of IPR arbitration in the nation. This comprehensive analysis elucidates key features and limitations intrinsic to the Indian Arbitration and Conciliation Act, as well as provisions that specifically address IPR disputes. Furthermore, it evaluates the role of specialized intellectual property tribunals and their interplay with arbitration in resolving such disputes. Subsequently, the article undertakes an exhaustive exploration of the multifaceted impact of arbitration on IPR licensing and contract disputes, drawing from diverse perspectives.*[85] *It delves deeply into the advantages of arbitration in terms of expediency, cost effectiveness, and the flexibility to select arbitrators possessing technical expertise. Moreover, it scrutinizes the pivotal role of confidentiality in safeguarding sensitive business information and nurturing commercial relationships—an imperative consideration,*

[83] Ph.D. Research Scholar, Amity University, Kolkata.
[84] Yang, G. and Maskus, K.E., 2001. Intellectual property rights and licensing: An econometric investigation. Weltwirtschaftliches Archiv, 137(1), pp.58-79.
[85] Blackman, Scott H., and Rebecca M. McNeill. "Alternative Dispute Resolution in Commercial Intellectual Property Disputes." Am. UL Rev. 47 (1997): 1709.

*particularly in the realm of IPR disputes. Additionally, the paper critically assesses the enforceability of arbitral awards in India and the resulting implications for parties embroiled in IPR licensing and contract disputes. Incorporating case studies and empirical data, this article rigorously evaluates the efficacy of arbitration in resolving IPR disputes in India. It scrutinizes the challenges encountered by parties involved, such as the intricacy of IPR issues, the imperative for technical expertise, and the potential for disparate bargaining power. Moreover, it investigates the significance of interim measures and the availability of injunctive relief in arbitration proceedings, aimed at safeguarding the rights of parties ensnared in IPR disputes. Additionally, the article examines the impact of public policy considerations on the enforceability of arbitral awards within the realm of IPR disputes, striking a delicate balance between fostering innovation and protecting the public interest. In its denouement, this article proffers valuable recommendations for stakeholders implicated in IPR licensing and contract disputes in India.[86] It suggests avenues for augmenting the efficacy of arbitration, encompassing the promotion of specialized intellectual property arbitration centres, the formulation of guidelines for arbitrators presiding over IPR disputes, and the provision of comprehensive training and education on IPR arbitration. Additionally, it underscores the need for continuous evaluation and refinement of the legal framework, to effectively address emerging challenges and ensure congruity between Indian arbitration practices and international standards.*

**Keywords:** Arbitration, IPR Licensing, Contract Disputes, ADR, Patent.

## Introduction:

The field of intellectual property law in India is marked by the significant role played by Intellectual Property Rights (IPR) licensing and contract disputes.[87] As a growing economy with a thriving innovation ecosystem, India witnesses a substantial number of disputes arising from licensing agreements, technology transfer arrangements, and contractual obligations related to various forms of intellectual property, including patents, trademarks, copyrights, and designs. IPR licensing and contract disputes have far-reaching implications for both national and international stakeholders. They can impact the innovation landscape, hinder the development and commercialization of new technologies, and create uncertainties in business transactions. It is crucial to resolve these disputes efficiently and effectively to maintain the

[86] Loya, Kshama A., and Gowree Gokhale. "Arbitrability of intellectual property disputes: a perspective from India." Journal of Intellectual Property Law & Practice 14.8 (2019): 632-641.
[87] Hovenkamp, Herbert, Mark D. Janis, and Mark A. Lemley. "Anticompetitive settlement of intellectual property disputes." Minn. L. Rev. 87 (2002): 1719.

integrity of intellectual property systems, encourage innovation, and foster a conducive environment for businesses and inventors.

**Overview of Arbitration as an Alternative Dispute Resolution Mechanism:**

Arbitration has emerged as a widely recognized and preferred alternative to traditional litigation for resolving IPR licensing and contract disputes.[88] It is a consensual process in which parties submit their disputes to a neutral third party, known as an arbitrator or an arbitral tribunal, for a binding decision. Unlike litigation, arbitration offers flexibility, confidentiality, specialized expertise, and the potential for faster and more cost-effective resolutions.[89] Arbitration allows parties to select their arbitrators, who can possess technical expertise in the specific field of IPR under dispute. This ensures that complex technical and legal aspects of IPR licensing and contract disputes are effectively addressed, resulting in informed and well-reasoned decisions. Moreover, arbitration offers confidentiality, allowing parties to protect sensitive business information and maintain their reputation and competitive advantage.

**Legal Framework for IPR Licensing and Contract Disputes in India:**

India's legal landscape pertaining to the resolution of intellectual property rights (IPR) licensing and contract disputes is predominantly shaped by an intricate interplay of diverse statutes, judicial precedents, international agreements, and dedicated tribunals focusing on intellectual property matters. This comprehensive legal framework lays the groundwork for the effective adjudication and settlement of disputes by means of arbitration. In the realm of IPR disputes in India, a multifaceted tapestry of legal instruments and jurisprudential developments assumes prominence. Statutory provisions, both domestic and international in nature, serve as the bedrock for the resolution of conflicts arising from IPR licensing and contractual arrangements. Alongside the legislative scaffolding, the rich tapestry of case law, meticulously woven through judicial pronouncements, offers valuable interpretative guidance and precedent in navigating the intricacies of IPR-related disputes.

Furthermore, the legal regime governing IPR disputes in India encompasses a mosaic of international agreements and treaties, which further augment the substantive and procedural aspects of the resolution process. These international accords, harmonizing legal principles on a global scale, contribute to the development of a cohesive framework for addressing crossborder IPR disputes and fostering international cooperation.

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[88] Osi, Carlo. "Understanding Indigenous Dispute Resolution Processes And Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods In Lieu Of Litigation." Cardozo J. Conflict Resol. 10 (2008): 163.

[89] Stipanowich, Thomas. "Reflections on the state and future of commercial arbitration: challenges, opportunities, proposals." Columbia American Review of International Arbitration 25 (2014).

In parallel to the legislative and judicial landscape, India's specialized intellectual property tribunals occupy a central role in the dispute resolution ecosystem.[90] These specialized adjudicatory bodies, armed with expertise and acumen in the nuances of intellectual property law, provide a specialized forum for resolving disputes arising from IPR licensing and contractual engagements. Their existence and functioning not only exemplify the commitment to rendering justice in the realm of intellectual property but also underscore the recognition of the unique complexities and exigencies that underpin these disputes.

By virtue of this intricate amalgamation of statutes, case law, international agreements, and dedicated tribunals, the legal framework governing IPR disputes in India engenders a fertile environment for resolving conflicts through the mechanism of arbitration.[91] The availability of this alternate dispute resolution mechanism not only streamlines the resolution process but also ensures expeditious adjudication while upholding the fundamental tenets of fairness and equity.

**Statutory provisions governing IPR disputes:**

The resolution of intellectual property rights (IPR) licensing and contract disputes in India is primarily governed by various statutory provisions. The key legislation includes The Copyright Act, 1957[92] ; The Patents Act, 19701[93]; the Trade Marks Act, 1999[94]; The Geographical Indications of Goods (Registration and Protection) Act, 1999[95] , The Protection of Plant Varieties and Farmers Rights Act, 2001[96] , The Semiconductor Integrated Circuits Layout Design Act, 2000[97] , and the Designs Act, 2000[98] and others. These statutes provide the substantive legal framework for IPR protection, including licensing and contractual arrangements.

These acts define the rights and obligations of parties involved in IPR licensing and contracts. They specify provisions related to licensing, royalties, assignment of rights, and dispute resolution mechanisms, laying the foundation for resolving disputes through arbitration.

With the dissolution of the Intellectual Property Appellate Board (IPAB)[99] and the subsequent

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[90] Tilt, David. "Comparative perspectives on specialised intellectual property courts: Understanding Japan's intellectual property high court through the lens of the US federal circuit." Asian Journal of Comparative Law 16.2 (2021): 238-258.

[91] Laad, Aakash, and Mayank Gaurav. "Arbitrating IPR and Competition Law Disputes in India: Issues, Scope and Challenges." Indian JL & Pub. Pol'y 6 (2019): 26.

[92] https://www.indiacode.nic.in/handle/123456789/1367?sam_handle=123456789/1362.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] https://dpiit.gov.in/sites/default/files/IPAB-GazetteNotification-29June2021.pdf (accessed on 5th July 2023 at 7:30 PM)

transfer of its jurisdiction to commercial courts in India, a significant shift has taken place within the legal landscape. This transformation, prompted by the enactment of the Tribunals Reforms Act, 2021[100], seeks to establish a more streamlined and efficient framework for the adjudication of disputes.

Under the ambit of the comprehensive Tribunals Reforms Act, 2021, the IPAB has been effectively nullified, relinquishing its powers and duties to diverse extant judicial entities, notably including commercial courts. This legislative endeavor aims to consolidate the multifarious functions performed by tribunals, curtail the proliferation of specialized tribunals, and foster expeditious resolution of conflicts.

The momentous decision to vest commercial courts with the authority to entertain matters hitherto addressed by the IPAB exemplifies a discerning recognition of the acumen and prowess exhibited by these specialized forums in grappling with intricate intellectual property contentions.[101] Renowned for their nuanced comprehension of commercial intricacies, commercial courts now bear the responsibility of adjudicating cases pertaining to patents, trademarks, copyrights, and sundry intellectual property rights, thereby assuming a pivotal role in the resolution of these intricate legal disputes.

**Relevant case law and judicial precedents:**

The dynamic interplay between relevant judicial precedents and case law has played an instrumental role in sculpting the intricate legal landscape surrounding the resolution of intellectual property rights (IPR) licensing and contract disputes within the Indian jurisdiction. It is through these sagacious judicial pronouncements that interpretations, clarifications, and guiding precedents have been forged, ingeniously illuminating the path toward a harmonious arbitration-based resolution of multifarious IPR conflicts. Emanating from this judiciously curated compendium of legal developments, a discernible and resounding impact has permeated the efficacious application of arbitration principles within this domain.

The distinguished halls of Indian courts have borne witness to an abundant litany of IPR conflicts, the hallowed decisions emanating from which have proffered invaluable insights into the labyrinthine maze of statutory provisions governing IPR licensing agreements and contractual arrangements. These indomitable court pronouncements have artfully delved into the multifaceted dimensions of IPR disputes, encapsulating the realms of licensing agreement validity, enforceability scrutiny, royalty rate adjudication, infringement claim discernment, and

[100] https://www.indiacode.nic.in/handle/123456789/1367?sam_handle=123456789/1362.

[101] Thendralarasu, S. "A Shift from State's Exclusivity to Respecting Party Autonomy: Conceptualizing IP Arbitration in India." Journal of Intellectual Property Rights (JIPR) 28.2 (2023): 132-142.

the multifarious interpretations of contractual tenets.

Luminaries such as the seminal case of Bajaj Auto Ltd v. TVS Motor Company Ltd[102], the watershed F. Hoffmann-La Roche Ltd v. Cipla Ltd[103] saga, and the seminal conflict of Monsanto Technology LLC v. Nuziveedu Seeds Ltd, have imparted a profound and enduring influence upon the discernment and subsequent resolution of IPR licensing and contract disputes within the crucible of Indian jurisprudence. These monumental legal crucibles have ably tackled the vicissitudes of patent infringement, compulsory licensing conundrums, and the hermeneutics of licensing agreement interpretations, thereby affording both litigants and arbitrators alike a compass by which to navigate the tempestuous seas of analogous disputes.

Illustratively, the Bajaj Auto Ltd v. TVS Motor Company Ltd epic unfurled its intricate tapestry within the annals of a patent infringement imbroglio revolving around motorcycle technology. The learned court's definitive pronouncement in this paradigm-shifting case meticulously underscored the quintessential need for assiduous scrutiny of patent claims, categorically averring that mere semblances between products would hardly suffice as incontrovertible evidence of infringement. This path-breaking edict has indubitably influenced the cogitation embraced by arbitrators when admeasuring the veracity of patent infringement claims, heralding an era wherein technical prowess assumes paramount significance in the resolution of such convoluted conflicts.

In an analogous vein, the F. Hoffmann-La Roche Ltd v. Cipla Ltd masterpiece saw the hallowed halls of justice delicately weighing in on the contested realm of pharmaceutical product patent infringement. Herein, the learned court astutely appraised the fundamental need to ascertain both the ambit and the vitiating factors impinging upon the patent's validity, preluding the sagacious contemplation of infringement allegations. This watershed pronouncement resolutely underscored the indispensability of an all-encompassing comprehension of IPR legal principles and precepts, permeating the very fabric of arbitration-driven resolutions concerning licensing agreements and contractual discourses.

Concomitantly, the hallowed jurisprudential canvas witnessed the mesmerizing panorama of the Monsanto Technology LLC v. Nuziveedu Seeds Ltd[104] saga. Unfolding within the realm of an impassioned controversy surrounding the severance of a licensing agreement vis-à-vis genetically modified seeds, this riveting legal narrative probed the mettle of contractual

[102] https://www.casemine.com/judgement/in/56ea81bd607dba36e9458318 (accessed on 6th July, 2023 at 9:30 PM)
[103] https://indiankanoon.org/doc/57798471/ (accessed on 6th July, 2023 at 9:45 PM)
[104] https://indiankanoon.org/doc/116548206/ (accessed on 6th July, 2023 at 10:10 PM)

interpretation and the concomitant rights and obligations of the contentious parties. The court's sagacious pronouncement emphasized the sine qua non of lucid and unambiguous provisions within IPR licensing agreements, thereby bestowing invaluable guidance upon arbitrators tasked with the delicate art of interpreting and implementing such agreements within the broader tapestry of arbitration proceedings.

Such breathtaking legal opuses, and an array of analogous milestones, have indubitably left an indelible imprint upon the hallowed corridors of Indian IPR jurisprudence, thereby immeasurably shaping the ever-evolving landscape of arbitration as the ultimate arbiter in the resolution of licensing and contractual IPR conflicts. The repository of court-ordained wisdom has deftly illumined the myriad facets encompassing the interpretation of licensing agreements, infringement determinations, damage assessments, and the sanctity accorded to arbitral awards. Indeed, it is a testament to the immutable significance of these judiciously crafted legal developments that arbitrators, legal practitioners[105], and the very protagonists embroiled within the enigmatic realm of IPR disputes invariably turn to this indomitable canon of case law as an erudite compendium of legal precepts and precedents, assiduously harnessed to furnish cogent resolutions to their respective conundrums. The perennial evolution of case law heralds an era wherein predictability and consistency intertwine harmoniously, serving as the veritable bedrock upon which the edifice of IPR dispute resolution via arbitration stands resolutely, engendering unswerving confidence within stakeholders who ardently espouse the indispensability, efficacy, and unwavering reliability of this exalted process.

**International Agreements and their Influence on Indian IPR Laws:**

India is a signatory to various international agreements and conventions related to intellectual property rights, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[106] and the Berne Convention[107]. These agreements have had a significant influence on Indian IPR laws and regulations.

International obligations and commitments arising from these agreements impact the interpretation and implementation of IPR laws in India, including the resolution of licensing and contract disputes. The harmonization of Indian laws with international standards has contributed to the development of a robust legal framework for IPR dispute resolution, which includes the recognition and enforcement of arbitral awards.

[105] Patterson, Jonathan. VILLAINY IN FRANCE C: A Transcultural Study of Law and Literature. Oxford University Press, 2021.
[106] https://www.wto.org/english/tratop_e/trips_e/trips_e.htm (accessed on 6th July, 2023 at 10:30 PM)
[107] https://www.wipo.int/treaties/en/ip/berne/ (accessed on 6th July, 2023 at 10:45 PM)

**Analysis of the Indian Arbitration and Conciliation Act and its scope in resolving IPR disputes:**

In India, The Arbitration and Conciliation Act, 1996[108], governs the conduct of arbitration proceedings in India. This legislation provides a comprehensive framework for resolving disputes through arbitration, including those arising from IPR licensing and contracts.[109]

The Act recognizes the autonomy of the parties to agree on arbitration as a dispute resolution mechanism, allowing them to determine the rules and procedures governing the arbitration process. The Act also provides for the appointment and qualifications of arbitrators, the conduct of arbitration proceedings, and the enforcement of arbitral awards.

Specifically, Section 8[110] of the Act empowers the courts to refer parties to arbitration if there is an arbitration agreement in place. This provision ensures that parties to IPR licensing and contract disputes are directed towards arbitration as a preferred method of resolution, promoting the efficiency and effectiveness of the arbitration process.

**Advantages of Arbitration in Resolving IPR Licensing and Contract Disputes:**

**a. Time efficiency compared to traditional litigation**

One of the significant advantages of arbitration in resolving IPR licensing and contract disputes is its time efficiency.[111] Traditional litigation in Indian courts can often be protracted and time-consuming due to a heavy caseload and procedural complexities. In contrast, arbitration offers a streamlined and expeditious process, allowing parties to resolve their disputes more quickly. Arbitration proceedings can be scheduled and conducted based on the convenience of the parties and the availability of arbitrators. This flexibility enables faster resolution, reducing the time and resources required for the resolution of IPR disputes.

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[108] https://www.indiacode.nic.in/handle/123456789/1978?sam_handle=123456789/1362

[109] Loya, Kshama A., and Gowree Gokhale. "Arbitrability of intellectual property disputes: a perspective from India." Journal of Intellectual Property Law & Practice 14.8 (2019): 632-641.

[110] Sec 8. Power to refer parties to arbitration where there is an arbitration agreement.—1 [(1)A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.] (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof: 2 [Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.] (3) Notwithstanding that an application has been made under subsection (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made

[111] Blackman, Scott H., and Rebecca M. McNeill. "Alternative Dispute Resolution in Commercial Intellectual Property Disputes." Am. UL Rev. 47 (1997): 1709.

**b. Cost-effectiveness and flexibility in selecting arbitrators with technical expertise**

Arbitration also offers cost advantages over litigation. Traditional court litigation can involve significant legal fees, court fees, and other associated costs.[112] In contrast, arbitration allows parties to control and manage the costs involved in resolving IPR disputes.

The flexibility to select arbitrators with technical expertise is another key advantage of arbitration. IPR disputes often require specialized knowledge and understanding of complex legal and technical issues. Arbitration allows parties to choose arbitrators with the requisite expertise, ensuring that the disputes are resolved by individuals who possess the necessary understanding of the subject matter.

**c. Confidentiality and its role in protecting sensitive business information**

Confidentiality is another crucial aspect of arbitration that makes it particularly suitable for IPR licensing and contract disputes. Parties involved in IPR matters often deal with sensitive business information, trade secrets, and proprietary technology.[113] Maintaining the confidentiality of such information is vital to protect the parties' commercial interests.

Unlike court proceedings, which are generally open to the public, arbitration offers a private and confidential setting.[114] Parties can negotiate confidentiality agreements and have greater control over the dissemination of sensitive information during the arbitration process. This confidentiality safeguards proprietary knowledge and prevents potential harm to the business interests of the parties involved.

**d. Enforceability of arbitral awards in India and its implications for parties**

The enforceability of arbitral awards is a critical consideration for parties involved in IPR licensing and contract disputes.[115] The Indian Arbitration and Conciliation Act provides for the recognition and enforcement of arbitral awards, both domestic and international, subject to limited grounds for challenge.

Arbitral awards are considered final and binding, creating a sense of certainty and reliability in the resolution of IPR disputes.[116] The enforceability of arbitral awards ensures that parties can effectively implement and benefit from the outcomes of arbitration, providing them with a practical and enforceable solution.

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[112] Stipanowich, Thomas J. "Rethinking American Arbitration." InD. lJ 63 (1987): 425.
[113] Ciraco, Daniel. "Forget the Mechanics and Bring in the Gardeners." U. Balt. Intell. Prop. LJ 9 (2000): 47.
[114] Böckstiegel, Karl-Heinz. "Commercial and investment arbitration: how different are they today? The Lalive lecture 2012." Arbitration International 28.4 (2012): 577-590.
[115] Adamo, Kenneth R. "Overview of international arbitration in the intellectual property context." Global Bus. L. Rev. 2 (2011): 7.
[116] Saskia, Madah, Idrus Abdullah, and Hayyanul Haq. "The Effectiveness of Enforcement of International Arbitration Awards in the Alternative Dispute Resolution Regime." International Journal of Multicultural and Multireligious Understanding 7.9 (2020): 303-313.

The recognition and enforceability of arbitral awards also contribute to the attractiveness of arbitration as a dispute resolution mechanism in IPR licensing and contract disputes. It enhances the perception of arbitration as a reliable and effective method for resolving such conflicts.

Overall, arbitration offers several advantages in resolving IPR licensing and contract disputes in India. Its time efficiency, cost-effectiveness, flexibility in selecting arbitrators with technical expertise, confidentiality, and enforceability of arbitral awards make it a preferred choice for parties seeking efficient and effective resolution of IPR conflicts.

**Challenges and Considerations in Arbitrating IPR Licensing and Contract Disputes:**

**The complexity of IPR issues and the need for technical expertise**

Arbitrating IPR licensing and contract disputes presents unique challenges due to the complexity of intellectual property rights.[117] IPR disputes often involve intricate legal and technical issues, requiring a deep understanding of the subject matter. Arbitrators without sufficient expertise may struggle to grasp the nuances of the dispute and make informed decisions. To address this challenge, it is crucial to appoint arbitrators with specialized knowledge and experience in the relevant field of intellectual property. Parties should carefully consider the qualifications and expertise of potential arbitrators to ensure they possess the technical understanding necessary to navigate the complexities of IPR disputes effectively.

**Unequal bargaining power and its Impact on arbitration outcomes**

IPR licensing and contract disputes may involve parties with significantly unequal bargaining power. In some cases, larger entities or multinational corporations may hold a dominant position, making it difficult for smaller entities or individuals to assert their rights effectively.[118]

The power imbalance can affect the arbitration process and outcomes. Weaker parties may face challenges in presenting their case, accessing relevant evidence, or securing legal representation. Additionally, the stronger party may exert pressure to favor its interests during the arbitration proceedings.

To address this issue, arbitration institutions and arbitrators must ensure a fair and level playing field. The selection of arbitrators should consider the need for impartiality and independence.[119]

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[117] Halket, Thomas D., ed. Arbitration of international intellectual property disputes. Juris Publishing, Inc., 2012.

[118] Pitelis, Christos N., Panos Desyllas, and Andreas Panagopoulos. "Profiting from innovation through cross-border market co-creation and co-opetition: the case of global pharmaceuticals." European Management Review 15.4 (2018): 491-504.

[119] Lowenfeld, Andreas F. "The Party-Appointed Arbitrator in International Controversies: Some Reflections." Tex. Int'l LJ 30 (1995): 59.

Parties should also have the opportunity to present their case effectively and address any power imbalances through appropriate procedural safeguards.

**Availability of interim measures and injunctive relief in arbitration proceedings**

In IPR licensing and contract disputes, the availability of interim measures and injunctive relief is crucial for protecting the rights and interests of the parties involved.[120] Interim measures, such as temporary injunctions or asset freezes, can prevent irreparable harm and maintain the status quo pending the resolution of the dispute.

While arbitration provides a flexible and efficient dispute-resolution mechanism, the availability and effectiveness of interim measures may vary.[121] Unlike courts, arbitral tribunals may not have the same authority to grant interim relief. Parties must carefully consider the arbitration rules and the jurisdiction governing the arbitration to determine the extent to which interim measures can be sought and enforced.

Public policy considerations and their influence on the enforceability of arbitral awards

Public policy considerations play a significant role in determining the enforceability of arbitral awards in IPR disputes. The Indian Arbitration and Conciliation Act allows for the setting aside of arbitral awards if they are found to be in conflict with public policy.

In IPR matters, public policy concerns often revolve around striking a balance between promoting innovation, competition, and public interest. Courts may be cautious in enforcing arbitral awards that appear to contravene public policy objectives, such as awards that may unduly restrict competition or violate fundamental rights.

The potential influence of public policy on the enforceability of arbitral awards underscores the importance of ensuring that the arbitration process adheres to principles of fairness, transparency, and respect for public policy considerations. Parties involved in IPR disputes should be mindful of the public interest dimension and work towards crafting solutions that are in line with societal objectives.[122]

**Recommendations for Enhancing the Effectiveness of Arbitration in IPR Disputes in India:**

**Promotion of specialized intellectual property arbitration centres**

To enhance the effectiveness of arbitration in IPR disputes in India, the establishment of

[120] Blessing, Marc. "Arbitrability of intellectual property disputes." Arbitration International 12.2 (1996): 191-222.

[121] Sun, Chan Leng, and Tan Weiyi. "Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief." Contemp. Asia Arb. J. 6 (2013): 349.

[122] Reiser, Dana Brakman, and Steven A. Dean. Social enterprise law: Trust, public benefit, and capital markets. Oxford University Press, 2017.

specialized intellectual property arbitration centres can be beneficial. These centres can provide a dedicated forum for resolving IPR conflicts, offering arbitrators with specialized knowledge and experience in intellectual property law. By consolidating expertise and resources, these centres can streamline the arbitration process and ensure efficient resolution of IPR disputes.

**Development of guidelines for arbitrators dealing with IPR disputes**

Guidelines specifically tailored for arbitrators dealing with IPR disputes can promote consistency and best practices in the arbitration process. These guidelines can address the unique aspects of IPR disputes, such as complex technical issues, the interpretation of licensing agreements, and the determination of royalties. They can provide practical guidance on evidence presentation, expert testimony, and the evaluation of damages, ensuring that arbitrators are well-equipped to handle the intricacies of IPR disputes effectively.

**Provision of training and education on IPR arbitration**

Training and education programs focused on IPR arbitration can enhance the skills and knowledge of arbitrators, legal practitioners, and stakeholders involved in IPR disputes. These programs can cover topics such as intellectual property law, arbitration procedures, and case management techniques specific to IPR conflicts.[123] By investing in professional development opportunities, the quality and expertise of those involved in IPR arbitration can be improved, leading to more effective and efficient resolution of IPR disputes.

**Continuous evaluation and refinement of the legal framework**

The legal framework governing arbitration in IPR disputes should be subject to continuous evaluation and refinement. Regular assessment of the Indian Arbitration and Conciliation Act, as well as other relevant legislation, ensures that the legal framework remains up-to-date and aligned with international best practices. Stakeholder feedback, empirical data, and comparative studies can inform necessary amendments and improvements to enhance the effectiveness of arbitration in resolving IPR licensing and contract disputes.

By implementing these recommendations, India can further strengthen the effectiveness of arbitration in IPR disputes. Specialized centers, guidelines, training programs, and a robust legal framework will contribute to the efficient and equitable resolution of IPR conflicts, fostering innovation, and promoting healthy business relationships in the Indian intellectual property landscape.

**Conclusion and Suggestion**

In this article, a critical legal analysis was conducted to examine the impact of arbitration on

[123] Yu, Peter K. "The investment-related aspects of intellectual property rights." Am. UL Rev. 66 (2016): 829.

resolving intellectual property rights (IPR) licensing and contract disputes in India. The following key findings and insights emerged from the analysis:

The legal framework for IPR disputes in India is governed by statutory provisions, relevant case law, and international agreements. These elements shape the landscape of IPR arbitration in the country and provide the foundation for resolving disputes through arbitration.

Arbitration offers several advantages in resolving IPR licensing and contract disputes, including time efficiency, cost-effectiveness, flexibility in selecting arbitrators with technical expertise, and confidentiality. The enforceability of arbitral awards further enhances the effectiveness of arbitration in this domain.

Challenges exist in arbitrating IPR disputes, including the complexity of IPR issues and the need for technical expertise, unequal bargaining power, availability of interim measures, and public policy considerations. These Challenges need to be carefully addressed to ensure fair and effective resolution of IPR disputes through arbitration.

To sum up, arbitration holds significant potential in resolving IPR licensing and contract disputes in India. Its time efficiency, cost-effectiveness, flexibility, confidentiality, and enforceability of arbitral awards make it an attractive alternative to traditional litigation. By addressing the challenges and adopting the recommendations provided, stakeholders, policymakers, and legal practitioners can enhance the effectiveness of arbitration in the resolution of IPR disputes, contributing to the growth and development of India's innovation ecosystem.

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# The Protection of Traditional Knowledge in India: Challenges Ahead

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## ABSTRACT

*The protection of traditional knowledge (TK) is still protracted subject matter in globalised context. As one of the mega bio diverse country like India is still identifying an appropriate method for protection of TK. Even today, a large number of local and indigenous communities rely on goods that are largely based on their traditional knowledge for their survival. However, this equation has been challenged by the technological advancements in particular. The field of biotechnology clearly reveals the significance of TK in the research and development of new commercial product. Probably, this has enabled industries get protection for these products through the formal architecture of Intellectual Property (IP). However, the same technological advancement had a negative impact on the TK-holding societies' means of survival and jeopardized biodiversity. Besides, there is also a growing concern over the loss of biodiversity and associated TK due to the increasing globalization. Without protection, there is a risk that TK will vanish as the custodians who are holding it do. Although India continued its commitment to the cause through Biological Diversity Act, 2002 (BDA); Protection of Plant Varieties and Farmers' Rights Act, 2001(PPVFRA); Patent Amendment Acts, 2005 etc., but the implementation of the same has not been satisfactory. TK protection is spread across various laws, rules, and regulations resulting in a fragmented approach rather than integrated one for the treatment for conservation of biological resources. In this context, the chapter is going to critically analyse the behaviour of State in the protection of TK which are associated with GR in the neo-liberal context and look into the potential challenges faced by the State in the formulation of a law for protection of TK in India.*

**Keywords:** Traditional Knowledge (TK), Intellectual property, Globalization, Identification of communities, Traceability issues.

## Introduction

The knowledge economy is now accessible to everyone, and globalisation has made it easier

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for ideas to spread freely. However, an uneven distribution of economic and political power between rich and developing countries has controlled the transfer of knowledge. Globalisation also influenced various countries to be more open towards the introduction of Intellectual Property Rights' (IPR) laws in their domestic legal systems. It should also be noted that technological advances through intellectual property rights have led to the misuse of TK and the chances of its potential use being translated into commercial benefits without proper authorization and benefit sharing has increased drastically. The misappropriation of valuable knowledge, with the support of technology saves time, money and investment in the development of new technology, especially for the modern biotech companies and other industries. This has adversely affected the TK owners' rights and led a call for the protection of TK through an international mechanism. Although the international community failed to reach an international consensus on the same, this led to many more deliberations on this topic. It has been identified that even though neoliberalism brought in many benefits to the population, these benefits has not reached the lower strata of the society.

**Changing ROLE OF THE STATE AND ITS IMPACT ON THE PROTECTION OF TK**

The State, as an institution, was initiated for the well-being of society. Therefore, the state's principal function is not merely political; it also owes its inhabitants moral duties by offering services that improve their quality of life. However, this role of state has been largely diminished due to the ongoing process of globalization. In a globalised world, the state has an important role to play in the establishment and preservation of an "even playing field" and an enabling environment for private enterprise, individual creativity and social action.[125]

The major dimensions of the contemporary globalization process that have affected the role of the State and its bureaucracy include the following:

(a) The globalization of market ideology;

(b) The globalization of the emerging neo-liberal State;

(c) The globalization of the business-like administrative model.[126]

The prevailing world-wide dominance of market ideology advocated by the capitalist States, transnational corporations, international financial institutions and new-right think tanks, have affected most of the developing countries, including India, resulting in the replacement of their

[125]C. S. Reddy, Globalisation and the Sovereignty of the Nation-State, *available at* https://www.jstor.org/stable/48566255 (last visited on May 16, 2023)

[126]Haque, M. Shamsul. "Impacts of Globalization on the Role of the State and Bureaucracy in Asia" *available at* http://www.jstor.org/stable/25611308 (last visited on June 6, 2023).

previously existing State policies based on nationalism, development and socialism by more business-friendly policies guided by the principles and beliefs inherent in this contemporary global ideology.

Prior to 1980s, the State and its bureaucracy remained deeply engaged in almost all social sectors, directly involved in economic production, distribution and exchange. In the past, the constitutional and officially proclaimed role of the state and bureaucracy was to address the basic needs and concerns (for example, food, health, education, transport) of common citizens, especially the under-privileged sections of the population left out by the market forces. Recently, this direct role has been replaced that of facilitating rather than directing economic activities and has initiated and implemented market oriented policies, such as privatization and deregulation, while reinforcing the rationale that it would improve efficiency, growth, share ownership, technology and market competition. Most of the current reform initiatives India have emphasized the function of the government and its bureaucracy in managing these market-based standards and concerns, rather than developing an overall societal progress.

The successive governments in India has endorsed and embraced market-driven programs such as structural adjustment guided by neo-liberal principles, since 1980s. This also ensured a conducive business atmosphere for the local and foreign private capital. In the case of India it is obvious that the State itself has evolved into a more market-driven, neo-liberal form of government. Under the effect of current globalisation, India's state and bureaucracy are changing, with significant ramifications for all segments of society[127] and has also influenced policy making in various sectors of the legal system, including the laws relating to the protection of TK. The changes in the character of State and its mechanisms, particularly the establishment and expansion of knowledge induced into market mechanisms, including fictitious commodities, and the 'duty' of States to maintain this 'new' form of market exchange.[128]

In earlier societies, TK associated with GR was considered as a collective resource that was held in common, shared, cultivated, and maintained by communities for the sake of the societies' interests as a whole. The introduction of the modern market systems and intellectual property into this 'common and shared property' of the communities invariably disturbed the existing traditional modes of economic and social activities and reshaped economic power

[127] Ibid

[128]Chakkri Chaipinit and Christopher May, The Polanyian Perspective in the Era of Neoliberalism: The Protection of Global Intellectual Property Rights", *available at* https://so03.tci-thaijo.org/index.php/jpss/article/view/84688(last visited on April 9, 2023).

relations. The process of Commodification of bio-resources and associated TK, through international trade and IPR regimes, is a consequence of the liberalism and neo-liberalist policies. It has been observed that even though State should be intervening in the market to prevent the use of knowledge as 'monopolistic commodities' as occurred with patent regime, it could not further this principle due to the pressure from market forces. Similarly, due to their TRIPs and CBD commitments, States were under an obligation to promote IPR-related laws, which led not only to the commoditization of knowledge but also "integration of knowledge and intellectual labour into production the appearance of severe social costs has undermined the attempt to present IPRs as a neutral and technical market solution, allowing the reassertion of a politics of IPRs".[129]

**Protection of Traditional Knowledge in India: Analysis of State Behaviour**

Establishment and enforcement of national rules that are compatible with the internationally agreed standards of market-access is an essential process under globalisation.[130] In order to integrate the 'market economy' into the 'market society', as well as to adopt an international legal regime into a national level, States have taken a prominent role in creating a conducive economy.[131]A self-regulating market and its associated fictitious commodities requires State intervention by establishing a set of rules for proper function of neoliberal market mechanism, where private property must be guaranteed and incentives must be given to compete for scarce resources. This needs to be understood in the context of broader changes that occurred during the 1970s and 1980s that brought about a more intense regime of valorization and competition in global markets, leading many developing States to view the biodiversity within their territories as a resource whose use would enhance their income and as a key component of their growth regimes. The goal of this new growth regime was to make India an internationally competitive economy. India declared that PGRs are sovereign property in the late 1980s as part of a defensive-assertive state strategy that aimed to both prevents biopiracy, which was stoked by nationalist outrage over neo-colonial expropriation, and to make India a competitive player in the world's agricultural and biotech markets. Realising this potential allowed India to become a new focus for biotechnology expertise and a globally competitive nation with a superior ability to turn genetic resources into income. For instance, India insisted during the CBD negotiations on both moving towards a property regime based on the principle of national sovereignty over genetic resources and making access to them dependent on the transfer of

[129] *Id*. at 113.
[130] *Id*. at 110.
[131] *Ibid.*

biotechnologies developed in frontier economies in order to support India's developing modern biotech sector.[132]

Since the 1990s, the competitive biotech sector has grown as a new growth regime capable of producing ecological surplus. This has attracted the attention of policymakers from all political backgrounds who view it as a potent enabling technology that will not only revolutionise India's agriculture but also help the country become a knowledge superpower in the world. Although this new growth regime supported indigenous rights in many international fora, it did not result in their effective or actual realisation domestically and instead placed a greater emphasis on the generation of ecological surpluses in comparison to other players in the global market. When contesting the validity of the U.S. Patent Office's claims about basmati rice and turmeric, this effect was also discernible. Though this strengthened India's reputation as the guardian of national genetic resources, it was argued that India only focused on the interests of Indian exporters when it came to these lawsuits, not the farmers who depended on these crops and received no advantages from the legal challenges.[133]

This must also be examined in light of how the Indian State has established specific technological, scientific, and legal frameworks pertinent to PGRs associated TK in the context of the Plant Variety and Farmers Right Act 2001, Biodiversity Act 2002, and Patent Act 1970. With regard to these laws, the State has been actively engaged in conflicts with a variety of groups over the ownership, use, and access to genetic resources. At times, the State appears to have shifting priorities depending on the situation, the parties involved, and the way it has attempted to balance domestic and international pressures. After a long persuasion from civil society activism, the Plant Variety and Farmers Right Act, Patent Act Amendment with regard to TK came into reality. It has been stated that the above said legislation made no recognition of community rights, who have significantly contributed for of biological diversity and inevitable for the great majority of rural people's means of subsistence. At the same time, the Act provided a vast array of initiative to protect the existing knowledge either through document or to catalogue all over the Indian subcontinent. As a signatory to the CBD, which acknowledges the inclusion of communities in the governance of biodiversity, it demonstrates that India fails to recognise the fundamental and customary rights of indigenous people who have lived in these areas for centuries. It is interesting to note that India emerged as a major

[132] Valbona Muzaka, "Stealing the common from the goose: The emergence of Farmers' Rights and their implementation in India and Brazil", *available at* https://doi.org/10.1111/joac.12398 (last visited on May 17, 2022)

[133] *Id*. at 366.

proponent of itself for the new growth regime, either through the establishment of suitable property laws or investing in high-tech clusters and biotechnology R&D, which is not necessarily advantageous to the holders of TK. India currently lacks a distinct sui generis law to safeguard such TK and its associated GR and the protection of TK and its elements are spread across various laws, rules and regulations resulting in a fragmented approach rather than integrated one for the treatment for conservation of biological resources and TK protection. It has been forwarded that this fragmentation affecting its implementation indicates the reluctance on the part of the Indian state to effectively enforce the legislation and to recognise ownership of TK associated GR rests with the community and has compromised meaningful implementation of these acts in many respects.

**Challenges in Formulating Policies for TK Protection: Owners of TK**

There are many unresolved issues, such as how to protect TK and GRs and whether to do so from the perspective of inherent rights and human rights or from the perspective of economic rights and property rights. The complexity of TK is further increased by technical problems like the issue of collective ownership and the methods of right enforcement. In the Indian context also, questions such as who are the owner and bearer of TK and for whose benefit should TK be "protected" exist and the legal framework has not adequately addressed these issues. Due to its diversity, identifying the legitimate owner of TK in the Indian context is still challenging. Thus it can be seen that it is essential to devise a fair and effective mechanism for the protection of TK, which would also address the interest of different stakeholders in the protection of TK.

Land and related knowledge have historically had a strong connection to indigenous identity, and they are characterised by a communal relationship to resources, as well as to social and spiritual well-being. Despite the fact that this identity is tied to Indigenous Peoples' nature and livelihood, it is difficult to accurately identify and trace the knowledge holders due to complex collective ownership. It is interesting to note that dynamic nature of culture, changes over time, and geographical dispersion across communities and nations, defining the ethnic and cultural boundaries of an indigenous group is difficult. It can be difficult to define what constitutes an indigenous person, whose prior informed consent should be sought, and with whom. This is due to factors like social, legal, and political ambiguity as well as cultural heterogeneity. Hansen and Van Fleet have thus classified the knowledge claims in this context as: known and used by an individual; known and used by a group of people or a community; or diffused widely

and in the public domain.[134] Traditional knowledge can be seen in India in the following forms:

- Knowledge that is practised and preserved by particular communities, particularly tribal groups, institutions, or families frequently found in particular territories of the country. Different traditional techniques are used to transmit this knowledge from one generation to the next.
- Knowledge that has no particular community, institution, or family acting as its custodian but is used to support the livelihoods of numerous people dispersed throughout India.

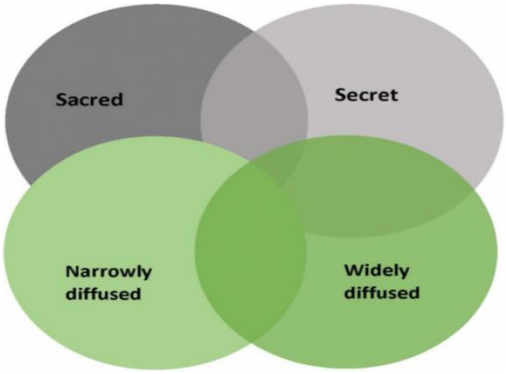


Fig.1: Representation of Tiered and Differentiated Approach to TK/TCEs
Source: Chidi Oguamanam, 2018.

The fig.1 shows that traditional knowledge in India falls into the following categories: secret, sacred, narrowly diffused, and widely diffused. The classification's main goal is to distinguish between the more limited types of rights for commonly used TK and TCEs. [135]

The "tiered approach" to conserving traditional knowledge (TK) may be advantageous in nations like India that are rich in TK and have numerous layers and degrees of TK. It will then be possible to assess which types the national government can represent and which ones require further protection.[136] An exclusive right (strong right) would therefore be granted to the indigenous group, which has kept it hidden and out of the public eye. After the policy is implemented, the mechanism would ensure that the stakeholders would share benefits in a stratified manner.

[134]Stephen A. Hansen and Justin W. VanFleet, " A Handbook on Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity", *available at* http://www.icimod.org/resources/353(last visited on August 7, 2022).

[135] Shambhu Prasad Chakrabarty and Ravneet Kaur, "A Primer to Traditional Knowledge Protection in India: The Road Ahead", *available at* visited https://link.springer.com/article/10.1007/s10991-021-09281-4(last on April 5, 2023)

[136] Javed, G etal., "Protection of Traditional Health Knowledge: International Negotiations, National Priorities and Knowledge Commons", available at https://doi.org/10.1177/2393861719883069(last visited on February 2 2023)

The implementation of this, however, faces some challenges due to the lack of consistency among indigenous leaders, the scientific uncertainty of the facts beyond a certain point in the past, the restoration of retroactive positions taken before the colonial era, and the assessment of the effects of knowledge piracy.[137] Throughout the IGC deliberations, India regularly gave instances of its highly developed traditional health systems, including Ayurveda and other AYUSH systems. These systems originated in recognised communities and were transmitted from one generation to the next as well as becoming widely used.[138] The Indian delegation has argued in favour of putting national authorities under the concept of beneficiaries in cases where TK could not be directly linked to a local community.[139] Additionally, it has been argued that specific types of undisclosed or narrowly disseminated knowledge require additional protections, such as exclusive use, adherence to specific moral and cultural standards, and equitable benefit sharing. [140] A nation state must be granted the fiduciary duty when it is suitable after discussing with local communities. Because of this, nation states' responsibility to protect collectively owned knowledge and their fiduciary duty to indigenous communities are crucial.[141] India still faces difficulties in identifying the owners of knowledge because the term "indigenous people" as a whole is not recognised.[142] The term "local communities" has been used by Indian BDA in place of "indigenous" in its legislative framework. Due to the rights associated with land and their right to "self-determination," which were deemed unacceptable in the Indian context, the term has now come to be rejected. Even back when it simply used the word "Indigenous," India backed the 1957 ILO Convention on Indigenous and Tribal Population. Given that so many indigenous populations in India are not recognised as scheduled tribes, the process is actually "more political than legal."[143] Determining what constitutes an indigenous and non-indigenous person for the purposes of laws and regulations raises a number of serious issues, particularly regarding the preservation of TK which is intimately linked to their way of life. Additionally, it should be noted that without these rights, communities are unable to enforce PIC and assert control over GR on their property. Knowledge holders are wary because local communities' rights to their TK or resources are not recognised by the law. This flaw effectively creates obstacles to the ownership of, access to, and utilisation of biological resources and knowledge. It has been reported that this government

[137] *Id*. at 419.
[138] *Supra* note 12 at 108.
[139] *Ibid*
[140] *Id*. at 109
[141] *Id*. at 110
[142] *Supra note 11* at 409
[143] *Ibid*

attitude is contrary to the true spirit of the CBD and Nagoya agreements, which made clear that the indigenous peoples are owners of such resources. In India, the question of "who are the people indigenous to India" is still open to debate. Indigenous perspectives are thus rarely heard in the Indian debate over TK. Despite the fact that their absence is generally excused by a lack of interest, illiteracy, and low linguistic ability, research demonstrates that there are many indigenous communities members and traditional healers who can and do articulate themselves fairly eloquently on traditional knowledge policy.[144] However, they frequently face political repression, and they are frequently prevented from getting more fully involved in what is thought to be a somewhat less urgent issue due to the need to safeguard their land and life.[145] In this situation, the legal system's structure and operation show that the government is using a variety of strategies. But State is unable to divide its responsibilities and bargain its commitments to specific communities, such as indigenous rights, in such a situation. Lack of knowledge owners' identification may result in a number of issues. First, the role of national legislation in protecting TK owners may be diminished; second, the healthy exploitation, dissemination, the growth of the cultural treasures in TK could be hindered and third, during the exercise procedure, unnecessary transaction fees could be incurred, enforcing, and TK rights transactions, especially when consumers (buyers) and suppliers (sellers) of TK come from different nations. Fourth, when it comes to prior informed consent and benefit sharing, distributive justice may be compromised, resulting in disputes between unidentified right holders.

At the WIPO IGC in 2019, India's basic position was to consider establishing minimum requirements, comparable to those in IPR agreements, and leave specifics to national authorities. India claimed that its position should be to ensure agreement on sovereign rights over biological assets and the "rights of local communities" in relation to TK protection. India has consistently argued that it is challenging to identify the creator and holder of TK in various countries like India because of the complexity of the resources; it is challenging to locate the proprietors of genetic resources in this situation. As a result, in India, the State makes decisions, manages resources, and grants PIC for resource access. As there is no systematic data on how much and to what extent TK exists widely within a country or across borders, it may not be possible to identify any, or even all, of the potential TK holders in this situation. The PIC could

[144] Thomas R. Eimer, "Global Wordings and Local Meanings: The Regulation of Traditional Knowledge in India and Brazil", *available* at https://www.mattersburgerkreis.a t/dl/qKorJMJLKmJqx4KooJK/JEP-2-2013_03_EIMER_Global-Wordings-and-Local-Meanings-The-Regulation-of-Traditional-Knowledge-in-India-and-Brazil.pdf (last visited on July 26, 2023).

[145] *Ibid*

be obtained from the actual suppliers of the resource and associated TK, who are qualified to negotiate benefits and rights, in cases where the TK is widely dispersed throughout the nation and there are numerous known potential communities that can lay claim to the TK.[146] A public fund system could be established, allowing holders of the same TK to share benefits and profits among the communities.

**Traceability and related benefit sharing concerns**

When the resource and its associated TK are used by communities outside of one country, things get more complicated. For instance, the natural distribution of resources, like that of basmati and turmeric, spans multiple nations, making the TK associated with these resources common. This brings up the question of who should gain from the agreement, and it may not be appropriate to demand the consent of the entire community or nation. As a result, it is challenging to pinpoint the origin of bio-resources due to the complicated movement of those resources across geographies. Due to a lack of traceability on the origin of accessed biological resources, several SBBs are currently struggling to distribute benefits to the communities and BMCs even though users have shared the benefits with them.[147] The State Biodiversity Fund must be utilised for biodiversity promotion, research, and conservation programmes when the material's origin is unknown. It is troubling that so few commercial ABS agreements have been reached in India, which points to GRs among potential customers, as well as onerous rules, as causes of the disappointing performance. Different stakeholders have pushed for an easy mechanism to access the same in order to overcome these obstacles. It is clear from the discussion above that ownership ambiguity and disputes regarding biodiversity and TK make the system complex and reckless. Therefore, it is urgent to amend the Act in light of recent developments so that the legal barrier that has separated scientists from national policy-making bodies regarding biodiversity can be lifted. This will help to strike a balance between the need for regulation and the need for innovation

**Concerns of Scientific community**

The majority of TK associated GR users are biotechnology companies, the academic research community, and the scientific community. These groups are also the ones who are most affected by the current ABS regimes' stringent regulatory requirements and high transaction

[146] Chenguo Zhang, "How is the Owner of Traditional Knowledge Right? A Perspective of International Law and the Case of China", *available at* https://www.abacademies.org/articles/how-is-the-owner-of-traditional-knowledge-right-a-perspective-of-international-law-and-the-case-of-china-7175.html(last visited on March 15,2022)

[147] Shreyas Bhartiya, "Good Practice of Access and Benefit sharing," Indo-German Biodiversity Program, *available at* https://www.giz.de/de/downloads/giz2019-good-practices-access-and-benefit-sharing.pdf (last visited on June 3, 2023)

costs**.** Being the main source of raw materials for the industry, therapeutic plants and herbs are crucial for research and development, they believe that the current mechanisms are restrictive in nature and restrict access to resources like these. Due to the emergence of new technologies like combinatorial chemistry and synthetic biology, actual access to biological substance is currently less significant than it formerly was...[148] According to the scientific community, conservation biologists and taxonomists, a vanishingly small constituency, have little clout in the legislative process because their agendas, while well-intentioned but not prioritizing science, get tangled up.[149] As a result, there is now national legislation that severely restricts research. Additionally, it contends that international cooperation and national regulations that were implemented in many countries with a high biodiversity in anticipation of commercial benefits have stifled domestic scientific research on biodiversity. The argument goes on to say that the burden frequently necessitates substantial financial and human resources in typically drawn-out approvals processes and the inability to acquire approval, as researchers have noted, for example, in India and Indonesia.[150]

Due to the bilateral character of these regimes, their inherent limitations, the interplay of different laws, and the emphasis on financial profits instead of value creation and sharing, the existing ABS framework is a barrier to sustainable development.[151] They also struggle with not being able to track down people with whom to consult and share benefits when using resources. They also noted that when industries buy products from the local market, it can be challenging for them to identify the product's origin or source.

**Conclusion**

From the analysis above, it can be concluded that states are currently having a difficult time protecting TK as a result of pressure from numerous stakeholders. The protection of TK is approached differently by each stakeholder. The result was incomplete international restraint mechanisms, hazy protection systems, and imperfect legislation. The discussion above makes it clear that the government's policy on traditional knowledge did not aim to give the communities themselves full "ownership" of the tradition. It demonstrates how the government has neglected to acknowledge the cosmovisions and worldviews of TK holders, which bestow

[148] D.A Dias, etal. "A Historical Overview of Natural Products in Drug Discovery", *available at* doi: 10.3390/metabo2020303 (last visited on March 18, 2023).

[149]K. Divakaran Prathapan, et al., "When the cure kills-CBD limits biodiversity research", *available at* 10.1126/science.aat9844(last visited on May 2, 2022)

[150] *Ibid*

[151]R. Sara, etal. "A need for recalibrating access and benefit sharing: How best to improve conservation, sustainable use of biodiversity, and equitable benefit sharing in a mutually reinforcing manner? How best to improve conservation, sustainable use of biodiversity, and equitable benefit sharing in a mutually reinforcing manner?" *available at* doi: 10.15252/embr.202153973 (last visited on August 4, 2022).

rights on knowledge keepers as well as reciprocal obligations to their communities and the ecosystems in which TK is used. Beyond this notion, though, there is the actual challenge of determining the structure in which such "ownership" might vest, particularly in terms of identifying the legal representatives and acknowledged decision-making levels. The customary law of the relevant communities holds great promise in the protection of TK because TK holders do not understand the concept of "ownership" as it is known in intellectual property, and instead view themselves as merely custodians on behalf of past, present, and future generations. However, for political reasons, governments did not accept it. In order to clarify the legal status and relationship between TK holders, their knowledge, and their ecosystems, it is urgent to take another look at the current mechanism. Therefore, TK holders or beneficiaries of those holders must be included in the definition of a community for TK holding purposes under the relevant customary law. Additionally, the top-down approach to traditional knowledge governance, in which the national and state governments are given enormous responsibility for TK protection, is disrespectful of the collective rights of TK and ignores the existence of TK custodians who are given responsibility over access, use, and control of TK under customary law. As a result, it has been suggested that rather than focusing solely on individual property rights, a sui generis system should consider biological diversity, human rights, community rights, and cultural heritage. The preservation of TK should be founded on government property rights and supported by community property rights, and the system of governance should progressively shift from the current system of having one department exercise control over the other to one department exercising control over it all. In addition, the current multiple departmental laws that protect genetic resources should be replaced with specific legislation designed to protect these resources, and the protection gaps that currently exist should be closed with the help of special legislation that is tailored to the protection steps.

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# Compulsory Licensing In Pharmaceuticals: From Being Relevant To Being Necessary

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## ABSTRACT

*India is a developing nation shouldering the responsibility of sustaining 17.5% of the world's population. According to Multidimensional Poverty Index, 2022 India ranks first in the world. Given the lack of resources with people and the prevalence of several complicated health conditions, the majority of people in India cannot afford the high prices of 'Cure Medicines'. Therefore, under Chapter XVI of the Indian Patents Act, of 1970, India provided for compulsory licensing keeping in view public health and morality. Compulsory licensing refers to a legal mechanism that allows a government to grant licenses for the production or use of a patented invention without the permission of the patent holder. It is an important tool that can be employed in certain circumstances to ensure access to essential products, particularly in the fields of healthcare, pharmaceuticals, and public health. Compulsory licensing is typically used when a patented invention, such as a medicine, is deemed to be of vital importance for public health, but the patent holder is unable or unwilling to supply the product in sufficient quantities or at affordable prices. By granting compulsory licenses, governments can authorize other manufacturers to produce the patented product or use the patented technology, thereby increasing its availability and affordability. The decision to grant a compulsory license is typically made by the government or a competent authority based on specific criteria and procedures outlined in national patent laws and international agreements. These criteria often include factors such as public health needs, the unavailability of the product, efforts to negotiate with the patent holder, and fair compensation to the patent holder. Compulsory licensing is recognized under international trade agreements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) administered by the World Trade Organization (WTO). A TRIP allows member countries to issue compulsory licenses under certain conditions, including cases of national emergencies, public non-commercial use, and anti-competitive practices. The use of compulsory licensing is a balancing act between the*

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*protection of intellectual property rights and the public interest. It aims to strike a balance by ensuring that essential products and technologies are accessible to those in need while providing reasonable compensation to patent holders for their innovations. It's worth noting that compulsory licensing should be implemented judiciously and by applicable laws and international obligations. It is generally considered a measure of last resort, to be used when other efforts to obtain the necessary products or technologies through voluntary means have failed or are deemed inadequate. Through this paper, the researcher aims to comprehensively analyze the importance of compulsory licensing in India and also aims at evaluating to what extent its application is deemed to be judicious and well-placed.*

**Keywords:** Compulsory Licensing, TRIPS, Patent, Intellectual Property, Pharmaceuticals.

**Introduction**

A patent is a protection given to the inventor for a product or a process that provides, a new resourceful way of doing something, or offers way out to a problem. An invention which has Novelty, Inventive Step and Industrial use is the one eligible for patents right[154]. The Patents Act, 1970 is the ultimate legislation governing patent regime in India. The Office of the Controller General of Patents, Designs and Trade Marks or CGPDTM is the body responsible for the Indian Patent Act. Under this act patent right is granted for 20 years from the date of filing the application for patent. In case the application is filed under Patent Cooperative Treaty, then the patent is deemed to be allotted from international date of filling. A patentee has several benefits of attaining patent, namely Right to sue for infringement, Right to exclude others from manufacturing patented product, Right to grant license, Right to exploit patent for own material benefit and Right to surrender or transfer patent.

In 2005, India patent law underwent material change as it had to be brought under the umbrella provisions of Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. India brought complete compliance to TRIPS agreement by bringing in Patents (Amendment) Act, 2005. Prior to ratification of TRIPS, Indian Patent laws related to Pharmaceutical industries were more inward looking allowing cheaper imports of drugs and domestic production of generic medicines providing affordable medicines to masses. However, due to TRIPS India had to amend Patents Act, 1970 in order to comply with the minimum standard of patentability and protection of patents rights. India had to remove some provisions[155] which earlier provided

[154]The Patent Act, 1970, India, Section 3 and 4 of Patent Act, 1970, available at: https://ipindia.gov.in/writereaddata/Portal/ev/sections/ps3.html (last visited on June 12,2023)

[155]The Patent Act, 1970 (Act 39 of 1970) Section 3(d).

for a way to protect Indian Pharmaceutical industry from cut throat competition and provided affordable medicines for masses. There was an introduction of 'Product Patents 'for pharmaceuticals, making it mandatory for inventors to disclose the full and complete details of the invention and enabling them to exclude others and fully exploiting their invention single handedly for 20 years.

**Compulsory Licensing: International aspect**

Compulsory licensing has international implications and is governed by international agreements, most notably the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement under the World Trade Organization (WTO). Here are some key international aspects of compulsory licensing:

- *TRIPS Agreement*: The TRIPS Agreement sets out minimum standards for intellectual property protection, including patents, and provides flexibility for member countries to issue compulsory licenses under specific conditions. It does not specifically mention words ' Compulsory Licensing' but does provide for 'other use without authorization of the right holder' in Article 31[156] Without the right holder's consent, the government or other parties it has granted authorization to may exploit a patent. Such permission is granted if specific requirements are met, including non-commercial use, non-exclusive usage, applicant has already made steps to seek license from patentee (although, this is not applicable in cases of national emergency or extreme urgency conditions), etc. Subparagraph (h) of Article 31[157] of the TRIPS Agreement additionally stipulates that the patent holder shall receive an adequate compensation that takes into consideration the economic worth of the patent. The most significant part of Article 31's subparagraph (f)[158] is the statement that the product is solely intended for the local market, which restricts the countries that can manufacture goods from receiving the advantages of a compulsory license. However, poor or least developed nations with little to no industrial capacity are the ones who experience health crises the most. TRIPS undoubtedly offered many advantages, but it also required modification, which was accomplished by the Doha Declaration in November 2001, which permitted the member country to issue a mandatory license to produce drugs for export to nations that proved they had no or very limited drug manufacturing capacity[159].

[156] The Agreement on Trade-Related Aspects of Intellectual Property ,art.31
[157] *Ibid.*
[158] *Ibid.*
[159] Amanpreet Kaur and Rekha Chaturvedi, "Compulsory Licensing of Drugs and Pharmaceuticals: Issues and Dilemma"20 Journal of Intellectual Property Rights, 279-287 (2015).

- *Doha Declaration on TRIPS and Public Health*: The Doha Declaration, which was adopted in 2001, underlined the TRIPS agreement's flexibility to safeguard public health and advance universal access to medications. One of the flexibilities listed in the Doha Declaration is "the right to grant compulsory licenses." A government organization or a court may issue a compelled license to use a patented invention in a particular way without the consent of the patent holder. This approach is acknowledged as a legal alternative or flexibility under the TRIPS Agreement, and some WTO members have taken advantage of it in the pharmaceutical sector. It typically appears in the majority of patent laws. To address anti-competitive behavior, mandatory licenses had to be given under the original TRIPS regulations, which restricted their use to domestic markets. It was made clear that TRIPS permits the use of mandatory licensing.[160]. In order for nations to be able to take the necessary actions to safeguard the interests of public health, licensing is required to address public health emergencies.
- *Paragraph 6 System*: The TRIPS Agreement introduced the Paragraph 6 system, also known as the "compulsory licensing and export" provision. It allows countries with insufficient manufacturing capacities to import generic versions of patented medicines produced under compulsory licenses from other countries. This provision addresses the challenges faced by developing countries in accessing affordable medicines.[161]
- *Differential Treatment for Least Developed Countries (LDCs):* LDCs have additional flexibilities under TRIPS. They have an extended transition period until 2033 to implement patent protection for pharmaceutical products. During this period, they are not obliged to grant or enforce patents or provide exclusive marketing rights for pharmaceutical products, which allows them more flexibility in addressing public health needs.
- *Access to Medicines in Developing Countries*: Compulsory licensing is particularly relevant in developing countries, where access to affordable medicines is often limited. The international framework, including TRIPS, recognizes the need to strike a balance between intellectual property rights and public health, allowing countries to issue compulsory licenses to address public health challenges and promote access to medicines.

[160] The Doha Declaration, 2001. Para 6.
[161] *Ibid.*

- *International Disputes*: Disputes related to compulsory licensing and its compliance with international agreements, including TRIPS, can be brought before the WTO's Dispute Settlement Body. This mechanism ensures that countries can seek resolution when concerns arise regarding the implementation of compulsory licensing provisions.

It's important to note that while international agreements provide guidelines and flexibility for compulsory licensing, the specific implementation of compulsory licensing provisions may vary among countries based on their national laws, regulations, and specific public health needs. Countries have the flexibility to tailor their compulsory licensing provisions within the framework provided by international agreements to address their unique circumstances.

**Patenting in Pharmaceutical Industry in India**

Known to be emerging '*Pharmacy of the World'* India's pharmaceutical industry is currently valued at USD 50 bn[162] with major chunk of exports of generic medicines being provided by India to entire world. Automation in the pharmaceutical industry has revolutionized the way that materials are handled, medications are distributed, and formulations are manufactured and packaged in various industries with little to no human involvement. Companies are constantly utilizing improvements in AI technology to develop new and improved medicines as well as to locate rapid access points for patients to care. Recently, patents have been granted for the use of machine learning, including the classification of digital images of cells that have been treated with various experimental compounds as well as the use of image processing and machine learning algorithms to test compounds against samples of diseased cells based on previously recorded historical data as a control. Convolutional Neural Network (CNN) usage is just one example of a recent advancement in diagnostic and research. Just before the 2005 amendment. The Indian pharmaceutical industry was significantly impacted by the lack of product patent protection in the pharmaceutical and agrochemical sectors, which resulted in the development of significant expertise in the reverse engineering of drugs that are patentable as products throughout the industrialized world but unprotected in India. But after introduction of amendments and product patenting, prices of many lifesaving medicines have skyrocketed making them completely inaccessible and unaffordable to masses. The main problem that is being faced by India currently is that pharmacy industries indulge in strategic improvements in medicines which actually have minimal contribution towards improvement of efficacy of drug but a happy gift to the inventors of renewed 20 years of patent rights.

[162]bn- Billion

Indian pharmaceutical firms have been accused of breaking intellectual property rights (IPR) rules, which has led to legal battles with international pharmaceutical firms. In one such instance, Roche, a Swiss pharmaceutical business, and Cipla, an Indian pharmaceutical company, engaged in 2014. By creating a generic version of the cancer medication Tarceva, Cipla was charged by Roche with violating the terms of the drug's patent. The argument intensified, resulting in a legal struggle between the two businesses. The Delhi High Court found in Roche's favor in 2016 and confirmed that Cipla had in fact violated Roche's patent rights. As a result, Cipla was mandated to compensate Roche[163]. Patenting in the pharmaceutical industry in India is closely tied to the provisions of compulsory licensing, which allow the government to grant licenses to third parties to produce and sell patented pharmaceutical products without the consent of the patent holder.

Here is an overview of how compulsory licensing relates to patenting in the pharmaceutical industry in India:

*Compulsory Licensing Provisions:* The Patents Act, 1970, includes provisions for compulsory licensing in certain circumstances. Section 84 of the Act[164] outlines the grounds for granting compulsory licenses, which include:

- *Failure to work the invention in India*: If the patented invention is not being worked in India or if there is insufficient working of the invention in India, a compulsory license can be granted. This provision aims to prevent the abuse of patents that are not being utilized or exploited effectively in the country.
- *Reasonable requirements of the public*: If the demand for the patented product is not being met on reasonable terms or at a reasonable price, a compulsory license can be granted to address the public's needs. This provision ensures access to essential medicines and promotes public health interests.
- *National emergency or extreme urgency*: In cases of national emergency or circumstances of extreme urgency, such as public health crises, the government can authorize the use of a patented invention to meet the urgent requirements. This

[163] The Law Brigade Publisher, *Case Analysis: F. Hoffmann-La Roche Ltd. & Anr. v Cipla Ltd.*, June 16,2017, available at https://thelawbrigade.com/intellectual-property-rights/case-analysis-f-hoffmann-la-roche-ltd-anr-v-cipla-ltd /(last visited on 30 June 2023)
[164] The Patent Act, 1970 (Act 39 of 1970) S. 84 Compulsory licences.

provision allows for the production and supply of essential medicines during emergencies.

- *Compulsory License Application Process*: To obtain a compulsory license, an interested party needs to apply to the Controller of Patents by submitting a detailed application justifying the grounds for seeking the license. The Controller evaluates the application based on the specified criteria and may grant the compulsory license if the grounds are satisfied.
- *Negotiations and Attempts to Obtain Voluntary License*: Before granting a compulsory license, the Patents Act requires the applicant to make efforts to obtain a voluntary license from the patent holder on reasonable terms and conditions. The applicant must provide evidence of such attempts in the application for a compulsory license.
- *Terms and Conditions of Compulsory License*: The terms and conditions of a compulsory license, including the scope, duration, and royalty payments, are determined by the Controller of Patents. The license is non-exclusive, and the licensee is typically required to meet the reasonable demands of the market and ensure the affordability and availability of the product.
- Public Interest Protections: The Patents Act includes safeguards to protect the interests of patent holders and to prevent the abuse of compulsory licensing provisions. These safeguards include provisions for reasonable compensation to the patent holder and the ability to revoke the compulsory license if the circumstances justifying it no longer exist.

There have been a few landmark cases related to compulsory licensing in the pharmaceutical industry in India. Here are a few notable examples:

*Natco Pharma Ltd. v. Bayer Corporation*[165]: This case involved Natco Pharma seeking a compulsory license for Bayer's patented cancer drug, Sorafenibtosylate (Nexavar). Natco argued that the drug was not reasonably affordable or available to the public. The Controller of Patents granted Natco a compulsory license, allowing them to manufacture and sell a generic version of the drug. This case was significant as it marked the first compulsory license issued in India under the amended provisions of the Patents Act.

[165] Natco Pharma Ltd. v. Bayer Corporation Before the Indian Intellectual Property Appellate Board (IPAB) Decision Date: 04.03.2013

*BDR Pharmaceuticals vs. Bristol-Myers Squibb*[166]: BDR Pharmaceuticals filed an application for a compulsory license for Bristol-Myers Squibb's patented cancer drug, Dasatinib (Sprycel). BDR Pharmaceuticals argued that the drug was not available to patients at an affordable price. The Controller of Patents rejected the application, stating that BDR Pharmaceuticals did not make sufficient efforts to obtain a voluntary license from Bristol-Myers Squibb. This case highlighted the importance of demonstrating efforts to obtain voluntary licenses before seeking compulsory licenses.

*Lee Pharma Ltd. v. AstraZeneca*[167] : Lee Pharma applied for a compulsory license for AstraZeneca's patented diabetes drug, Saxagliptin. Lee Pharma argued that the drug was not being made available to the public at a reasonably affordable price. The Controller of Patents rejected the application, stating that Lee Pharma did not establish a prima facie case for granting a compulsory license. This case highlighted the importance of providing strong justifications and evidence to support a compulsory license application.

It's important to note that compulsory licensing is a complex and contentious issue, and the specific application and interpretation of the provisions can vary depending on the circumstances. The use of compulsory licensing in the pharmaceutical industry is aimed at balancing the protection of patent rights with public health interests and ensuring access to affordable medicines.

**Compulsory Licensing- Gracious Messiah of masses**

Compulsory licensing can play a significant role in helping poor people by improving access to essential medicines. Here are some ways in which compulsory licensing can benefit the poor:

- *Affordable Medicines*: Compulsory licensing allows for the production of generic versions of patented drugs, which are generally more affordable than their branded counterparts. This helps lower-income individuals and marginalized communities access life-saving medications that they may otherwise be unable to afford.
- *Increased Competition*: By introducing competition into the market, compulsory licensing can drive down prices of patented medicines. When multiple manufacturers produce generic versions of a drug, it creates a competitive environment that can lead to further price reductions, benefiting poor patients who rely on these medicines.

[166] BDR Pharmaceuticals vs. Bristol-Myers Squibb CS(COMM) 27/2020
[167] Lee Pharma Ltd. v. AstraZeneca C. L. A. No. 1 of 2015.

- *Expanded Availability*: Compulsory licensing can expand the availability of essential medicines, ensuring a more significant supply to meet the needs of the population. This is particularly relevant in developing countries where access to healthcare infrastructure and medicine distribution networks may be limited. Increased availability can save lives and improve the overall health outcomes of poor individuals.
- *Public Health Emergencies*: During public health emergencies or crises, such as outbreaks or pandemics, compulsory licensing can be invoked to address urgent needs. It allows for the rapid production and distribution of medicines, vaccines, or medical technologies required to combat the health crisis, ensuring that poor populations have access to critical healthcare interventions in a timely manner.
- *Health System Strengthening*: Compulsory licensing can contribute to the strengthening of healthcare systems, particularly in resource-constrained settings. By facilitating access to affordable medicines, it helps governments allocate their healthcare budgets more effectively, enabling them to provide a broader range of essential services and treatments to underserved populations.

It is important to note that while compulsory licensing can positively impact access to medicines for the poor, it should be implemented judiciously and in line with legal frameworks and international agreements. Balancing the interests of patent holders and the public interest is crucial to maintain innovation incentives while ensuring affordable access to necessary medications for disadvantaged populations.

**Conclusion and Suggestions**

On the one hand, creators make a substantial contribution to the development of novel, improved treatments for the benefit of society. In contrast, generic drug companies benefit society by offering less expensive versions of name-brand drugs, which drives down drug costs and makes it simpler for individuals to access affordable treatments. Society benefits most from new and improved drugs as well as prompt access to generic drugs when the interests of these two parties are balanced. However, if one of the parties wins out, society will suffer since there won't be enough access to either innovative or cost-effective treatments. The effective promotion and protection of both generic competition and pharmaceutical innovation are so imperative.

Suggestions:

- Strengthen Regulatory Frameworks: Governments should establish robust regulatory frameworks that clearly define the circumstances and criteria for granting compulsory

licenses. This will ensure that the provision is used judiciously and in alignment with international agreements, such as the TRIPS Agreement.

- Prioritize Public Health Needs: When considering compulsory licensing, policymakers should prioritize public health needs, especially in cases where access to essential medicines is limited due to high prices or insufficient supply. Balancing patent rights with the urgent requirement for affordable and accessible medications should guide decision-making.
- Promote Collaboration and Voluntary Licensing: Encouraging voluntary licensing agreements between patent holders and generic manufacturers can be an effective alternative to compulsory licensing. Governments can facilitate negotiations and incentivize voluntary licenses to promote innovation and access simultaneously.
- Ensure Fair Compensation: When granting compulsory licenses, mechanisms for fair compensation should be established to address the concerns of patent holders. Determining reasonable royalty rates or other forms of compensation can help maintain a balanced approach that supports innovation incentives while addressing public health needs.
- Continued Monitoring and Evaluation: It is crucial to monitor the impact and effectiveness of compulsory licensing provisions in the pharmaceutical sector. Regular evaluation of the outcomes, including access to medicines, innovation, and market dynamics, can inform policy adjustments and ensure that the provision remains relevant and necessary.

By adopting these suggestions, governments can navigate the complex landscape of compulsory licensing in pharmaceuticals, recognizing its importance in promoting public health while upholding intellectual property rights and fostering innovation.

I P BULLETIN

Vol. 3 Issue 2 JULY-DEC 2022, pp. 87-98

# Intellectual Property Rights (IPR): Driving Innovation, Growth, and Legal Protection in the Global Landscape

*Mihir Trivedi*[168] *& Bhaskar Dev*[169]

## ABSTRACT

*Through this article, I have tried to explain about the changing scenario of the world regarding intellectual property rights. How ideas are growing, how people are changing their mindset in all the fields what so ever we see around us. A person can't live a normal life without thinking something big. With that very big thinking come great ideas and innovations and motivation to think more and more. And create that thing which can help him to grow. And here arise something which is dangerous. Coping, duplication, Multiple ways are there in which people copy each other let the real person behind that idea be in vain, his ideas, his knowledge, his hard work, his creativity all wasted in a matter of time. In the recent times, we have seen penalty of cases where copyright infringement can be seen in all the field what so ever we know. Intellectual Property Rights are such right which protects the real person behind the curtain, does not let the creative thing die inside the person, and let him to continue his work and do something more great and nourish the society, economy of the country. Intellectual property refers to the legal rights that result from intellectual activity in the industrial, scientific, literary and artistic fields. These are the rights that are given to the owners of the ideas carved out of nature for him, by applying his skill and labour. Intellectual property is divided into two categories: Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. IPRs play a very important role in the development of individual and the society. IPR protect and encourages the creators for innovation and economic gain. It also leads to a healthy competition among creators and users, which ultimately leads to the progress of the society. The transfers of*

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*technology are important for developmental research. It is helpful in the solution to global challenges in the field of alternate energy resources, new products to the consumers and pharmaceutical development. The agriculture and biotechnology is the part and parcel of IPRs. The industries are interwoven with intellectual properties. It is necessary to stimulate economic growth and encourage fair trading, leads to employment, trade and commerce for economic and social development. The Union Cabinet has approved the National Intellectual Property Rights (IPR) Policy on 12th May, 2016 that shall lay the future roadmap for IPRs in India. The Policy recognises the abundance of creative and innovative energies that flows in India, and the need to tap into and channelize these energies towards a better and brighter future for all.*

**Keywords:** IPR Policy, Biotechnology, Infringement, Industrial Property, Innovation.

## Introduction

In the vast growing today's world, ideas can be copied anywhere, anytime, so there is a need to protect the ideas as far as we can. This is done in order to protect the individual interest of the artist or the make(s) of that piece of work. In this world where we are connected from each other with a single click; there are high chances that the things, ideas, etc. can be copied at a single click. In the past few years a massive growth has been seen in the newly creative ideas and over the years it has also been seen that how those are misused. The real person behind that curtain did not get the chance to show up their talent. Some or the other way the work done by the real owner gets destroyed. So there is a chance that the real work isn't paid off. And thus the term Intellectual Property Rights came into existence (IPR). The domain of IPR is very vast. IPR plays a pivotal role in fostering innovation, creativity, and economic development. By granting exclusive rights to creators and inventors, IPR incentivizes them to invest time, effort, and resources into research and development. This, in turn, leads to the generation of new ideas, products, and technologies, benefiting society as a whole. Moreover, IPR facilitates the transfer of knowledge and encourages collaboration through licensing and technology transfer agreements.

The digital age has presented unique challenges to the enforcement of IPR. With the widespread accessibility of digital content and ease of replication, protecting intellectual property has become increasingly complex. Online piracy, counterfeiting, and unauthorized distribution pose significant threats to creators and rights holders. Policymakers and stakeholders must adapt and develop robust mechanisms to address these challenges effectively.

**Types of Intellectual property**

Intellectual property can be divided into two major types:

1. Industrial Property which includes patents, trademark, designs, logo etc. and,
2. Copyright which includes the hard work of the artist, musical artist, author etc.

**1. Industrial Property:**

1. Inventions (Patents) - Patent is a term that is used to protect the exclusive right of ownership of the new invention created by the inventor with a very new ideas and skills he/she has. These can also be sold to another person in exchange for the consideration. Patent also means exclusive monopoly rights over a product for a limited period of time. In India, Patents is guided by The Patents Act, 1970 and is protected by law of IPR. This is done because, there must not be any misuse of the work done/invented.
2. Trademark- Recognising a thing by a unique things present on that thing is called trademark. Some of them are: font (through which the specific thing is written), pictorial representation etc. For example: Parle-G Biscuits can be clearly recognized by that small girl on the packet of the biscuit, similarly Patanjali Products can be identified by the word 'PATANJALI' written over their products.
3. Industrial design – Industrial design refers to the design of something that is the origin of human creativity, skill, labour, and hard work. Or in layman language it can also be said as an ornamental aspect of an article. An industrial design may consist of 3-d features such as: shape of an article or 2-d features such as: colour, lines or shapes. In some countries, industrial designs are protected under patent law as "design patents".
4. Geographical Indication- A geographical indication is given to that very product which has gained his name/fame from the place it has originated, the use of geographical indication may act as a certification that the product possesses certain qualities which is made by different traditional methods, and enjoy a certain reputation. Ex- A potato variety 'La Bonnette' which is grown on a mere 50 sq. meter sandy soil, with natural fertilizers in a province of France. Now the farmers who grow those potatoes are known by their land and area. This is because the potato grows only on that soil, so GI tag is used to protect the potato from any duplication, and the potatoes are well known from that area.
5. Trade Secrets: Trade secrets encompass confidential and proprietary business information that provides a competitive advantage. Unlike other forms of intellectual property, trade secrets are not registered but are kept secret through reasonable efforts.

Examples of trade secrets include manufacturing processes, formulas, customer lists, marketing strategies, and technical know-how. Trade secret protection relies on maintaining confidentiality, and unauthorized acquisition or use of trade secrets is considered an unlawful practice.

**2. Copyright:**

Copyright basically means that you have the full right over the product, thing, or the ideas or anything. Nobody without your permission can reproduce, sell, or do anything without your permission. Copyright plays a crucial rule in fostering creativity and encouraging the production of new works by providing legal protection and economic incentive to the creator of the work.

The evolution of copyright can be traced in three steps:

1. Primary Stage- Copyright basically came in India with the emergence of British East India Company in 1874. They firstly introduced the Indians with the term 'Copyright'. According to their laws they stated that "lifetime of the author plus seven years after his/her death, and in no circumstances the term can't be extended more than 42 years."
2. Secondary Stage- Later in 1914, with the help of UK Copyright Act of 1911, the British formulated Copyright Act of 1914. However the two acts are formed on similar lines, but there was a major difference that in the Copyright Act of 1914 there was provision for laying criminal sanctions against the wrongdoer of the act.
3. Tertiary stage – In this stage, with India gaining independence, the Copyright Legislation of 1957 was formed, which gained its importance from the Berne Convention. But with the passage of time the real senescence of the act remained the same. Moreover, only changes were done in the charges levied as penalty on the person who didn't followed the law.

Following are the Intellectual Properties Protected under Copyrights:

1. Literally Works- All kinds of work done under the umbrella of literature come under the heading of Literally Works. For Ex- novels, articles, research work, poems, essay, etc. comes under the head of Literally Works. And such works are protected by the laws of copyright.
2. Musical Works- Sometimes the people who are connected with the music and their creations get their work copyright so that their work doesn't get copied, reproduced without their prior permission. Examples of such works are the graphical notations and the lines used in the music industry.

3. Dramatic Works- In the dramatic industry new ideas comes up every second in the minds of producers. Hence they transform those immediately to the script. So the things like script, costume designs, the way of dialogue delivery, and various other things are also protected by the way of copyright.
4. Artistic works: Paintings, sculptures, drawings, engravings, architectural designs are covered under this category.
5. Cinematography: Films, that is, audio-visual representations come under this category, regardless of duration of quality. Nowadays the young generation people are much interested in making videos of different types. So that part is also covered in the subheading of copyright.

Intellectual Property Rights have benefited millions of people throughout the globe. Now the people are know that their hard work is also protected. No one can copy, duplicate, and reproduce it without the permission of the sole owner. IPR is territorial in nature which means it can be limited to one country or a part of the country. This creates a problematic situation in the global era of today. Therefore not only in the source country but IPR needs to be protected in the other countries as well. Ex- MNC works globally, so if they do something new there are high chance of duplication, so in the global era where thing can be copied a single click or in a matter of time, it is necessary for them to protected beyond their territorial area also.

**Important Conventions governing IPR**

In the recent years intellectual rights are framing an important part in today's world. Nowadays IP rights are performing a major role in Public international law. Following are the conventions that form the substantive part of IPR in PIL. These are the following:

1. **The Paris Convention of 1883**

   This convention was an eye-opening convention for all the countries around the globe and trailblazer in the field of international protection of IPR. This convention was signed by the 177 countries around the globe. It was signed on 20 March 1883, at Paris, France. The Convention has the following silent features:

   a. Doctrine of National Treatment- Each and every country who signed the convention will have to protect the intellectual property right of their citizens as well as the citizens of other countries, who signed the convention in the same manner in which the country protect their citizen IP rights. (article 2 and 3)
   b. Union priority right: If a person files an IPR application in a country after filing it in some other country, the effective date of filing it will be the date of application

in first country; for both countries. Provided that the gap should be within 1 year for utility models and within 6 months for trademarks and industrial designs (article 4).

c. Temporary protection: Items (eligible for IPR protection) displayed at recognized international exhibitions should be granted temporary IPR protection in respective territories (article 11).

d. Mutual Independence- Countries that are party to the convention are mutually independent when it comes to IPR registration in their respective jurisdictions. Countries need not follow IP laws of any other country while processing requests of foreign origin (articles 4 & 6).

2. **Berne Convention (1886) -** Berne Convention was a landmark convention on IPR which was done to protect the Artistic Works created by the peoples around the globe. The Convention also has 177 members in and it got it approval on 9 September 1886 at Berne, Switzerland. In this convention the countries were taught how actually to protect the individual interest of the creator of the work across the globe. It established that a copyright is in place as soon as a creator finishes her work.
3. **TRIPS-** Trade Related Aspects of International Law Agreement (TRIPS) which came into existence on 1st January, 1995 addresses the difficulty faced by the Paris and Berne Conventions. In some way or the other this agreement gave the member of WTO (World Trade Organisation) to follow up the standard of protection provided by BERNE and PARIS Convention.
4. **Madrid Convention**- In the growing today's world when each and every thing can be done by the way of internet, The Madrid Convention allowed the users for a single and inexpensive way of international trademark registration. This process eliminated the need of filing, prosecuting, or maintaining separate registration in several countries.

With the passage of time, many a things have changed. Now the people need not to worry about their ideas, creative work. They are very much protected by the way of copyright.

Time change and the way of earning also changed. Now the Intellectual Property can be commercialized. These are majorly the new forms of earning. In the recent times commercialization in IP sector has made profitable many people. Some of the major practice which is followed are Licensing and Technology transfer, Patent pooling.

1. Licensing and Technology transfer- Technology transfer or T2 helps negotiate the use sharing and assigning of IP; so that companies and individuals can use government

technology or joint project between the government and the private sector can take place. T2 can make it easy to licence a patent or share confidential information, so both the parties can help each other solve problems or create a new products.

For ex- A person named 'A' invented a formula through which automobiles can run without fuel. Now at a glance he can't apply that to any vehicle because of lack of money with him. So, by the way of technology transfer 'A' will contact the company who is interested in such works, and sells him the formula. Now each and every time when the company sold the product made with A's idea, 'A' will earn money out of it. Licensing provides a great opportunity for the inventor as well as the exploiter; the inventor can earn royalties while the exploiter can generate handsome revenue by using the technology. With the passage of time each and every thing develops its own advantages and disadvantages. Some of them are enumerated below:

Advantages:

1. License as a contract: License bestows contractual obligation on the parties. Henceforth, there is no need for formal registration process unlike registration requirement in some forms of intellectual property.
2. Research and development: One of the greatest advantages of IP licensing is that it saves huge amount of money which otherwise would be invested in the process of research and development.
3. Commercialisation of technology: Bringing all the works on the same platform by the way of technology transfer and licencing brings grater revenue to the owner of the business and the real person who helped to do so, i.e. - the real work is paid off.

Disadvantages:

1. Risk of third-party intervention: As far as the drawbacks of licensing are concerned, the licensor may lose his control over his technology by way of unwanted third-party intervention, who may exploit his technology through piracy.
2. Licensed IP turning obsolete: Another drawback of licensing is associated with the risk of licensed intellectual property turning redundant. In simpler terms, the licensed technology loses its significance as other technology develops, thereby rendering the licensed IP redundant.

**Issue of ownership over intellectual property?**

Now, the answer to this question is based on the premise that whether the license rendered is exclusive in nature. The authority over intellectual property shall vest with licensee. In cases where licensee has a right to deal with the technology, with an exception of licensor, the authority shall vest with both of them. However, if Intellectual Property rights over the technology has been granted to others in addition to licensee, then the authority shall extend to those few as well (e.g.: sub-licensing).

Patent Pooling- Patent pooling involves a collaboration approach where multiple patent owner pool their patients together to create a portfolio of complementary or related technology. This facilitates cross licencing between the participating entities, enabling them to collectively licence their patents to other and share the licencing revenue. In a layman's language we can say that, Patent Pooling is a means by which the national and international companies use the ideas of different which include some expenses related to R&D. The latest emerging companies like the companies of radios, semiconductors, airplanes, audio and video etc. uses patent pooling to reduce their cost which is going to be incurred on the research and development field.

Human capital development is vital for individuals, organizations, and societies as a whole. By investing in people knowledge, skills, and well-being, countries can enhance their competitiveness, drive innovation, reduce poverty, and promote sustainable development.

But in recent years, it has been seen that by some way or the other something is going wrong with the system of Intellectual Property Rights. Even after somebody has claimed the copyright of something, there is no action being taken. This gives more freedom to the people to misuse someone's hard earned work. But the Government with the help of different organisation has now established a system in which all the things are done in a smooth way. And the creator has now no more to be worried.

In the recent era, we saw the emergence of many of the redressal units which help the real person beside the hard work to be cared off. Some of the major things are:

1. Tribunals- Around the world, almost all the countries have now framed a tribunal with the experts who look around to the laws related to Intellectual property and provides an expert solution for it. They contains members who are well specialised and provide a better resolution than the regular courts. Sometimes, Tribunals may have dispute over

all the Intellectual Property Rights such as patents infringement, copyrights violations, and all the other matters related to the Intellectual Property.

2. Special Courts- In addition to the tribunals, we have special courts which monitor all the cases related to the Intellectual Property Disputes. The judges in this court have specialised knowledge in the IP Laws, ensuring efficient and effective functioning of the law at an international level and national level. These courts are present in both National Level and International Level.
3. Mediation-Mediation is a method by which some other person, who has a complete knowledge of the subject matter, comes and solves the problem. He is often called a mediator. This is a very flexible process in which the resolution is done outside at some place. Mediation provides a better resolution in comparison of the court procedures. Resolution taken here are too fast which help in speedy recovery of the individual interest too.
4. Alternative Dispute Resolution (ADR) - In this process a wide range of option is provided to the people apart from the traditional method. The new methods such as arbitration and negotiation provide a quick and safer as well as affordable solution to the peoples. Arbitration is a formal process by which the arbitrator hears the argument of both the parties and provides a fair judgement. This method of resolution provides a quick and cost effective solution to the peoples.

These redressal mechanisms complement the regular court and offer effective means of resolving Intellectual Property Disputes. The choice of the mechanism depends on the nature and complexity of the case, preferences of the parties involved, and the legal frame work or jurisdiction. Also it is important to the peoples to be aware of these options and seek legal advice at time to time whenever intellectual property disputes arises. Peoples must be aware of the remedies available to them if they get into such a problem. Time to time there are various seminars conducted to train the peoples about their rights and responsibility towards the advantages of their IP rights.

So the reimbursement of Intellectual Property Rights has started very early. But with the beginning of revolution, there comes various types of problem with it. Some or the other has done something wrong to infringement the rights of the other person or companies. History has been a best example for this.

Let's discuss some of the major case laws in the field of Intellectual Property Rights and see how others rights have been infringed.

Major Case Laws:

1. Novartis V/s Union of India

   Facts: Novartis is the largest pharmaceutical company in the field of medicines and drugs. The company filed a patent for anti-cancer drug (GLIVEC 400 mg). This drug is used for the treatment of CHRONIC MYELOID LEUKAEMIA & GASTROINTESTINAL STROMALTUMOURS. This drug is invented from beta-cristriline in the form of Imatinib Mesylate.

   The Indian Patents office rejected the application for the patent stating the reason that the drug is not BEING NOVEL under section 3(d) of the Patents Act, 1951. The return application also stated that the drug did not make any change in the therapeutic efficacy over its pre-existing form that is Zimmermann Patent.

   Novartis then filed two writ petitions in Madras High Court, one against the order passed by the Patent Office and the second writ petition was filed for Sec. 3 (d) of the patents act which violated Article 14 of the Indian Constitution.

   Madras high court transferred the case to IPAB. IPAB dismissed the appeal by stating patentability of the drug GLIVEC which was violating the Section 3(d) of the Patent Act, 1950. Afterwards, NOVARTIS filed a special leave petition in 2009.

   Held: Supreme Court rejected the appeal and decided to rule efficacy as the therapeutic t because the subject matter of the Patent is compound of the medicinal value. The key observation is the judgement given by honourable court is to prevent the evergreening of the patented product and this gives immense help to those individuals who can't bear the cost of the lifesaving drugs produced by the pharmaceutical company. The court made it clear that through the case that the Patent Act should contain a clear indication that the food and medicines and other curative devices were to be made available to public at the cheapest price with giving reasonable compensation to the Patentee.

2. Natco V/s Bayer

   This was the first landmark case of compulsory licensing in India, obtained in the pharmaceutical field. In this case NATCO, a generic drug manufacturing company

requested BAYER for giving it a voluntary licencing for drug "SORAFENAT" branding as "NEXAVAR 200mg".

The request was denied. Therefore NATCO filed an application before the controller of patents for grant of compulsory licencing. After hearing claims from both the parties, NATCO finally receives the licence from the Drug Controller General of India for manufacturing the drug. The controller of the patents analyzes 3 requisite for granting compulsory licencing:

a. Cost of NEXAVAR 200 mg was Rs. 280000 per patient per month which was provided by NATCO at Rs. 8800 per person per month.

b. The second observation was made that there was a requirement of 23000 medicines bottle and only 200 were supplied every month.

c. The controller also pointed that the invention was not worth in India.

Copyright are the basic element that helps the creator to get motivated ahead, and showcase his talent again to the society and to motivate others also that the work which he/she will so will not be duplicated, misused, etc. His work will be protected and if anyone does so then, many laws are there now and the wrongdoer will be punished. In recent years, we have seen that in India many chairs related to Intellectual Property Rights have been given to various institutions to realm to the success of IPR. Also people are now aware of the fact that how they can use the copyright, what the ways to do so are. Also by the virtue of Government of India the filing of patent/copyright or anything related to IPR has been made very easy and the process has been completely free. Anyone can access that from anywhere, anytime without any restriction. The process of filing of IPR has been made very simple.

Firstly, the person who need to get the right need to file an application online and,

Secondly, the person needs to wait for 45 days for his application to be accepted or rejected by the Patent Office where he filed the application.

If His application is considered to be of his own then he will be given the patent/copyright or what so ever he demands and if there is duplication he will not be given the Patent or the Copyright over that very product or the things which he has made or created. These rights can be obtained by anyone whether it is institution or a firm or a private individual.

Copyrights can be infringed anytime, anywhere. Be it the place of online sites or even we are working in offline stores or making a video. These all thing comes under the venue of copyright and violation of Intellectual Property Rights.

**Conclusion**

In a conclusion I must say that Protection of Intellectual Property has now become mandatory and each and every person must abide by the laws of Intellectual Properties. This will help the world to grow new talents and creative minds even from a small town. In some way or the other this protection will help to change the society and boost the economy of the countries. By the way of Protection artist's hard-work will be saved and will motivate him to work more and more because there is someone standing before to safeguard, if their IPR are infringed.

I P BULLETIN

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# Traditional Medicine And Drug Development: India's Golden Rose

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**ABSTARCT**

*The authors have discussed in detail the above-mentioned topic in five parts. In the first Part the authors have discussed the brief outlook for the existence of Intellectual Property Rights in the pharmaceutical sector and drug patents. Further how pharmaceutical products are protected by utilizing Intellectual Property Rights. In the second part the authors focus his intention to describe the Traditional Knowledge and how the indigenous communities are transferring from generation to generation and is relevant for various treatments. It is imperative to protect this traditional knowledge as it is under serious threat today from the callous neglect visible in various policies. In the third part the authors have given a detailed outline about the Traditional Medicines and how it is the golden rose of India and thus need protection for its development. These various medicinal plants are used for pharmacological targets including cancer, AIDS/HIV, Malaria, and Pain. Opium and Turmeric are plant based and thus used for various other treatments also. In the fourth part the authors present the Indian Traditional Medicine System and its worth as India is the oldest as well as largest tradition of system of medicines. The Indian Traditional Medicine system includes Ayurveda, Sidha, Unani, Homoeopathy, Yoga and Naturopathy. The law also define manufacturing of Ayurveda, Sidha and Unani medicines. In the fifth part the authors give the conclusion and suggestions for the Traditional Medicines and Drug Development.*

**Keywords:** Intellectual Property Rights, Patent, Traditional Knowledge, Traditional Medicines, Drug Manufacturing.

## Introduction

The creation and inventions which are being created or invented and protected through legal rights are known as Intellectual Property Rights. Intellectual Property also plays a vital role in

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the modern economy. Traditional Knowledge includes the indigenous heritage and customary heritage rights and also deals with the indigenous cultural and intellectual property as per the World Intellectual Property Organization (WIPO).[172] It enables people to earn many financial benefits from their creation and invention. These rights are divided into following categories:

1. Copyrights and their rights
2. Industrial Property

Examples of Intellectual Property Rights are Patents, Trademarks, Copyrights, etc. IPR is one of the vital rights in the pharmaceutical industry. The object of every pharmaceutical industry is to discover the drugs to treat the medical diseases. Drug is discovered by spending the huge amount of money on the research and development.

In the Pharmaceutical Industry, Intellectual Property Rights helps the industry to protect their drug discovery. At the same time IPR also promote the healthy competition between the pharmaceutical industries which has proven to be beneficial for the economy. Patents protects the discovered drugs and bans the other pharmaceutical corporations from manufacturing and selling the same for the time period of 20 years. Patent medicines mainly includes the alcohol and the drugs like opium.[173] It is necessary to mention that the patent medicines are trade-marked in order to keep the secrecy for the formulas of medicine. In the 10th century the opium poppy was first cultivated in India by the native merchants. IPR allows to take the strict action against the pharmaceutical companies who manufacture or sale the counterfeit drugs. Indian Patent Act, 1970 authorizes the Central Government to issue the compulsory license after the grant of the patents.

**Traditional Knowledge**

The indigenous and various local communities has contributed in the development of traditional knowledge. These knowledge are developed through local environment and further transmitted from generation to generation for the need based therapy. These knowledge changes with the changing environment. A category of TK includes the knowledge for agriculture, knowledge about bio-diversity, knowledge about ecology, knowledge about medicine, scientific information and technical knowledge.[174] As now the traditional knowledge is under serious risk and many national and international policies are neglecting the traditional knowledge, so it is essential to protect the same. These traditional knowledge require protection

[172] WIPO: "Intellectual Property Needs & Expectation of Traditional Knowledge Holders" *available at* www.latestlaws.com (last visited on July 10 2023).
[173] Charles Fletcher: The Centaur Company and Proprietary Medicine Revenue Stamps.
[174] World Intellectual Property Organization Report "Finding Missions on Intellectual Property & Traditional Knowledge" (last visited on July 10 2023).

in order to preserve the traditional practices and promotion of its uses so that the local cannot be burden with higher costs. The most of the local communities use these knowledge for healing in daily life and to overcome their nutrition needs. These knowledge of tradition are mostly used in field like agricultural, botanic, biotechnology, research about genes and pharmaceutical.

A patent entails for granting of the domination to the creator who have applied his acquaintance and the abilities for creating an innovative procedure or product that can be employed in the industrial setting. There are specific clauses in the TRIPS Agreement that only apply to the protection of Traditional Knowledge.

**Traditional Medicines: India's Golden Rose**

Generally 75 percent of the 120 active chemicals now extracted from higher plants that are currently utilized in medicine exhibit and thus showing a positive correlation between traditional knowledge of their use and their therapeutic use.[175]

1. **The Neem Patent:** The biological name of Neem patent is Azadirachta indica. It is also known as "sarva-roga nivarini" and "curer of all ailments" particularly in India, and known as the "wonder tree" in English, which means that the West has discovered the medicinal usage.[176]

   A Florida-based agricultural chemical firm was given a patent for the neem tree. A version that can be stored easily was made using the active component, and later on it was isolated. Both the process for making a stabilized azadirachtin in solution and the solution itself are covered by a patent that belongs to the company. As soon as possible, farms started using this solution as a pesticide.[177]

   On the surface, the invention appears to be new and original based on consideration of the patentability laws and adhering to the thought of "products of nature". United States also follows the same perception. According to US patent regulations, the entire process of separating and purifying the material, satisfy the criteria for the innovative and inventive step. According to Section 102 of United States Patent Act, preceding foreign use can only render a U.S. patent ineligible if it is fixed in a tangible, readily accessible from, such as by a description in a printed publication, or in a document related to either the applicant's own foreign patent or the foreign patent of another person.[178]

[175] Gurdial Singh Nijjar, "*TRIPS and Biodiversity, The Threat and responses*" (A third world view)
[176] es.scribd.com: Visited on July 10 2023
[177] *Ibid.*
[178] US Patent Law, s.102

Since centuries, India has used a mythical tree as a bio pesticide and medicinal.[179] As early as 5000 BC, Indian Ayurvedic scriptures described the Neem tree and its healing benefits.[180] Patent number 436257 has been revoked by the European patent office (EPO) and has given to the W.R. Grace, the multinational corporation and to the United States of America. Recently, emulsions and solutions based on Neem have been excluded from the 12 US patents.

2. **The Turmeric Patent:** The patent right was approved to heal the wound by administering the turmeric in 1993. This patent right was granted to the University of Mississippi Medical Center by US PTO. Since many years, the turmeric has shown several benefits in India. By drying the tuber, turmeric grows up. Indians are very much aware about its practical usage.[181] After re-examination proceedings in the Court, the patent was cancelled in 1998.[182]
3. **The Basmati Rice Patent:** In Sept. 1997, the US Patent office granted patent to "Rice Tec" for the Basmati rice and Aromatic rice. These rice are mostly grown in the parts of India and Pakistan.[183] Indian Government was actively pursuing the case and the final decision was given on August 14, 2001, where the title was changed from Basmati Rice and Grains to Rice Lines Bas 867, RT 117 and T 121. As per the South Asia Commission on Economic and Social Policy, "Rice Tec's patent also violated the CBD in not recognizing the sovereign rights of India and Pakistan over Basmati Rice."

After signing the TRIPS Agreement, India can made the transitional agreements through an amendment to the Patent Act. Second amendment was done in year 2000 and the duration of drug patents was extended and also certain new matters was added and even introduced the compulsory license. Then under the third amendment the product patents were introduced and also the fee structure and procedure was changed for the Indian Pharmaceutical Companies.[184] The TRIPS Agreement was came into effect on January 1, 1995. Drug Patents are categorized into following types:

1. Process Patent: It is a type of patent by which the process of manufacture of drug could be patented, but not the discovered drug. Thus the other competitors uses the different

[179] Shiva Vandana, "*Indigenous Knowledge and IPRs Biopiracy 69*" (The Plunder of Nature and Knowledge, South End Press, Boston)
[180] About Neem *available at* https://www.neem.com (last visited on July 10 2023)
[181] Walker and Simon "*The TRIPS Agreement, Sustainable Development and the Public Interest 36*"(INCU Law and Policy)
[182] Gollin, Michael, "*New Rules for Natural Products 921-922*" (Sep. 1999)
[183] Devraj and Ranjit, "*US Corporate Biopirates Still Staking Claim on Basmati Rice*", (Common Dreams, New Delhi)
[184] Drug Patents in India, *available at* https://vakilsearch.com (last visited on July 10 2023).

methods to manufacture the discovered drug which ultimately leads to the copies and the generic medications.

2. Product Patent: It is a type of patent where the actual discovered drug got patented in India and thus prevent the other pharmaceutical corporations from manufacturing the discovered drugs. This type of patent ensures that the competitors could not make the same drug and thus the pharmaceutical corporation could gain the monopoly over the shares of market for the drug specialized by them.

But in India, it can be categorized into the Non-Patented Drugs and Patented Drugs only. Non-Patented Drugs means when any pharmaceutical corporation can continue to manufacture and supply the drug to the both export and domestic market. Whereas, the Patented Drug means the Manufacture and Supply of such drugs can be possible by the compulsory license. A compulsory license is granted to the party by the administrative body, so as not to exploit an intervention without any authorization of the patent's holder.[185] The main object behind the issuance of compulsory license is to promote the research and for the development of new drugs and in India it is also subjected to the payment of the reasonable royalty. By the Compulsory license the licensee is allowed to produce the generic copy of the discovered drug and the drug which are available in the local market on low price as compare to that of the competitor on the conditions.[186] These various medicinal plants are used for pharmacological targets including cancer, AIDS/HIV, Malaria, and Pain. Opium and Turmeric are plant based and thus used for various other treatments also. Opium is said to be one of the oldest herbal medicine which is currently used for the analgesic, antidiarrheal and sedative treatments. The Opium and its derivatives are the medications commonly used in acute and chronic pain.

As such in Covid-19 Pandemic, there was the urgent demand for the vaccines and medicines in India. Then the compulsory license of covid vaccines and covid drugs was seemed to be appeared as a bonus for the fulfillment of shortage of supplying the drugs and vaccines. For the faster production of the vaccines in India, the govt. may also force the makers of vaccine to share their intellectual property with other companies. Private sector are more threatened and doesn't want to indulge in the prolonged litigation by other multinational companies. So, Compulsory license are now used by the private sector. On dated 27.05.2021, in a press statement, the NITI Aayog clearly mentioned that there should be no compulsory license for

[185] Pharmaceutical industry and patents in India *available at* www.blog.ipleaders.in (last visited on July 10 2023).
[186] Ibid

the vaccines and drugs of Covid-19[187]. Many countries like South Africa and India have stated in the WTO Resolution that whether the patent rights may be suspended not only for the vaccines but also for the medicines and other necessary equipment.

**Indian Traditional Medicines System and Its Worth**

India medicine system is one of the oldest as well as largest traditions. It cover the aspect of all systems which are invented in India and also which are adopted by India from outside. Traditional Indian schemes of medicine include Ayurveda, Siddha and Unani, homeopathy, yoga and naturopathy. Now these are adopted by Indian culture and traditions. India has having the strong traditional medicinal plant knowledge and are having the high plant biodiversity and thus forming one of the greatest potential in this area. There has been a burst in the area of herbal medicine in the recent decades. It has become common in developing and developed countries due to its natural origin and few side effects.[188] Arya Vaidya Shala, Dabur, Himalaya and Shree Baidyanath are the well-known industries and the annual turnover is of more than 50 crores.

Now, the several problems has emerged by the existing Intellectual Property Laws and the existing frameworks. It also need one of the strong measure for protecting the biopiracy. The biopiracy should be protected at national and international level. Presently, there is no legislation which protects the traditional knowledge in India. Thus, following legal protection has been accorded in India to the traditional knowledge:-

1. The Indian Patent Laws and Amendment Act of 2005, which makes it essential to disclose the origin and country of the biological material used in an invention when applying for a patent and permits the patenting of medicinal compounds.
2. The Indian Biodiversity Act 2002 regarding the benefit sharing and it also follows the guidelines of Convention for Biological Diversity.
3. The central authority named “National Biodiversity Authority” has been established by India to keep an eye on and manage foreign access to Indian biological resources, such as traditional medicine.
4. Creation of the "Traditional Knowledge Digital Library" (TKDL), a database that will establish the prior art to prevent Indian knowledge from being patented. NISCAIR, a CSIR Laboratory, has been given responsibility for this mission.

In the past, vaidyas has been used to treat the patients and the drugs are prepared according to

[187] The Indian Dilemma on Compulsory Licensing of the Covid-19 vaccines *available at* https://www.mondaq.com (last visited on July 10 2023).
[188]Indian Traditional Medicines *available at* www.nistads.res.in (last visited on July 10, 2023).

the patients requirements. Now the herbal medicines are manufactured in mechanical units, where the manufactures have come across most of the issues such as accessibility of quality raw materials, authenticity of raw materials, accessibility of standards, appropriate standardization method of individual drugs and dosage forms, and control parameters, etc.

Ayurvedic, Siddha, or Unani drugs are defined in Section 3(a) of the Drugs & Cosmetics Act of 1940. All medications intended for internal or external use for or in the diagnosis, treatment, mitigation, or prevention of disease or disorder in humans or animals and manufactured exclusively in accordance with the formulae described in the authoritative books of Ayurvedic, Siddha, and Unani Tibb systems of medicine, as well as those listed in the First Schedule, are considered Ayurvedic, Siddha, or Unani drugs.[189]. Chapter IVA of Drugs & Cosmetics Act, 1940 is related to the provisions of Ayurvedic, Siddha or Unani Drug[190].

Schedule T of Drugs & Cosmetics Act, 1940[191] deals with the Ayurvedic, Siddha, or Unani medicines should be manufactured using good practices. It states that the following Good Manufacturing Practices (GMP) are required in Parts I and II:

(i) The raw materials used to make medications are real, of the required quality, and free of contamination.

(ii) The production procedure follows the guidelines established to uphold the requirements.

(iii) Sufficient quality control procedures are implemented.

(iv) The manufactured medicine that has been made available for purchase is of a respectable caliber.

(v) In order to fulfill the aforementioned goals, each licensee must develop methods and guidelines for adhering to the required medication manufacturing process. These guidelines should be written down in a manual and maintained on hand for inspection and reference.[192]

Vaidyas, Siddhas and Hakeems registered under the IMCC Act, 1970 who prepare their own medicines for distribution to their patients and do not sell such medicines in the market are G.M.P.

**Conclusion & Suggestion**

The currently prepared regulatory system does not cover all issues as the country is still at the

[189] The Drugs and Cosmetics Act, 1940, s. 3(a)
[190] Substituted by The Act 68 of 1982
[191] Substituted vide GSR 560(E) dt. 7-3-2003 w.e.f. 7-3-2003
[192]Good Manufacturing Process *available at* www.fdaharyana.org (last visited on July 10, 2023).

stage of developing a strict formulation. The gaps in the laws based on the traditional knowledge needs to be filled up and new laws should be enforced to become one of the major player and well poised.

There are various suggestions that can be advanced in India to grant the protection to knowledge, innovation and practices of traditional medicines and rights dealing with the Intellectual property. It can be following:

1. Documentation of Traditional Knowledge
2. Registration of patent system
3. Innovation of patent system
4. Sui generic system development

It is generally believed that proper documentation of traditional information can help control biopiracy because once the information is documented, it is easily accessible to patent examiners, thus the prior art of inventions based on such material and information is readily available to them. It is also believed that such documentation will make it easier to find indigenous tribes with whom to share the rewards of such knowledge's commercialization. The creation of an international portal for traditional knowledge could make it easier for patent officials and relent judicial authorities to access these databases. It can also electronically connect traditional knowledge based on data.

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# Navigating the Copyright Landscape in Cinematography, Performers' Rights, and Music: Challenges and Solutions

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## ABSTRACT

*Performers' rights under the Copyright Regime are especially important in the digital age. Actors, musicians, dancers, and other performers bring their special talents and skills to the production and distribution of artistic works. It has gotten simpler to copy, disseminate, and manipulate performances as a result of the broad availability of digital tools. The fields of copyright, cinematography, performers' rights, and music face numerous difficulties as a result of the quick development of technology and the spread of digital platforms. The rights of the performer assist shield them from internet piracy, unlawful use, and other forms of infringement. They give performers the chance to profit financially from their creative endeavours by providing legal tools to stop the unauthorized copying and dissemination of performances. A group of legal safeguards known as "performer's rights" are given to performers in order to value and preserve their contributions. These legal protections are a crucial component of the copyright system because they guarantee that performers have control over their performances and are fairly compensated for their contributions. This academic paper explores the complex interactions between the various challenges faced in different fields in the digital age. It looks at how copyright protection is changing, how digital platforms are affecting cinematography, how performer rights and pay are changing, and the complicated problems with music licensing and distribution. This article examines the difficulties encountered in various fields in an effort to highlight the technological, economic, and legal ramifications and offer suggestions for potential remedies.*

**Keywords:** Copyright, Cinematography, Performers' Rights, Digital Platforms, Digital Distribution.

## Introduction

Globalization and technical advancements have significantly changed the realm of creative

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expression. The merger of music, performers' rights, and filmmaking has resulted in a huge change in the creative industries, which has generated a complicated web of legal complexity and issues in the copyright environment. The complicated relationships between creative contributors in film productions, the legal complications of joint authorship, and the determination of copyright ownership are some of the challenges that are being addressed by the legal frameworks that are emerging. New problems with intellectual property protection, piracy, and illegal distribution have been brought about by the advent of digital platforms and online content distribution.

Music holds a prominent position within the broader framework of copyright convergence due to its profound capacity to arouse emotions and enhance visual storytelling. Navigating the complex ecosystem of rights spanning authorship, performance, synchronization, and licensing is crucial for musicians, composers, and music producers. This research paper aims to examine the global variances in copyright laws, treaties, and agreements that influence the relationships between cinematography, performers' rights, and music, aiming to gain a thorough understanding of the current copyright landscape. By examining case studies from various jurisdictions, the paper aims to discover difficulties and novel solutions from various legal frameworks and improve the overall copyright landscape.

**Cinematography Copyright:**

The Indian Copyright Act of 1957 provides protection for cinematograph films as a type of creative work. A cinematograph, a device that rapidly displays a series of images to give the impression of motion on a screen, is used to make a specific type of motion picture known as a cinematograph film. According to Section 2(d) (v) of the Copyright Act, the producer of a cinematograph film is regarded as the work's creator.

Even though many individuals collaborate to create a movie, including the director, actors, soundtrack composer, and scriptwriter, only the producer is acknowledged by copyright law as the film's sole inventor and owner. Recently, this preference in copyright law for producers has been called into doubt. Producers and other contributors, such as scriptwriters and musical composers, have argued over the rights to the storyline and music utilized in the film.[195]

The script, which is classified as a literary work and has its own copyright, is one of numerous

[195] Belgium, Denmark, Germany, France, and Italy are among the nations that protect the creator of a film rather than the employer of the creator. Refer to Anne Moebes' article from 1992, Copyright Protection of Audio-Visual Works in the European Community, 15(2) Hastings Communication and Entertainment Law Journal, which discusses this topic in detail.

compositions in a film that is protected by copyright. Furthermore, specific copyright rules protect musical compositions. There have been incidents recently where film producers and screenwriters or musical composers disagreed about rights like remakes, dubbing rights, etc. Another problem is that copyright laws do not recognize film directors, which has led some to claim that both producers and directors should share authorship.[196] In order to provide a fair and sensible system for copyright management and income sharing and to safeguard the rights of people participating in audio and video recordings, the Copyright (Amendment) Act of 2012 was passed.

The Indian Performing Rights Society (IPRS) created its tariff structure for licensing musical works and lyrics for public performances in the 1977 lawsuit known as *IPRS v. Eastern India Motion Pictures Association*[197]. The film's producers contested the system, asserting that they were the real authors of the work and that the music and lyrics utilized in the production were not covered by copyright or other legal protections against public performance. They contended that they possessed legal ownership of the finished product because they had paid for these components to be used in their film.

Several creative brains, including directors, cinematographers, and editors, collaborate when developing a movie. When various people contributed to the final project, it might be difficult to determine copyright ownership and resolve potential problems. To establish copyright ownership and avoid disputes, clear contracts and agreements are necessary. Fair use is recognized by copyright law, which permits the restricted use of copyrighted content for things like commentary, criticism, or educational purposes. Fair use in the context of cinematography can be a tricky concept to define and frequently calls for legal interpretation. It is a hard issue to strike a balance between the rights of creators and the freedom of expression.

Rapid technological development has facilitated the copying, sharing, and accessibility of copyrighted content. The increase in online piracy is a serious threat to cinematography copyright since unlicensed copies can reduce a project's commercial viability and financial return. In the digital age, it is crucial to enforce copyright rules and look into cutting-edge protection strategies.

The copyright to the entire movie belongs to the producer; therefore, different authors don't each have their own separate copyright in a movie. The book or biography that served as the inspiration for the film, as well as the music, choreography, narrative, and other foundational

[196] Marley C. Nelson, Moral Rights in the United States, available at: https://library.osu.edu/site/copyright/2017/07/21/moral-rights-in-the-united-states

[197] 1977 AIR 1443, 1977 SCR (3) 206

works, may, however, be subject to independent copyright protection. But it wouldn't be possible without some of the important contributions made to the writing, directing, filming, editing, and other parts of the film. Many people believe that the director should be the exclusive owner of the copyright.

Alfred Hitchcock, one of the most significant individuals in film history, articulated this point of view. He claimed that the director is the genuine author of the work because a film is a reflection of the filmmaker's ideas and personality. He contends that when watching a film, a viewer might gain insight into their personal identity through the director's particular visual cues and recurrent motifs. For instance, viewers may easily recognize the filmmaker if they see one of Anurag Kashyap's movies because they all have a similar tone and subject matter.

The intimate details in the films directed by Quentin Tarantino, Sanjay Leela Bhansali, and Karan Johar also provide the audience with a glimpse into the personalities of the producers. The "Auteur Hypothesis," however, is still simply a theory, even though it was essential in starting conversations regarding a director's authorship in movies.

We must resort to precedents to comprehend the copyright in a cinematograph film, which is a legal fiction. The copyright of a filmmaker in a film was one of the first issues to be addressed in the case of *Sartaj Singh Pannu v. Gurbani Media*[198]. The case is *Kabir Chowdhry v. Sapna Bhavnani & Others (2021).*[199] Was it possible for anyone, regardless of their role, to assert ownership of a film's copyright?

1. The producer is the only audience for the author's work;
2. The author is the initial owner of the copyright;
3. The producer is the one who took the initiative and assumed responsibility for producing the work;

The court stressed the producers' "financial investment" and "risk of suffering losses" and pointed out that, even though the director is involved in every phase of filmmaking, the producer is the one who writes the script. According to the Court, which also noted the auteur's vision of the work, in order to bring the work into existence, a co-producer must have taken the initiative to conceptualize it, and there must be a risk element in the nature of their obligations.

The issue of whether a person receiving credit for writing or directing a film has the right to

[198] Ltd2015 SCC OnLine Del 9627

[199] 2021 Latest Caselaw 2765 Bom

assert original ownership of the script, screenplay, or dialogue in the absence of a written agreement was covered in the case of *S.J. Suryah v. S.S. Chakravarty & Anr. (2021)*[200]. In this case, the appellant's plaintiff failed to establish his copyright claim beyond a reasonable doubt. The producer cannot assert copyright by merely acknowledging an author's or filmmaker's creative contribution, the court ruled. Due to the fact that both the appellant and claimant insisted they had maintained their rights, the court used statutory standards to reject their request for an interim injunction against the producer.

**Performers' Rights: Balancing Artistic Expression and Legal Ownership**

Actors, singers, musicians, and dancers all participate in the creation of public performances. It has long been accepted that artists should receive a portion of the ownership rights to their recordings as well as a share of the revenue generated by its commercial use. This holds true for recordings of both audio and visual performances.

The first international acknowledgment of these so-called "neighboring rights" (rights associated with copyright) came from the Rome Convention of 1961. This agreement provided protection from unlawful broadcasts and recordings of their performances for actors and actresses working in audiovisual works such as feature films, videos, and television dramas.

The growth of the internet and sophisticated digital technology has considerably increased the possibilities for both legal and illegal copying, as well as the manipulation of digital performance. Today, Bollywood and Hollywood both rely heavily on foreign sales for their income. In 1996, WIPO adopted two new copyright agreements: the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT), which was revised for the internet era. A second attempt in 2000 likewise failed to reach consensus among the WIPO members on a comparable pact for actors in audiovisual works.

On August 23, 1969, the IPRS was founded. The only body permitted to provide licenses for the use of musical compositions and literary music in India is the IPRS. It is a nonprofit that advocates for the rights of music's creators, lyricists (or authors), and publishers. Writers and lyricists are also known as lyricists, music publishers as music firms, and composers as music directors. Music publishers also refer to those who possess the publishing rights to musical and literary works.

As a company limited by guarantee under the Companies Act of 1956, The Society is a nonprofit organization. Additionally, it is acknowledged as being the sole copyright society in the country authorized to provide licenses for the use of music under Section 33 of the

[200] OSA No.138 of 2021

Copyright Act of 1957. In other words, the IPRS is the only national copyright society in the country with the power to initiate and continue any action that is intended to be sung, spoken of, or performed in conjunction with music. The Registrar of Copyrights issued a Certificate of Registration for it on March 27, 1996.

Collective enforcement of copyright is the idea that the copyright in works is managed and protected by a society of the owners of such works. It goes without saying that no one who has the copyright to a work can keep track of all the uses that others make of it. Because of its organizational capacity and strength, a national copyright society is better able to monitor how a work is utilized across the country and collect the appropriate fees from users. Due to India's participation in international conventions, the copyright societies are permitted to enter into reciprocal agreements with organizations of a similar nature in other nations in order to collect royalties for the use of Indian works there. This inevitably implies that it will be in the interests of copyright owners to join a collective management organization in order to assure stronger copyright protection for their works and to realize the greatest possible financial rewards from their achievements. The collective administrative society makes it simple for users of various kinds of works to acquire licenses for the proper commercial exploitation of the works in question.

In the UK and India, organizations like the Performing Rights Society (PPS) and Phonographic Performance Ltd. for music deal with issues relating to performances. The Copyright Act of 1957, Section 33, provides for the creation of the copyright society, under which IPRS was created. The Companies Act of 1956 has granted permission for the limited liability company known as IPRS. It belongs to a nonprofit. The society is permitted to initiate and conduct copyright business in musical works and/or any words or actions intended to be sung, spoken, or performed with the music, as well as among the owners themselves, in accordance with the Copyright Act, 1957, s. 33(3). Thus, despite the difficulties it encountered, IPRS persisted in its fight for a better copyright environment.

In today's copyright industry in India, IPRS is a very active society. Contrary to the past, when it solely collected, distributed, and remitted worldwide royalties, it has recently begun to collect even for Indian music. Through ongoing communication with relevant industry organizations, IPRS has played a crucial role in defining who owns musical rights in India.

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*Broadcast v. Phonographic Performance*[201], the plaintiff, who had obtained licenses from various organizations, including the IPRS, was given permission to start an FM radio station. The defendant, a group that oversees the public performance rights of sound recording publishers, refused to reduce their excessively high rate. While submitting an application to the copyright board for a compulsory license, the plaintiff filed an action to request authorization to transmit sound recordings of the defendant at reasonable royalty rates. The Bombay High Court claims that the defendant's current quoted charge looks excessive. The defendant was mandated by the court to grant the plaintiff a license.

**Music Copyright: Harmonizing Melodies and Legalities**

A song's copyright is handled in accordance with the Act and Copyright Rules, 2013 (the "Rules"). A song has many different components. When the lyricist writes the song's lyrics, the song is finished as a whole. The song's composer then adds music to the lyrics. The song is sung by the vocalist. The vocalist may perform this song live, or a studio may record it. The song was recorded by the producer. A song typically represents the joint work of many people. However, if a single person writes, composes, and performs a song, then he or she may occasionally be the exclusive owner of the entire work.

Songs are not regarded as independent works of art. According to the Copyright Act, a song comprises various parts. The copyright for each component of the music is its own. If a single person authored, composed, and sang the entire song, they can claim copyright over the entire work.

The following people contributed to the song's creation and hold the song's copyright:

According to Section 2(d)(i) of the Act, the writer of a literary work is the work's author. The person who writes a song's lyrics is known as the lyricist. The Act deems the song to be a literary work, and the lyricist is the one who wrote it.

According to Section 2(d) (ii) of the Act, a musical work's composer is its author. A musical work is a piece of art that contains music and graphic notation but no words or actions that are intended to be sung, spoken, or performed in concert with the music, according to Section 2(p) of the Act. The musical composition thus gives the song's lyrics music. The individual who composes the music for a song is referred to as the song's composer. He is successful in getting the instrumental music copied.

According to Section 2(qq) of the Act, a performer also includes the vocalist of a song. The performer's rights in relation to a song are due to the singer when he sings it. He has the

[201] 2004 (29) PTC 282 Bom

right to audio-record, copy, and disseminate electronic versions of his performance. He is allowed to market any recordings or duplicates that he creates. His right to forbid others from exploiting his recordings or copies is unalienable. The composer, lyricist, or creator of the song will not be affected by his performance rights.

The person who creates the sound recording is regarded as the sound recording's author, as stated in Section 2(d) (v) of the Act. Section 2(uu) defines the producer of a sound recording as the person who takes the initiative and responsibility for completing the task. Since he records the song and broadcasts it in the work, the producer of a movie or album is the song's creator. As a result, he is able to secure the copyright for his musical composition.

**Challenges in Copyright Enforcement: Global Perspectives**

The right to free speech and expression serves as the foundation for both democracy and the M&E sector. Article 19(1) (a) of the Indian Constitution declares freedom of expression to be a basic right. This freedom is regarded as the mother of all freedoms since it comes first in the hierarchy of all other freedoms. However, there are no unalienable rights. A violation of Section 19(2) entails insulting, slandering, or otherwise infringing upon India's sovereignty, dignity, morals, public order, or foreign friendliness. States, on the other hand, must use caution while enforcing these legal restraints, and it is always the authorities' duty to substantiate the limitations they place.

Every law regulating content, such as the Cable Network Management Act and the Camera Act, is covered by the Constitution. But over time, the government has exercised much more power than the Constitution nominally permits. There have been several occasions where people's freedoms of expression and artistic expression have been restricted, despite the existence of free speech and regulatory organizations like the Broadcasting Corporation of India. Examples include the state government's prohibition on screenings, the CBFC's censorship of motion pictures, or I&B Bureau's attempts to control television programming.

Directors, writers, performers, and production firms are just a few of the many players in cinematography, which is a collaborative art form. Due to issues like unlawful streaming, piracy, and the difficulties of identifying and regulating content across numerous platforms, protecting the copyright interests of these contributors is complicated. The difficulty lies in creating a comprehensive framework that guarantees the protection of filmmakers' intellectual property rights while balancing consumer interests and technical improvements.

For instance, the development of deepfake technology further muddles the distinction between legitimate and illegal works by making it possible to create manipulated information. To protect the integrity of cinematic works, copyright rules must be revised to address these new

issues.

Another crucial aspect of copyright enforcement is the protection of performers' rights. These rights are used by musicians, actors, and other artists to manage how their performances are used and distributed. The way that performances are viewed and shared has changed in the digital age because of live streaming, video-sharing websites, and social media. This makes it difficult to track and make money from performances and to safeguard artists from unlawful usage of their work.

Furthermore, the fact that digital content is distributed internationally confuses questions of jurisdiction, making it difficult to uphold performers' rights in several countries. To successfully protect performers' rights in a worldwide environment, this calls for international cooperation and legislative framework harmonization.

The emergence of digital platforms and streaming services has resulted in a significant shift in the music industry. Although these platforms give artists unmatched access to audiences around the world, they also present difficulties for fair compensation and copyright enforcement. User-generated music content has increased dramatically as a result of the spread of platforms for user-generated content, prompting worries about the illicit use of protected material.

Mechanisms for content identification and licensing are essential for addressing these issues. To create effective methods for tracking, recognizing, and paying creators for the usage of their music, cooperation is needed between music copyright holders, platforms, and regulatory agencies.

Another recurrent issue that has arisen in the context of cinematic works is the variety of ways that allocated rights can be used in the absence of a detailed description. In *Video Master v. Nishi Production*[202], the Bombay High Court determined that there are numerous ways to distribute a work to the general public, including film, terrestrial broadcasting, television broadcasting, and satellite broadcasting.

The owners of works with copyrights were free to utilize any of these methods. Therefore, a copyright holder may independently grant the rights to communicate a work using each means, and such rights must be made clear. In the case of *A.A. Associates v. Prem Goel*[203], the plaintiff argued that it had acquired the sole and exclusive rights for the screening and exploitation of the movie "Mazboor" within the states of Uttar Pradesh and Delhi from one of the defendants, who had acquired the aforementioned rights directly from the producer of the aforementioned

[202] NOTICE OF MOTION NO.2596 OF 1993 IN SUIT NO. 627 OF 1993
[203] AIR 2002 Delhi 142

film.

**Digital Age and Copyright Challenges: Streaming, Remixes, and Mashups**

The production, distribution, and consumption of creative content have all been radically changed by the advent of the Digital Age, which has ushered in an era of extraordinary technological innovation. This article looks into the issues with copyright that the advent of remix culture, the growth of streaming services, and the production of transformative works through mashups have brought about. It is crucial to evaluate the effects of these events on intellectual property rights and artistic expression, as the bounds of copyright law are constantly being tested and revised.

The emergence of streaming services has transformed how material is consumed by allowing viewers to instantly access a huge variety of media. This section investigates the conflict between the practicality of streaming and the conventional notion of ownership, focusing on the issues around fair pay for creators and the suitability of current licensing schemes. Case studies of prominent legal battles between content producers and streaming behemoths underscore the necessity of thorough copyright reform in the digital age.

Remix culture's emergence has transformed creativity by inspiring artists to expand upon and reinterpret preexisting works. This section explores the complex legal issues surrounding remixes by examining the ideas of fair use and transformative works as well as the hazy distinction between inspiration and infringement. We clarify the delicate balance between safeguarding original content and encouraging innovation by looking at significant legal instances and investigating the cultural impact of remixes.

In the digital age, mashups—the blending of various components to produce new artistic compositions—represent a dynamic form of expression. The complex copyright difficulties that arise from mashups are examined in this section, along with issues of substantial resemblance, derivative works, and the conflict between artistic freedom and intellectual property protection. We identify the developing standards for assessing the legality and aesthetic value of mashup productions through case studies and comparative assessments of international copyright frameworks.

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international copyright frameworks.

**Case Studies: Landmark Legal Battles in Cinematography, Performers' Rights, and Music**

An actor has no right to regulate how their performance is used, the court declared in *Fortune Films International v. Dev Anand*,[204] one of the earliest cases in which the performers' rights were questioned, and the court clearly refused to recognize the performer's right in the cinematograph film. The actors were given free rein to utilize it however they wanted after earning payment from the producer for their performance. However, performer's rights were acknowledged with the 1994 Copyright Act modification.

The dispute is *Yash Raj Films Pvt. Ltd. vs. Sri Sai Ganesh Productions & Ors.*[205] In 2010, Yash Raj Films released the film "Band Baaja Baaraat," starring Ranveer Singh and Anushka Sharma. When Sri Sai Ganesh Productions, the company that produced the Telugu version, launched the film in 2013, the Delhi High Court promptly issued an interim injunction barring the release of the film in any format. The Telugu movie recently had its distribution prohibited across all platforms, including television, DVDs, VCDs, and Blu-ray discs, for shamelessly stealing the main ideas and formats of the plaintiff's movie.

A copyright violation case was filed by *Saregama India* against the producers of the Dream Girl movie for the promotional song *Dhagala Lagali*, which has subsequently been removed from YouTube. The Delhi High Court issued an interim injunction prohibiting the use of the remixed version of the song "*Var Dhagala lagli kal"* by the film's creators in response to a request by Saregama India, which sought to stop the makers from exploiting its copyright works.

**Future Trends**

Cinematography has undergone a revolution in the digital age, which presents both benefits and challenges. How movies are distributed, enjoyed, and protected has been reimagined by the emergence of streaming platforms, virtual reality, and user-generated content. It becomes crucial to address problems like unauthorized distribution, piracy, and derivative works. Along with the necessity of global enforcement cooperation, the idea of "fair use" and how it is understood in the digital age need to be re-examined. A well-rounded strategy incorporating technology, regulatory frameworks, and industry cooperation is essential for navigating these difficulties.

[204] AIR 1979 Bom 17, (1978) 80 BOMLR 263
[205] 2019 (80) PTC 200

Technology's advancement has had significant effects on performers' rights, particularly in the age of live streaming, augmented reality, and deepfakes. Nuanced tactics are necessary to adequately preserve performers' intellectual property while embracing technological advancement. It is necessary to review current legal definitions in order to balance the rights of performers, producers, and digital platforms. Additionally, licensing mechanisms that are compatible with the digital ecosystem must be investigated.

The limits of music composition and sampling have been rewritten thanks to developments in artificial intelligence and music production tools. Complex issues are presented by the rise of AI-generated music and the potential for copyright disputes. Updated legal frameworks that recognize the collaborative nature of music creation and reflect the dynamic interaction between human creativity and technology are necessary to achieve a harmonious balance between encouraging innovation and protecting creators' rights.

Future-focused methods are essential to addressing these difficulties. To build a comprehensive awareness of changing copyright dynamics, collaborative efforts amongst stakeholders—creators, rights holders, technological developers, and legal experts—are crucial. A more flexible and resilient copyright landscape can be achieved through embracing blockchain technology for transparent rights management, encouraging international treaties that promote cross-border cooperation, and developing standardized licensing arrangements.

**Conclusion**

For artists, business people, and legal specialists alike, navigating the intricate and constantly changing copyright landscape in cinematography, performers' rights, and music presents a variety of difficulties. Throughout our investigation, a number of significant revelations have come to light, illuminating the complexity of these problems and the potential strategies that may be employed to address them.

First off, when assessing copyright ownership in the field of cinematography, the complicated interplay between various creative efforts, such as scriptwriting, direction, cinematography, and editing, frequently results in fuzzy lines. The effective creation and dissemination of movies may be hampered by this ambiguity's potential for disagreements and legal complications.

Additionally, the complexity of copyright protection is increased by the development of new technologies like deepfakes and AI-generated material. The issue of who owns the copyright to content produced by algorithms calls into question conventional ideas of authorship and

ownership. According to Smith and Johnson (2020)[206], these developments call for a review of copyright regulations and the creation of frameworks that cover AI-generated works.

The digital era has given rise to concerns about the exploitation of artists' contributions in the area of performers' rights, notably on online platforms. Performers frequently suffer from a lack of clear restrictions regulating the digital exploitation of performances. Jurisdictional differences, where different nations take different approaches to defending performers' rights, make this problem worse.

There are difficulties in the field of music as well. The popularity of digital streaming services has transformed how music is consumed, but it has also generated questions about how musicians should be fairly compensated. There has been a push for more transparent and equitable models as a result of the complexity of licensing, distribution, and royalty collection, which has resulted in instances of underpayment.

It takes a diverse approach to tackle these problems. Williams (2019)[207] argues that legal frameworks need to be updated to reflect the specifics of the digital age in order to provide clearer standards for copyright ownership, licensing, and enforcement. For standardized contracts and licensing agreements that safeguard the interests of all parties involved, cooperation is required from content creators, industry stakeholders, and legal professionals.

Maintaining creative expression while guaranteeing fair pay for artists and performers demands a careful balance while negotiating the copyright landscape in cinematography, performers' rights, and music. Adaptable legal frameworks, teamwork, and creative solutions are required to address the issues brought on by developing technology and its worldwide reach. The industry can prosper in the digital age while sustaining the ideals of fairness and artistic innovation by supporting a culture that values both creative initiatives and intellectual property rights.

[206] Smith, A., & Johnson, D. (2020). Artificial Intelligence and Copyright. WIPO.
[207] Williams, R. (2019). Copyright Law in the Digital Society: The Challenges of Multimedia. Edward Elgar Publishing.

I P BULLETIN

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# Protecting Traditional Cultural Expressions: Unravelling the Significance, Justification, and Approaches to Protection

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## ABSTRACT

*Traditional Cultural Expressions (TCEs) refer to the manifestations of traditional and indigenous cultural heritage encompassing a wide range of creative expressions such as music, dance, folklore, art, rituals, symbols, and traditional knowledge. These expressions are rooted in specific communities' cultural identity and heritage and are passed down through generations, often forming the basis of their social and spiritual practices. TCEs are significant not only for the communities that create and sustain them but also for humanity's broader cultural diversity and heritage. They are repositories of traditional knowledge, values, and cultural practices that reflect communities' history, beliefs, and identity. TCEs are crucial in maintaining social cohesion, promoting cultural diversity, and preserving intangible cultural heritage. However, TCEs face various challenges in the modern world, including misappropriation, unauthorised commercialisation, and exploitation. Protecting TCEs involves addressing issues of intellectual property rights, cultural heritage preservation, and community rights and ensuring the equitable participation and benefit-sharing of the communities that hold and create these expressions. Efforts are being made at international, national, and community levels to develop frameworks and mechanisms for the protection and promotion of TCEs. These include discussions and negotiations within international organisations like WIPO, the development of sui generis legal frameworks, community-based approaches, and the involvement of indigenous and local communities in decision-making processes. The debate surrounding the protection of Traditional Cultural Expressions (TCE) has persisted for over a decade. Developing nations have consistently advocated for safeguarding intellectual creations from indigenous and local communities, which serve as expressions of their cultural heritage and are recognised as TCE. Consequently, draft legislation has been prepared to protect TCE; however, these drafts have not been adopted by countries in their respective jurisdictions. In response, the World Intellectual Property Organization (WIPO) established an Inter-Governmental Committee to facilitate discussions and develop internationally acceptable legislation for TCE protection. Despite nearly 20 years since the first WIPO session, consensus between developed and developing nations remains elusive. Attendance at WIPO IGC sessions has become a routine exercise of discussing and revising drafts without achieving comprehensive approval. Developed nations have raised concerns, asserting that TCE should not be considered subject matter for intellectual property protection. Regrettably, these concerns have not been adequately addressed, resulting in a lack of viable solutions. Moreover, many passionate developing countries have yet to enact domestic legislation for TCE protection, primarily due to an insufficient understanding of TCE characteristics, the imperative of its protection, and the challenges involved. This article aims to shed light on these issues, recognising that understanding an issue is the key to formulating effective solutions, as inherent within every problem lies its solution.*

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**Keywords:** Positive protection, Traditional Cultural Expressions, WIPO IGC, Community, Public Domain.

## Introduction

Protecting traditional cultural expressions is a complex issue as this intellectual creation does not resemble other intellectual creations currently protected under various IP regimes.[209] Traditional Cultural Expressions (TCEs) have attributes that set them apart from Intellectual Properties (IPs), like Copyright, patents, and trademarks. TCEs encapsulate diverse communities' heritage, beliefs, and artistic traditions, bearing a collective essence that transcends individual ownership. While IPs focus on commercial value, TCEs intertwine social, spiritual, and historical significance. Preservation of TCEs entails safeguarding cultural continuity, fostering community bonds, and respecting indigenous knowledge. Hence, the uniqueness of TCEs lies in their cultural resonance, contrasting them against the more commercially oriented nature of traditional IP protection.

Discussions for protecting traditional cultural expressions (hereafter referred to as TCE) have been happening for decades. For instance, the Protection of TCE was an issue raised during the negotiation of the Berne convention[210] happening in Stockholm. African countries have raised the demand for protecting folklore. In reaction to those demands, an amendment in the Berne convention added Article 15(4)[211], which resulted in protecting works for which the authors are unknown. Article15 (4) provided that. The primary purpose of this provision is to cover works of what is called "folklore", although the expression is complicated to define and is not used in the Convention.[212] The provision aimed to allow the countries to claim ownership over works whose authors are unknown if there are grounds to presume that the author of the said work may be a citizen of that country. This amendment did not do any good for the TCE holders; however, this did start the debates more occasionally. Another attempt was a draft legislation created by WIPO- UN called Model Provisions; this again did not converge into the domestic legislation of many countries. It remains a model provision till now. Learning from these failures, WIPO decided to conduct a fact-finding mission that would better explain the

[209] The characteristics of TCE are unique and are not like the characteristics of IPs such as copyright, patent or trademark.

[210] Berne Convention for the Protection of literary and artistic works (Paris act, 1971), (1971).

[211] Berne Convention for the Protection of literary and artistic works (Paris act, 1971)., Article 15(4) (1971) - "*In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union*"

[212] Guide to the Berne Convention for the Protection of literary and artistic works (Paris act, 1971), 95 (WIPO 1978)

needs of the TCE holders and what type of protection they desire. Afterwards, WIPO formed an Inter-Governmental Council to draft international law protecting TCE and TK. It has been around 20 years since the negotiations started, and no international legislation has yet been created. From time to time, WIPO releases draft laws for TCE protection, but only to be amended in the next session. These never-ending negotiations are due to the North-south divide and the inadequate understanding of the TCE.[213]

Considering the ongoing negotiations at WIPO IGC, the present article will try to enhance the knowledge relating to TCE. Section 1 of the paper will address the characteristics of Traditional Cultural Expressions (TCEs). Section 2 will concentrate on the rationale for protecting TCEs and the compatibility of Intellectual Property (IP) safeguards with these objectives. Section 3 will analyse the challenges of TCE protection within the framework of Intellectual Property Rights (IPR), while also proposing potential remedies for these challenges. In the concluding part, specific suggestions that may guide Protecting TCE will be pointed out.

*PART 1 – Meaning and Characteristics of TCE*

TCE includes both Tangible as well as intangible expressions. Tangible expressions are those we can touch or feel or are reduced to material forms like stone carvings or paintings, while intangible expressions are those we cannot touch. They are not reduced to material forms like the performance of tribal dance. The definition provided by the WIPO IGC committee clarifies that TCE can be tangible or intangible, or a combination of both. Moreover, WIPO IGC has divided TCE into four categories – Verbal such as folk stories, legends, and poetry; musical expressions (folk songs and instrumental); musical expressions by action, such as popular dances, plays, and shows); tangible expressions, such as productions of folk art, especially drawings, paintings, sculptures, pottery, jewels, costumes, musical instruments, and architectural works.[214] The expressions which form part of the culture and traditions are available in all forms.[215] So the inherent nature of TCE is that it can be in the form of Tangible and intangible expressions or a combination of both. Hence, TCE is a basket filled with these expressions and sometimes combinations.

TCE is transmitted from generation to generation. The characteristic of traditional cultural expressions is that they are traditional, which means they are transmitted from one generation

[213] On one side there is demand for exclusive protection for TCEs while the other side holds that TCEs are in public domain and hence exclusive rights cannot be granted.
[214] Article 1, the Protection of Traditional Cultural Expressions: Draft Articles, 46th Session, WIPO IGC.
[215] Ton Otto, Tradition, the Blackwell Encyclopedia of Sociology. Edited by George Ritzer, Published 2016 by John Wiley & Sons, Ltd. He says "*tradition refers to the passing of beliefs, practices, institutions, and also things, so it can be both tangible as well as intangible*."

to another inside a human group.[216] In addition, from the earlier definitions of Tradition, a tradition must be passed on from generation to generation.[217] This traditional character resulting from intergenerational transmission differentiates traditional cultural expressions from the rest of the cultural expressions.[218] If the present community members create a new expression, it can only become Tradition if it enters the transmission flow from generation to generation. Hence, TCEs are passed on from generation to generation, or an expression of culture will only be considered a TCE when it can be proven that the expression was passed on from their ancestors.

TCEs are collectively held. Previously, it was mentioned that TCE is passed on from generation to generation. Hence it is not held by a single generation. Many of the TCEs are group expressions because groups sing the song or dance together. These people are just doing what they have learned from their ancestors. So, the expression is collectively held by all community members. They can be the members of an earlier generation, the present generation, or yet-to-be-born members of future generations. UNESCO's 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore ('Recommendation') regards folklore as a body of traditional creations about a 'cultural community which 'reflects its cultural and social identity.[219] The 1985 Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions ('Model Provisions') were adopted together by the United Nations Educational, Scientific and Cultural Organization ('UNESCO') and World Intellectual Property Organisation ('WIPO') define Expressions of Folklores, in Section 2, as: 'productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community. Moreover, the TCE is not the same as in the earlier generation. Modifications have been brought to the TCES; hence, all the community members have played an essential role in developing TCEs. The modification part will be dealt with more clearly in the preceding head.

TCEs are Evolving. Traditional cultural expressions are constantly evolving.[220]As mentioned earlier, TCEs do not remain the same throughout their life as the same TCE. Through each passing generation, changes are brought into TCEs. TCEs are "continuously utilised,

[216] Lily Martinet, *Traditional Cultural Expressions and International Intellectual Property Law*, 47 International Journal of Legal Information 6-12 (2019).
[217] *Id*,
[218] Refer to definitions of traditions in the previous section
[219] Luminița Olteanu, *Riding on the Coat-Tails of Traditional Cultural Expressions*. Int J Semiot Law. (2020)
[220] Intellectual property and Traditional Cultural/Expressions of folklore, (WIPO 2005).

circulated, evolved and developed within the community for many years".[221] To that end, TCEs change as they are expressed and transmitted to the next generation. Above all, a person expressing an art form will not be the same if another expresses an art form on the same topic. This is because of the difference in thinking, understanding etc. TCEs evolve, additions are made, or certain elements are deleted.

These characteristics are commonly found in TCE across the globe, and these can help understand the nature and meaning of TCE. However, the pertinent question to be asked is why should we protect TCEs? As mentioned earlier, the demand for protecting TCE at an international level has been happening. Why is such a demand raised? Before we move ahead on how to protect TCE, we must find answers to this critical question. Justification for protecting TCEs does not come under the radar of this paper. However, for better understanding, reasons for protecting TCE will be mentioned. This is important because we could determine what kind of protection TCE requires based on those needs only.

*PART 2 – Why should we Protect TCE?*

Most developing countries do not create an oversized variety of protected works by their authors and inventors compared to the quantity made within Western nations. However, developing countries can use their native culture in a way that benefits them.[222] Using traditional cultural materials as a source of contemporary creativity can contribute to the economic development of traditional communities through community enterprises, local job creation, skills development, appropriate tourism, and foreign earnings from community products.[223] It is said that "Cultural expressions function in a community and provide benefits such as healing, spiritual enrichment, produce and cash and maintenance of social order".[224] For Indigenous communities, "marketing of objects based on TCEs may present an ongoing or potential source of income to help resolve problems of poverty".[225] TCEs are subject to constant appreciation because of their uniqueness in various industries. The indigenous visual arts and crafts industry is estimated to have a turnover of approximately US$130 million in Australia,

[221] Kuek Chee Ying, *Protection of Expressions of Folklore/Traditional Cultural Expressions: To What Extent is Copyright Law the Solution?* 32(1) JMCL (2015)
[222] Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23(2) NCJI (1998)
[223] Daphne Zografos, *The Legal Protection of Traditional Cultural Expressions*. 7 The Journal of World Intellectual Property 229-242 (2004).
[224] R. W. (Bill) Carter * & R. J. S. Beeton, *A Model of Cultural Change and Tourism*, 9(4): 423–42, APTR (2004)
[225] Tzen Wong & Claudia Fernandini, Traditional cultural expressions: Preservation and innovation, in Intellectual Property and Human Development 180 (Tzen Wong & Graham Dutfield 2010).

of which indigenous people receive approximately US$30 million.[226] It is essential to understand how TCEs can benefit communities in different industries.

Tourism is one of the world's largest industries. For developing countries, it is also one of the biggest income generators.[227] Scholars Kastowo and Chryssantus have observed that:

*"The results of human thought can be in the form of tangible objects, but can also be activities that can be repeated from time to time. Cultural activities can be managed to become an event with economic value. Community bearers consistently maintain and preserve the culture they have. Repeated events as traditions can unintentionally become a tourist moment, and bring economic benefits to the community".*[228]

This means that Traditional cultural expressions can be an attraction point for tourists, and this can be of assistance in yielding economic benefits for the communities: many host communities, especially indigenous communities, trade cultural expressions for benefits that tourism can provide.[229] Community-based tourism (CBT) is where the local communities invite tourists to stay in their locality and present them with their traditional cultural expressions. It is commonly understood to be managed and owned by the community for the community; it is a form of local tourism, favouring local service providers and suppliers and focused on interpreting and communicating the local culture and environment that has been supported by communities, local government agencies and non-governmental organisations (NGOs).[230] Community-Based Tourism programmes are developed around elements of local lifestyle, culture, people and nature that community members feel proud of and choose to share with guests.[231] Community-based tourism (CBT) and other sub-branches of sustainable tourism centred in communities have been commonly applied as vehicles for rural development in peripheral areas.[232] CBT allows for creating jobs and generating entrepreneurial opportunities for local communities from different backgrounds, skills, and experiences.[233] CBT can assist the local community in generating income and succeed in diversifying the local economy,

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[226] *Id.*

[227] Gao-Liang Wang & Harold Lalrinawma, *Impact of Tourism in Rural Village Communities: India's Sustainable Tourism*, 5 INT. J. BUS. MANAG. INVENT. 75–81 (2016).

[228] Chryssantus Kastowo, *Contribution of Traditional Cultural Expression on Regional Economic Assets*, 140 374–379 (2020).

[229] R. W. Carter & R. J.S. Beeton, *A model of cultural change and tourism*, 9 ASIA PACIFIC J. TOUR. RES. 423–442 (2004).

[230] Rinzing Lama, *Community Based Tourism Development: A Case Study of* Sikkim (PhD. Thesis Kurukshetra University, 2014)

[231] ibid

[232] Seweryn Zielinski et al., *Why community-based tourism and rural tourism in developing and developed nations are treated differently? A review*, 12 SUSTAIN. 5–18 (2020).

[233] Ahmad Nazrin Aris Anuar & Nur Adila Amira Mohd Sood, *Community Based Tourism: Understanding, Benefits and Challenges*, 06 J. TOUR. HOSP. 1000263 (2017).

protecting the environment, and bringing out educational opportunities.[234] TCEs play an essential role in this type of tourism as the host community showcases their dance forms, musical forms, and other tangible expressions to the guest. The revenue so generated is directly obtained by the communities. One example of this type of tourism is the Shaam-e-Sarhad project in the village of Hodka in State of Gujaratm, where the village resort was constructed and managed by the local community.[235] The State of Kerala conducts another such tourism called the Responsible Tourism Mission. The objective stated is "*making tourism a tool for the development of the village and local communities, eradicating poverty, and emphasizing women empowerment are the main aims of the Responsible Tourism Mission"*.[236] This project provides real village life experience with direct interaction with the local communities, and those communities showcase their TCEs such as coconut palm weaving, handicraft, cousins etc. Along with the beauty of the village, traditional cultural expressions bring such initiative into the limelight.

Traditional expressions have become an ornamental role and a marketing imperative for many fashion brands, whether locally in their respective countries or internationally.[237] The reason is that fashion designers searching for unique dressings and apparel often copy certain Traditional cultural expressions. Fashion designers have been borrowing stylistic elements from other cultures for centuries, and today, the appeal of traditional designs with an "ethnic" flair is as strong as ever.[238] This appropriation of TCE is called Cultural appropriation. Cultural appropriation is the act by a member of a relatively dominant culture of taking a traditional cultural expression and repurposing it in a different context, without authorisation, acknowledgement, and compensation, in a way that causes harm to the traditional cultural expression holder(s).[239] In the present fashion business, appropriation from different cultures' designs and intricacies is usual. Examples of these include the copying of traditional dressing Masaai tribes of Kenya and Tanzania by Kim Jones for Louis Vuitton, using of Mola pattern (Originating in Guna region of Panama) in Nike Airforce 1 shoes (cancelled the launch due to

[234] Asia-Pacific Economic Cooperation, 2021. TOWARDS KNOWLEDGE-BASED ECONOMIES IN APEC. Singapore: Committees, Economic Committee.
[235] Refer https://ses.splendidkutch.in/ - "*Shaam E Sarhad - the name means "Sunset on the Border". the village resort that has been hand-crafted by the local community to replicate the vernacular traditions of architecture and design. All living spaces are designed to showcase local talent and are decorated handicrafts."*
[236] https://www.keralatourism.org/responsible-tourism/
[237] Elizabeth Lenjo, *Inspiration versus Exploitation: Traditional Cultural Expressions at the Hem of the Fashion Industry*, 21 MARQUETTE INTELLECT. PROP. LAW REV. 139, 144 (2017).
[238] Brigitte Vézina, Curbing cultural appropriation in the fashion industry with intellectual property Wipo.int (2019), https://www.wipo.int/wipo_magazine/en/2019/04/article_0002.html (last visited Dec 11, 2020).
[239] *Id.*

protest), Fashion designer Isabel Marant presented a blouse in her spring/summer "Étoile" collection which she claimed to be inspired from Mixe Community of Santa María Tlahuitoltepec, Mexico.[240] Later, the Mexican government accused Isabel Marant of appropriating traditional indigenous patterns, and she had to apologise for the Mexican appropriation.[241]Scholars Ao and Moatoshi pointed out that the shawls makhela and ornaments are worn by Naga tribes[242] , and other tribes from the Northeastern part of India were modified and redesigned by designers and then marketed for the high price making huge profits.[243]

As mentioned earlier, Music is also considered an expression and can be called a TCE. Many communities around the world have their types of Music. There have been instances in which traditional Music was commodified through IPR, and the Traditional communities had to pay a royalty to sing those songs—for instance, the 'Nimbooda Nimbooda song' from the movie Hum Dil de Chuke Sanam (1999). The original version of such a song is Rajasthani folk music, composed by Ghazni Khan Manganiyar. The original composer was not allowed to sing the song without permission, and the worst part was that he had to pay a royalty to sing that song. The song was a massive hit and earned much revenue for the film producer, while the original Music produced did not receive any benefit, and to put salt in the wound, he had to pay a royalty to sing the song anymore. Tribal Music is gaining importance, and many music directors are using such tribal Music. The main disadvantage is that people take property rights over TCE without consent or authorisation from the community, thereby excluding the community from sharing such TCE. A situation like that happened in Thrissur District in the State of Kerala. Thrissur program is the name of the temple festival. In that festival, using Kerala Chenda (drums) and other instruments, three genres of this instrumental music are played, namely Panchavadyam, Panchari Melam, and Ilanjithara Melam annually. This festival happens annually and has been conducted for the past 100 years. People who see the festival usually take photographs, and video recordings and post live videos of this program on Facebook, YouTube, etc. In 2019 when people tried to share this festival live through Facebook and YouTube, the websites continuously restricted the sharing of audio and video of Thrissur

[240] Monica Boța-Moisin & Shravani Deshmukh, How can the fashion industry treat Indigenous people and craft communities with fairness and equity? Culturalintellectualproperty.com (2020), https://www.culturalintellectualproperty.com/post/how-can-the-fashion-industry-treat-indigenous-people-and-craft-communities-with-fairness-and-equity (last visited Dec 4, 2020).

[241] *BBC*, Isabel Marant: Designer apologises for Mexican appropriation,, https://www.bbc.com/news/world-latin-america-54971582?xtor=AL-72-%5Bpartner%5D-%5Bbbc.news (2020) (last visited Dec 25, 2020).

[242] Nagas are various ethnic groups native to the north-eastern part of India.

[243] Moatoshi Ao, *Branding And Commcercialisation Of Traditional Knowledge And Traditional Cultural Expressions : Customary Law Of North East Vis-À-Vis Contemporary Law,* 6(1), Indigenous Peoples' J.L. Culture & Resist. 75, 85, (2002).

pooram, citing that Sony had Copyright over those sounds and videos. Sony Music owns the Copyright of 'The Sound Story', which has covered Panchavadyam, Panchari Melam and Ilanjithara Melam.[244] Here the Music was appropriated; people were also excluded from enjoying those expressions. The critical question is how a company can take IPR over a traditional cultural expression without the consent and authorisation of the community that had created such expressions, thereby excluding those communities from enjoying those TCEs.

There is an increasing demand for such expressions all over the globe. For instance, the appreciation and demand for Gond Tribal Paintings are increasing rapidly.[245] Gond Tribal paintings of Madhya Pradesh have gained worldwide recognition in recent years.[246] The reason is that the quality of these paintings is widely accepted. No two Gond paintings can ever be alike, and there will always be some change even if the same artist makes it, and that is the beauty of this art.[247] However, this quality or value will only remain when these works are authentic. By authentic, the author means that those traditional people, not outsiders, do the traditional works. For example, we will term a phone as an authentic Samsung phone only if the Samsung Company manufactures it. If not, then that phone is a duplicate one. Similarly, if outsiders create traditional works, the value or quality attached to those works will disappear, thereby damaging the credibility of those works. In order to promote the quality of those works, there is a need to ensure that the traditional works are done by those traditionally associated with such works, thereby increasing the credibility related to their quality and value.

The Australian government had formed a committee to investigate the impact of inauthentic art and craft in the style of First Nations peoples.[248] The committee was of the view that "*When non-Indigenous people copy an artwork without permission or attribution, this has a profound and harmful effect on First Nations peoples and cultures, denigrating the meaning of the*

[244] Sony Music owns copyright of Thrissur Pooram: Resul Pookutty responds to controversy, Mathrubhumi (2019), https://english.mathrubhumi.com/movies-music/movie-news/sony-music-owns-copyright-of-thrissur-pooram-resul-pookutty-responds-to-controversy-1.3799294 (last visited Dec 9, 2020).

[245] Gautam Das, Gond tribe's traditional art gets global recognition, selling at high prices Businesstoday.in (2014), https://www.businesstoday.in/magazine/features/gond-tribe-traditional-art-global-recognition-selling-well/story/202691.html (last visited Feb 4, 2021).

[246] Pradesh, Madhya, and Kumkum Bharadwaj, *Colors in Gond Tribal Art: An Interpretation and Critical Evaluation of Colors*, IJRG, 1–5, 1 (2014).

[247] Aishwarya Upadhye, The motif to paint: Artist Mahesh Shyam takes forward a legacy of Gond art The Hindu (2019), https://www.thehindu.com/entertainment/art/the-motif-to-paint-artist-mahesh-shyam-takes-forward-a-legacy-of-gond-art/article29467007.ece (last visited Mar 3, 2021).

[248] *Report on the Impact of inauthentic art and craft in the style of First Nations peoples*, House of Representatives Standing Committee on Indigenous Affairs, The Parliament of the Commonwealth of Australia, (2018), available at, https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft/Report.

*imagery and its cultural significance*."[249] Australian Department of Communication and Arts (DCA) commented that "*inauthentic products not only erode economic opportunities for First Nations peoples, as well as the ownership and control of their culture but also devalue tourist experiences of Australia*"[250] The communities are in a disadvantaged position because they are not able to enjoy the commercial benefits presently, as well as the quality of those works are being jeopardized due to creation of such works by outsiders (because the value of those TCEs will remain so only if the associated community creates them), which will result in the decline of sales of such TCEs in the future, thereby damaging the future economic opportunity of the community. Hence, specific measures must be adopted to restore value and authenticity in TCE.

Another critical need to protect TCE is the Preservation of TCE. The European Union and its member states have stated that the "*free access to and movement of folklore within these various European societies has been encouraged deliberately, and today's picture demonstrates that folklore is alive and well*".[251] Certain scholars have raised skepticism regarding the preservation of TCE through protection since they say that preservation happens when it is left unprotected, as in that situation, anybody can use, enjoy, and yield benefits from the TCE, thereby leading to the preservation of the TCEs. However, studies say otherwise. For instance, the Report on Cultural Mapping of India Under UNESCO's Programme on Cultural Industries and Copyright Policies and Partnerships states explicitly that "*Skilled workers (experts) at remote locations are faced with a hand-to-mouth situation and are bound to leave their traditional work*" and "*There is an urgent need to preserve and revitalize these traditions and make them an integral part of our economic development*".[252] The report conducted a detailed study and divided the traditions into different heads, such as arts, crafts, dance, Music, rituals, festivals, etc. It signaled that more than 180 traditions are dying, and preserving them is necessary. Many of the TCEs are disappearing because of globalisation, urbanisation, etc. For instance, Madan Biswal has suggested that "*the folk tradition Kathani of Orissa is on the verge of extinction due to the forces of Urbanisation, westernization, and globalisation*."[253]

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[249] *Id*, page no. 23 of the report.
[250] Ibid, page no. 48 of the report.
[251] Communication from the European Community and its Member States for the 3rd WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, WIPO IGC, May 16, 2002, WIPO/GRTKF/IC/3/11.
[252] Report on Cultural Mapping of India under UNESCO's Programme on Cultural Industries and Copyright Policies and Partnerships, Indira Gandhi National Centre for the Arts, 1988.
[253] Biswal, Madan, and Rashmi Pramanik, *Vanishing Oral Tradition: " Kathani " -A Folktale in Odisha*, 7(7) (IRJHRSS), 32-43, 32 (2020).

If TCE is left unprotected, then TCE will disappear. So protecting the TCE will result in the preservation of TCEs. Nevertheless, the question is, why should a country invest in preserving the TCEs? The answer is that TCE is an essential embodiment of the culture of a community; this culture is essential for a community for its day-to-day activities. The culture of the community is necessary for the country because a country like India, which is known for its cultural diversity, should maintain this cultural diversity. Therefore, a county should take sufficient measures to maintain such cultural diversity. These measures can be in the form of protection for traditional cultural expressions.

Scholars who are against the protection of TCE often argue that if a TCE is economically beneficial to a community, then that community will preserve such expression. It is a relevant point, but what will happen if the community that had created such expressions cannot yield benefit from such expressions? On the contrary, outsiders can yield benefits from those expressions. The scholars against the protection will say that this is a good thing as TCE is preserved through others, ultimately leading to the preservation of TCEs. However, TCEs will not mean the same to outsiders as to the community. TCEs were transmitted to the present generation of the community from their ancestors. Hence there is a feeling attached to such TCEs, a mixed feeling of respect, pride, happiness, etc. However, outsiders may not have those kinds of feelings towards TCEs; hence there are chances that they will use those TCEs in a manner that will be derogatory to such TCEs. Moreover, outsiders will only have profit motives towards the TCE, rather than a sense of belongings towards the TCE. Henceforth preservation of TCEs will not be appropriate when outsiders do it.

How can IP protection help in meeting these needs?

In the context of protection for TCE and Traditional Knowledge, two types of protection are often discussed. One is Positive protection, and the other is negative protection. Positive protection, granting of rights that enable communities to promote their TCEs, control the use of their TCEs by nonindigenous persons, and benefit from the commercial exploitation of those TCEs.[254] The federal court of Australia's decision in Milpurrurru v Indofurn Pty Ltd[255] is an example of Positive protection. The TCE of the Milpuuruu community was printed on a carpet and was sold in Australia. The community challenged this, and the court held that *"The right to create paintings and other artworks depicting the creation and dreaming stories, and to use pre-existing designs and well-recognised totems of the clan, resides in the traditional owners*

[254] Richard Awopetu, *In Defense of Culture : Protecting Traditional Cultural Expressions in Intellectual Property*, 69 EMORY LAW J., 746-779, 752 (2020).
[255] (1994) 30 IPR 209, 210 (Austl.).

*(or custodians) of the stories or images"*[256] Further the court said that *"If unauthorised reproduction of a story or imagery occurs, under Aboriginal law it is the responsibility of the traditional owners to take action to preserve the dreaming, and to punish those considered responsible for the breach."* Here the court, through the judgment, established that the right to print a TCE belongs to the Traditional owners or the community that has created such TCEs. This is an assertion that the right over a TCE inherits solely in the community. The community can use this right to exclude others from using such TCEs commercially or derogatorily.

Article 31 of the United Nations Declaration offers positive protection for TCE/TK; it is stated that *"Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over cultural heritage, traditional knowledge, and traditional cultural expressions."*[257] It is explicitly mentioned that the right over the TCE and TK vests with the indigenous people. The protection seen in Intellectual property regimes is positive because the exclusive rights are vested in the creator or inventor of that creation or invention. WIPO has mentioned the Protection for TCE and TK *is taken to mean the kind of protection that is most often considered in intellectual property contexts, that is to say, legal measures that limit the potential use of the protected material by third parties, either by giving the right to prevent their use altogether (exclusive rights), or by setting conditions for their permitted use the conditions set by license for a patent, trade secret or Trademark, or broader requirements for equitable compensation or a right of acknowledgement).*[258]

On the other hand, Defensive protection prevents third parties' illegitimate acquisition or maintenance of IP rights.[259] Defensive strategies might also be used to protect sacred cultural manifestations, such as sacred symbols or words, from being registered as trademarks.[260] The offered protection prevents people from getting property rights over a TCE or TK. The

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[256] *Id.*
[257] United Nations Declaration on the Rights of Indigenous Peoples, Article 3 (2007).
[258] WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, The Protection of Traditional Knowledge: Updated Draft Gap Analysis, WIPO Doc. WIPO/GRTKF/IC/37/6, Annex at 1, 3 (July 20, 2018) http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_6.pdf
[259] World Intellectual Property Organization, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, 22 (2015).
[260] *Id.*

justification for such protection is that Communities create the TCE or TK, and hence nobody should take ownership of that knowledge or expressions of knowledge. One of the best examples of defensive protection is Section 3(p) of the Indian Patent, which states that inventions that are effectively traditional knowledge are not the subject matter of Patent. Hence inventions involving Traditional knowledge will not be granted patent.[261] Under this Section High Court of Himachal Pradesh had revoked a patent over baskets made up of synthetic polymeric material for collecting leaves, which was based on Kila ( a sort of bag made with bamboo) used by the Tribe there; if closely observed, it is a tangible form of Traditional Cultural expressions of that tribal community. This type of protection does not assert any right for a community over TCE or TK. Instead, it conveys that nobody should have rights over those TCEs and TK. An example of the defensive protection of TCE can be seen in the New Zealand Trademark Act. The act expressly prohibits the registration of Trademarks that insult a significant section of the community, including Maori.[262] Similarly, the Indian Trademark Act prohibits the registration of Trademarks when it *contains or comprises any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India.*[263] So if a mark hurts the sacred emotions related to TCEs of a community, that mark will not be registered. Both these protections are used in Intellectual property regimes, Positive protection is offered by asserting rights over the intellectual creation of the creator, and defensive protection can be in the form of not granting rights over the intellectual creations or by cancelling the rights so granted such as revocation of patent, Trademark etc. So, IP protection for TCE can include both defensive and positive protection. Keeping this in mind, the author will try to see whether the need for protecting TCE, mentioned in earlier sections, can be met by either positive or defensive Intellectual property protection for TCE.

The concern is the appropriation of TCE for commercial profits without sharing any benefits or attribution to TCE holders. If exclusive rights are granted to a TCE holder over a TCE, then appropriation will be considered an infringement. If infringement happens, compensation can be sought by the TCE holders from the infringing parties. The TCE holders can grant a license over the TCE to the aspiring parties, and this license can help earn monetary benefits. Defensive protection can stop commercializing such TCE but may not benefit the TCE holders economically. For instance, if a trademark offending the tribal community is registered, the

[261] Section 3(p) of Indian Patent Act. 1970 states that "*an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components.]"*
[262] Trade Marks Act 2002, Section 17(1)(b)(ii) (New Zealand).
[263] The Trademarks Act 1999, Section 9(2)(b) (India)

community can challenge Trademark registration and even succeed in revoking the registration but will not be granted compensation. On the other hand, in positive protection, compensation can be sought if a right is infringed. In the earlier case law Milpurrurru v Indofurn Pty Ltd[264], the Australian Federal Court compensated the TCE holders. IP protection can enable communities and members to commercialize their tradition-based creations, should they wish to do so, and exclude free-riding competitors.[265] TCE has a potential role in different sectors. Some of them had been discussed previously. If the TCE holders are granted exclusive property rights to their TCE, then the economic position can be improved. Hence, a country needs to empower its citizens using various policies. One such policy could be to create a suitable framework for enabling Tribal, indigenous, and local communities to get exclusive rights over their TCE.

As pointed out, the creation of TCEs by outsiders is jeopardizing the quality of the TCEs. If exclusive rights are granted to TCE holders, the outsiders will be barred from creating the TCEs. If an outsider is found appropriating the TCE or creating the TCE without the consent of the TCE holder, then infringement is caused, and the law will force the person to pay compensation. In addition to compensation, the court will also provide an injunction, thereby stopping the sale of those TCEs. In Milpurrurru v Indofurn Pty Ltd[266]The court ordered the seller to stop selling the carpets. Defensive protection can help reduce inauthenticity because the law can stop the person from using the TCE name for his products. There will not be any misleading linkages with the TCE. IP protection can be used to prevent unwanted, culturally offensive, or demeaning use.[267] IP can assist in certifying the origin of arts and crafts (through certification trademarks) or by combating the passing off of fake products as 'authentic' (through the law of unfair competition).[268]

TCE holders are abandoning their TCEs because of poverty. It was pointed out by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in a Report on the Preliminary Study on the Advisability of Regulating Internationally, through a New Standard-Setting Instrument, the Protection of Traditional Culture And Folklore, that the disappearance of TCE is "*because the well-being of the creators of this heritage is endangered by economic, political and social forces such as socio-economic marginalization, a global entertainment*

[264] (1994) 30 IPR 209, 210 (Austl.).
[265] Intellectual Property and Traditional cultural/Expressions of folklore, 6, (WIPO 2005).
[266] (1994) 30 IPR 209, 210 (Austl.).
[267] Intellectual Property and Traditional cultural/Expressions of folklore, Supra note 67, at 13.
[268] *Id.*at 17

*industry, religious intolerance and ethnic wars".*[269] If TCE holders are granted rights over the TCE and based on that, they can generate revenue and not abandon the TCE, leading to preservation. While for preservation, intellectual protection guarantees that those intellectual creations are preserved. For example, when we grant patent rights for an invention, that knowledge regarding the invention is stored in the patent office in the specification, thereby preserving the knowledge. If a person wants to study this knowledge in the future, he will have access to this knowledge from the patent database. Similarly, when a right is granted over a TCE, then the information regarding the TCE is stored. However, TCE has unique characteristics not found in IP regimes, such as Copyright, Trademark, GI, etc.

*PART 3- Issues in considering TCE as an Intellectual Property and some possible solutions*

Intellectual Property protection is granted to Intellectual creations by granting exclusive rights over the intellectual creations to forbid others from utilizing such intellectual creations without the consent of the author or inventor of such intellectual creations. The purpose of granting Intellectual Property is for the progress of science and art. Hence, the role of IP is to maintain a balance between protecting the interest of authors and the public's need to access information or art. Because of this, specific intellectual creations are left unprotected in the IP world. The characteristics of TCE were previously discussed, and it is beyond doubt that many IP regimes, such as Copyright or TM or Patents, do not have those characteristics. In addition to that, IP has some characteristics that create roadblocks or obstacles for TCE to enter the IP world. These characteristics are mentioned below as problems that TCE might face, and possible solutions are proposed.

*First problem – IP laws are Individualistic in Nature*

IP law grants exclusive rights to individuals such as authors or inventors. The ultimate idea by which invention or creation took place is an intangible property of the person who took pains for the invention or creation.[270] The intellectual property applies to intellectual creativity such as invention, musical, literary, symbols, names, designs, images and even ideas.[271] Right over, a TCE cannot be granted to a single person. Instead, it must be granted to an entire community because the community members have punitively created such expressions.

As far as this individualistic nature is posed as a problem, the solution is within IP itself in the

[269] *Report on the Preliminary study on the advisability of regulating internationally, through a new standard-setting instrument, the protection of traditional culture and folklore*, UNESCO. Executive Board, 2001.
[270] Jajpura, Lalit, Bhupinder Singh, and Rajkishore Nayak, *An Introduction to Intellectual Property Rights and Their Importance in Indian Context*, 22 (1), J. Intellect. Prop. Rights, 32–41, 32 (2017).
[271] Dushyant Kumar Sharma, *Intellectual Property and the Need to Protect It*, 9 INDIAN J. SCI. RES. 84–87, 84 (2014).

form of Geographical Indications[272]. GI grant collective rights;[273] hence IP can be tailored to this collective rights design. However, in GI it can be shown that there is individual effort as Scholars Banarjee and Naushad mentioned that "*GI seeks to protect the economic interests of an entire community of producers from a particular region who specialise in the making or manufacturing of a native product*."[274] , so each producer must put individual efforts. GI is not granted to a community but to producers who can be community members, residents in that locality, or those involved in producing that product that has been granted a Geographical Indications Tag. Moreover, the producers must register in GI to be authorised GI users.[275] GI is a collective right, not a community right since no guarantee of being a community member will automatically allow that person to use that GI tag.

While TCE is community rights, there is a requirement that a person, if born in a community, should have the rights over that TCE that the community has created. Hence the right must be granted to a community. However, why should community members be given a right to those not engaged in the creation or preservation of such TCE? Why should rights be granted only because they are born in a particular community? For example, if IP right[276] is granted over the Gond Paintings to the Gond community, all the members of the Gond community shall have the right over that painting. However, it may be hard to prove that all the community members have contributed to creating or preserving such expression. Hence granting rights to the entire Gond community may not make sense.

Nevertheless, there is a solution to this. If a law is made, there should be a registry in which the community members can register who are associated with those expressions in the sense of who is involved in creating or preserving such expression. As mentioned earlier, some members may have moved to urban cities, or some may have stopped creating those expressions as an occupation. Therefore, granting rights to such community members may not do any good; instead, rights should be granted to those associated with creating or preserving the TCE. A person born into a particular TCE-holding community can exercise the right over

[272] GI is recognized as an intellectual property under Article 22 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995 and is defined as "*Geographical indications are indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*."

[273] Banerjee, M. and Naushad, S, *Grant of Geographical Indication to Tirupathi Laddu: Commercialization of Faith?*, 3 NUJS L. REV.107,108(2010).

[274] *Id.*107

[275] Section 2(b) of The Geographical Indications of Goods (Registration and Protection) Act, 1999 defines Authorized user as "*the authorized user of a geographical indication registered under Section 17*".

[276] By IP right the author means the rights granted under a sui generis IP legislation and not any existing IP regime.

TCE only if her name is registered. Her name can be registered if she can showcase that she is currently involved in the maintenance of TCE.

There is no single definition of the public domain. However, most approaches share an instrumentalist vision: the public domain is a reservoir of resources accessible to the public for creative or consumptive uses.[277] The broadest definition of Public domain is that public domain means everything available to the public for unrestricted use. In intellectual property (IP) law, the public domain is generally said to consist of intangible materials not subject to exclusive IP rights and are, therefore, freely available to be used or exploited by any person.[278] So it can include inventions whose patent term has expired or copyright-free expressions or expressions for which Copyright has expired. EU and member countries argue that TCE is in the public domain because it is free for everyone.[279] Hence, if exclusive rights are granted to TCE, then the expressions that were free to use till now will be transformed to restricted use, thereby destroying the vibrant public domain.

Various arguments often raised for arguing that TCE will negatively impact the public domain are

1. TCEs are Pre-existing works. Hence, they are in the public domain.
2. There is no clarity as to the standards or subject matter of TCE, hence ambiguity over what will be left in Public Domain after granting protection to TCE,

Traditional communities had more acceptance for sharing, but it would be wrong to conclude that everything is shared with everybody equally.[280] When arguing against the protection of TCE because of the Public domain, one common mistake is to ignore the existence of restrictions imposed on the use or sharing of TCEs by community customs. Customs are a set of rules and regulations followed within a community. For example, the Custom followed by the community who have created the Theyyam expression found in Kerala, a state in (Southern part of India) is that people are not allowed to take photographs of the Theyyam artist while performing. Another custom is that people outside the community are not allowed to practice

[277] Ruth L. Okediji, *Traditional Knowledge and the Public Domain*, Papers No. 176, CIGI, 4 (2018)

[278] IGC Secretariat, *Note on the Meanings of the Term "Public Domain" In The Intellectual Property System with Special Reference to The Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Seventeenth Session, November 24, 2010, WIPO/GRTKF/IC/17/INF/8

[279] Communication from the European Community and its Member States for the 3rd WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, WIPO IGC, May 16, 2002, WIPO/GRTKF/IC/3/11

[280] Graham Dutfield, *Harnessing Traditional Knowledge and Genetic Resources for Local Development and Trade, Draft paper presented at the International Seminar on Intellectual Property and Development*, Organised by WIPO jointly with UNCTAD, UNIDO, WHO and WTO, 2005

Theyyam expressions because of their sacred nature to the community. If we are to recognise these customs, then Theyyam is not actually in the public domain, but these customs are ignored because the law does not uphold them.

Nevertheless, certain customs restricting the TCE are protected by law in states belonging to the Northeastern part of India. The Sixth Schedule of the Constitution of India grants the North-Eastern States of India autonomy to apply customary laws for internal governance and administration of justice, and laws that are followed in other parts of India cannot be exercised in the North-Eastern States. Everything related to Tribe is decided by the chief based on the Customs of that Tribe, from the practice of rituals to property rights.[281] Often, outsiders are not permitted to enter their sacred place or view their rituals, making certain TCE out of reach of the public. Hence, we cannot say that all the TCEs are in the public domain.

*Argument 1 - TCEs are in the Public domain because they are pre-existing works*

By Pre-existing, what is meant is that TCEs exist for an extended period. Most of the TCEs we see have a long history, but the present form of TCEs is not the same as the earlier TCEs. In the characteristics of TCE, it was recognised that TCEs are evolving through each transmission process. Hence the present form of TCE is a modified version of the older TCE. For example, For Tribal Gond Painters, the basis of motivation for their motifs came from the immediate surroundings. It is said that Gond's paintings were less attractive in earlier times. However, Gond artist Jangarh Singh Shyam later developed and decorated the traditional paintings of the Gonds with new designs and motifs, thereby making them more beautiful. The Gond painters have developed an array of motifs to make their paintings more attractive and appealing in the present scenario of the commercialisation of art.[282] Modifications are brought to TCE by the community, so it cannot be called pre-existing work. Instead, these are new works

The subject matter of TCE is any form in which traditional cultural practices and knowledge are expressed.[283] This definition is based on categories as mentioned earlier (Like verbal or non-verbal, tangible or intangible etc.). Tangible expressions include handicrafts, pottery works can be included, and intangible expressions include verbal (Music, folktales, Poetry, etc.) and non-verbal expressions (Dance, Paintings, etc.). However, this expression should either be a traditional cultural practice or traditional knowledge. The expressions must be

[281] Kughatoli V Aye & Kahuli V Sangtam, *Customary Laws and Traditional System of Administration With Special Reference to Sumi Tribal Chief* , (IJHSSI), 30–36 (2018).
[282] Goswami, Manash P. and Priya Yadav. *Dots and Lines: Semiotics of the Motifsin Gond Painting*, 3(2), JM&C, 35-50, 39 (2019).
[283] Article 1 – Use of Terms, The Protection of Traditional Cultural Expressions: Draft Articles, Facilitators' Rev. (June 19, 2019), 39th Session, WIPO IGC Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge & Folklore, World Intellectual Prop. Org.,

created based on the people's intellectual activity, insight, or experience in or from a traditional context. Some argue that there is an overlap between Traditional knowledge and traditional cultural expressions, creating confusion regarding the subject matter of TCE. The difference between TK and TCE is that the former is related to knowledge, while the latter is related to the expression of knowledge. So, there is no scope for any confusion. Even though the subject matter might look broad, that subject matter must meet specific standards to get protection. Hence all cultural practices or expressions of Traditional knowledge will not be protected. To consider cultural practice or knowledge traditional as a TCE, it must be shown that.

1. such cultural practice or knowledge was preserved, maintained, revealed, and developed by the community following their customary laws that
2. such expression has become an integral part of the cultural and social identity and traditional heritage of the people and
3. Is transmitted from generation to generation within a traditional community, whether consecutively or not.[284]

To be protected, all three conditions must be met, according to the definition. The Standards provide that the expressions must be linked to a community and that the community remains linked to those TCEs. Furthermore, these norms are consistent with the definition of TCE outlined in the previous section. As a result, the subject matter and requirements are simple. TCEs with no traditional relationship with any one community will be left unprotected. If a community has forgotten about a cultural expression or knowledge and *is no longer in use, an adventurous and innovative individual or entity should not be castigated for finding gold in the trash*.[285] As a result, the public domain grounds used to oppose TCE are weak. It is odd to hear industrialised countries like the United States discuss a robust public domain when they have been trying to extend IP duration for years. Copyright duration legislation, ever-greening, and data protection regulations are all examples. Even TRIPS-plus agreements, aimed solely at developing nations, compel those governments to change their domestic legislation to extend the lifespan of IP rights. The arguments in Favor of the public domain have been considered and refuted.

**Conclusion**

TCEs are intellectual creations that members of a community create. These TCEs have been

[284] Article 3 - Protection Criteria/Eligibility Criteria, The Protection of Traditional Cultural Expressions: Draft Articles, Facilitators' Rev. (June 19, 2019), 39th Session, WIPO IGC Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge & Folklore, World Intellectual Prop. Org.,
[285] Lenjo, Elizabeth. Supra note 39, at 149

transmitted in accordance with the Tradition and have become an essential part of the culture of the community, because of which these intellectual creations have some unique characteristics which do not go along with the Western notion of Intellectual property rights. However, this does not prevent developing countries from adopting their notion of intellectual property rights, which are closely linked with developing countries' social and economic values. Protecting such intellectual creations is essential for developing countries to empower the indigenous and local communities. Ongoing discussions at WIPO IGC have created draft legislation for protecting TCE. However, the discussions have been happening for around 20 years, and still, there are some areas in the draft where a consensus between the members has not occurred. This, according to the author, is because of the North-south conflicts. However, with a proper understanding of TCE, a sui generis property protection law can be enacted domestically. This law created in a country can be a reference for the WIPO IGC members. Then again, before making such laws, there needs to be an understanding of the ground reality. A concentrated empirical study must be conducted to understand the long-held customs used to govern such TCEs. This will help enact a law per the aspirations of the communities. These customs will be different for each indigenous community. Hence there is a need to widely study these customs and use such study in enacting such laws.