

# LEGAL PROTECTION FOR TRADITIONAL KNOWLEDGE

This page intentionally left blank

# LEGAL PROTECTION FOR TRADITIONAL KNOWLEDGE

Towards a New Law  
for Indigenous  
Intellectual Property

ANINDYA BHUKTA



United Kingdom – North America – Japan – India  
Malaysia – China

Emerald Publishing Limited  
Howard House, Wagon Lane, Bingley BD16 1WA, UK

First edition 2020

Copyright © 2020 Emerald Publishing Limited

**Reprints and permissions service**

Contact: [permissions@emeraldinsight.com](mailto:permissions@emeraldinsight.com)

No part of this book may be reproduced, stored in a retrieval system, transmitted in any form or by any means electronic, mechanical, photocopying, recording or otherwise without either the prior written permission of the publisher or a licence permitting restricted copying issued in the UK by The Copyright Licensing Agency and in the USA by The Copyright Clearance Center. Any opinions expressed in the chapters are those of the authors. Whilst Emerald makes every effort to ensure the quality and accuracy of its content, Emerald makes no representation implied or otherwise, as to the chapters' suitability and application and disclaims any warranties, express or implied, to their use.

**British Library Cataloguing in Publication Data**

A catalogue record for this book is available from the British Library

ISBN: 978-1-80043-066-2 (Print)

ISBN: 978-1-80043-063-1 (Online)

ISBN: 978-1-80043-065-5 (Epub)



REGISTERED

Certificate Number 1985  
ISO 14001

ISOQAR certified  
Management System,  
awarded to Emerald  
for adherence to  
Environmental  
standard  
ISO 14001:2004.



INVESTOR IN PEOPLE

*my wife*  
*source of my inspiration*

This page intentionally left blank

# CONTENTS

<i>Preface</i>	<i>xi</i>
1. Introduction	1
1.1 The Prelude	1
1.2 The Problem We Are Facing	7
1.3 Rationale Behind the Study	9
1.4 The Gaps We Found	12
1.5 Our Objectives	13
2. Traditional Knowledge: An Overview	15
2.1 Definition of Traditional Knowledge	15
2.2 Different Dimensions of Traditional Knowledge and Their Uses	17
2.2.1 Traditional Knowledge on Agriculture	18
2.2.2 Traditional Knowledge on Medicine	18
2.2.3 Traditional Cultural Expressions	20
2.3 Economic Importance of Traditional Knowledge	21
2.4 Argument for Protecting Traditional Knowledge	22
2.5 Traditional Knowledge in International Fora	27
2.5.1 International Milestones in Safeguarding Traditional Knowledge	27
2.5.2 The International Union for the Protection of New Varieties of Plants	28
2.5.3 Food and Agriculture Organization	31
2.5.4 World Intellectual Protection Organization WIPO	33

2.5.5 Convention on Biological Diversity	35
2.5.6 World Trade Organization	40
3. Bio-piracy	45
3.1 Definition of Bio-piracy	45
3.2 Economic Impacts of Bio-piracy	46
3.2.1 A Threat to Food Security	50
3.2.2 A Threat to Health Security	54
3.3 Case Histories of Bio-piracy in India	57
3.3.1 The Case of Turmeric	57
3.3.2 The Case of Neem	58
3.4 Case Histories of Bio-piracy in Other Countries	59
3.4.1 The Case of Ayahuasca	59
3.4.2 The Case of Enola Bean	61
3.5 Access and Benefit Sharing Mechanism	62
3.5.1 Bonn Guidelines	64
3.5.2 The Nagoya Protocol	66
3.6 Examples of Access and Benefit Sharing over the Countries	68
3.6.1 Examples of Access and Benefit Sharing in India	69
3.6.2 Examples of ABS in Other Countries	70
4. Protecting Traditional Knowledge: Ways and Means	73
4.1 What Is Intellectual Property?	73
4.2 Protecting Intellectual Property Right	73
4.3 Alternative Ways to Protect Traditional Knowledge	74
4.3.1 Positive protection	75
4.3.2 Defensive protection	76
4.4 Positive Protection via Intellectual Property Rights Laws	78
4.4.1 Patent	78
4.4.2 Plant Patent	79
4.4.3 Geographical Indication	80



4.4.4 Copyright	81
4.4.5 Trademark	84
4.4.6 Trade Secrets	85
4.5 Defensive Protection	87
4.5.1 Documentation of Codified Traditional Knowledge in India	87
4.5.2 Traditional Knowledge Databases of Other Countries	92
4.5.3 Documentation of Non-codified Traditional Knowledge: Initiatives in Different Countries	94
5. Initiatives to Protect Traditional Knowledge	97
5.1 Introduction	97
5.2 Initiatives in India	98
5.2.1 Patent Act of India	98
5.2.2 Geographical Indications of Goods (Registration and Protection) Act, 1999	106
5.2.3 Copyright Act, 1957	107
5.2.4 Biodiversity Act, 2002	108
5.2.5 Protection of Plant Varieties and Farmer's Rights Act, 2001 (PPVRA, 2001)	111
5.2.6 The Seeds Bill	116
5.3 Initiatives in Other Countries	118
5.3.1 The Philippines	118
5.3.2 Panama	120
5.4.1 Africa	122
6. How Fit Are the Existing Intellectual Property Rights Laws in Protecting Traditional Knowledge?	125
6.1 Introduction	125
6.2 Limitations of Patent	126
6.3 Limitations of Plant Patent	127
6.4 Limitations of Copyright Act	128
6.5 Limitations of Geographical Indication Act	133

6.6	Limitations of Trademark	135
6.7	Limitations of Trade Secrets	136
7.	Towards a New Law	139
7.1	Introduction	139
7.2	The Model Law	142
<i>Notes</i>		149
<i>References</i>		155
<i>Index</i>		167

## PREFACE

Misappropriation of different types of traditional knowledge of different countries is, nowadays, a thriving business and hence a great challenge to the developing world, especially to the developing countries of the Southern hemisphere. The aboriginal communities of these developing countries, who possess this knowledge, are getting deprived as a result. The multi-national companies of developed countries, who are especially misappropriating this knowledge, neither recognize the contribution of these people, nor do they share the benefits arising out of the commercial use of this knowledge with these people. All these can happen due to the absence of any appropriate law to protect this valuable knowledge base. Presently different countries are trying to prevent these misappropriations with the help of existing intellectual property rights laws. Some *sui generis* laws have also been developed. But the problem is that most of these initiatives consider a particular dimension of this multi-dimensional knowledge suited to their objectives. What is happening as a result is that very often these laws are becoming overlapping and contradictory. To overcome this problem what is the need of the hour is to develop a comprehensive law which will encompass all the dimensions of traditional knowledge.

The objective of the present study, 'Legal Protection for Traditional Knowledge: Towards a New Law for Indigenous Intellectual Property' is to find out the lacunas of the present

legislative structure and to propose the outlines of a law, its objectives and provisions that could protect the rights of the traditional knowledge holders. Accordingly, the study defines the term traditional knowledge, addresses its different dimensions and explores the economic importance of this knowledge. How this issue is addressed in different international and national forums, how different existing IPR laws try to protect the rights of knowledge-holders, what initiatives are taken by different countries – all such issues are discussed in the present treatise. The study also explains the limitations of existing laws in this regard. Finally, on the basis of the above analysis, a *sui generis* law – what should be the objectives of the law, what provisions should be included in the law – has been suggested.

The present work is the outcome of my decade-long study on different issues on intellectual property rights. It's my great pleasure that a renowned publishing house like Emerald Publishing Limited has come forward to bring my work to the notice of the world of intellectuals. I would always be indebted to all the family members of Emerald, especially to Nick Wolterman, who extended immense support to me throughout this journey with Emerald. I would also like to convey my sincere gratitude to Professor Sebak Kumar Jana of Vidyasagar University, West Bengal, for his valuable suggestions in completing the work. Above all, I must acknowledge the fact that the work would not have started at all if Professor Raj Kumar Sen had not been there to literarily insist on my serious pursuit of the project. Professor Sen is no longer among us. I shall feel his absence once more when this book finally sees the light of the day.

Anindya Bhukta

Arambagh

January 25, 2019