CHAPTER VII

PROTECTING TRADITIONAL KNOWLEDGE:
THE INDIAN EXPERIENCE

I. Introduction

India is rich in genetic resources and associated traditional knowledge and has been identified as one of the countries with mega biodiversity. Traditional knowledge has been used for centuries by Indian indigenous and local communities and has been the mainstay of their existence, especially in key sectors of food and health. In addition, TK also plays a vital role in the conservation of biodiversity in the country. For instance, some tribal populations in India, like the Garo and Khasi tribes of Northeastern India have created "sacred groves" in forest areas that help to conserve the forest and its inhabitants. Similarly the Onges of the Little Andaman Island in the Andaman and Nicobars and the Cholanaickan tribals of Kerala have devised elaborate social procedures to conserve and sustainably exploit natural resources (Sahai 2003: 167). India, apart from her well-endowed biological resources, is also home to rich traditions of crafts. Most of the crafts from the past continue to flourish due to their utilitarian nature, their availability to the common people, and popularity in domestic and foreign markets. Despite such wealth of biodiversity and cultural resources, India is yet to have a clear and exclusive legal protection of traditional knowledge. It is only the CBD and the conclusion of the TRIPS that led Indian policymakers to look at the problems concerning the protection of traditional knowledge in India (Gopalakrishnan 2002: 730). This chapter seeks to examine some of the existing laws in India that may possibly offer protection to traditional knowledge in India.

II. Indian Constitutional Provisions and TK

The Constitution of India does not directly address the issue of protection of traditional knowledge. Article 48(A) of the Constitution refers to the State’s obligation to protect and improve the environment and safeguard the forests and wildlife of the country. Article 51(A)(g)
imposes a duty upon the citizens of India to protect and improve the natural environment, including forests, lakes, rivers and wildlife. As regards protection of TCEs, Article 29 of the Constitution recognizes as a “Fundamental Right” (Part III) the protection of the culture of minorities. According to Article 29, “any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.” It is possible to protect the folklore of the distinct groups in India based on this provision. However, the majority of the TCEs existing and misused now in India belong to small communities who do not come under the scope of the aforementioned constitutional provision (Kutty 2002). The only other general provision in the Constitution that can be identified as a source to protect TCEs is Article 51 A (f) of the Constitution. It is the fundamental duty of every citizen of India “to value and preserve the rich heritage of our composite culture.” Furthermore, considering the special cultural identity of the tribal population in India, the Constitution envisages special protection of the indigenous communities. The areas where there are only tribal communities, as per Article 371 read with the Schedule VI of the Constitution, are permitted to have separate Autonomous Councils for self-governance in accordance with their customary laws. 

III. Biological Diversity Act

With the growing phenomenon of biopiracy and the rapid increase in the appropriation and commercialization of genetic resources “as they are”, new pressures have emerged on biodiversity practices. In view of these concerns, India, being a signatory to the CBD passed the Biological Diversity Act (BDA), 2002 which is intended to provide for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources and knowledge (BDA, Chapter V,

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2 The normal laws of the land are applicable only if accepted by the community and the Council has the power to make laws even to protect their social customs. For other parts of the country, as per Schedule V of the Constitution, the government has the power to create scheduled areas to protect the interests of the tribes. The application of the normal laws, if they are in conflict with their customs, can be prohibited by the head of the State. The tribes not falling in the above categories are subjected to the normal laws of the land (Kutty 2002: 19). To some extent whilst there may be some recognition of customary rules of use within communities, such as at religious and spiritual occasions like marriages, birth and death rituals etc., there exists no law in India presently that directly prohibits outsiders from misappropriating their folk arts and practices.
Section 21). The Biological Diversity Act, 2002 along with the Biological Diversity Rules, 2004 are the prevailing laws for biological diversity\(^3\) in India.

The BDA primarily addresses access to genetic resources and associated knowledge by foreign individuals, institutions or companies, which is intended to ensure equitable sharing of benefits arising out of the use of these resources and knowledge to the country and the people. The power to give prior informed consent along with the terms and conditions of the use including benefit sharing is vested with the National Biodiversity Authority (NBA) presently located at Chennai (BDA, Section 19). Under this Act, a foreigner\(^4\) is prohibited from obtaining any biological resource occurring in India or knowledge associated thereto for research or commercial utilization or for bio-survey or bio-utilization without the prior approval of the National Biodiversity Authority (NBA) (BDA, Chapter II, Section 3). Such a person must seek the permission of the NBA by making an application in the prescribed format and on the payment of the prescribed fee. Even a citizen of India or a body corporate, association or organization, which is registered in India has to give prior notice to the State Biodiversity Board before obtaining any biological resource for commercial utilization, or bio-survey and bio-utilization for commercial utilization. This however does not apply to local people and communities of the area, including growers and cultivators of biodiversity and vaid\(s\) and hakims (indigenous doctors) who have been practicing indigenous medicine (BDA, Chapter II, Section 7). The BDA provides for the exclusion of value added products from the definition of biological resources\(^5\) and traditional use from the definition of commercial utilization\(^6\). Where there is no

\(^3\) Under the BDA, “biological diversity” is defined in Section 2(b) as: “the variability among living organisms from all sources and the ecological complexes of which they are part and includes diversity within species or between species and of ecosystems.”

\(^4\) This is a person who is not a citizen of India or who is a citizen of India but is a non-resident (as defined in clause 30 of Section 2 of the Income Tax Act, 1961), or a body corporate, association or organization that is not incorporated or registered in India or if incorporated or registered in India has any non-Indian participation in its share capital or management. See Section 3, BDA.

\(^5\) Section 2(c) reads: “means plants, animals and micro-organisms or parts thereof, their generic material and byproducts excluding value added products, with actual or potential use or value, but does not include human genetic material. Value added products means products, which may contain portions/extracts of plants and animals in unrecognizable and physically inseparable form.

\(^6\) Section 2(f) read: “commercial utilization means end uses of biological resources for commercial utilization such as drugs, industrial enzymes, food flavours, fragrance, cosmetics, emulsifiers, oleoresins, colours, extracts and genes used for improving crops and livestock through breeding or genetic intervention and shall not include traditional practices in use in any agriculture, horticulture, poultry, dairy farming or animal husbandry or bee keeping”.

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“commercial utilization” in many cases Indian industries and other citizens could be exempted from requirement to obtain prior approval.

Under the Indian Biological Diversity Act, 2002, no application for IPRs can be made by any person within or outside India, without the prior approval of the NBA (BDA, Chapter II, Section 6). This obligation is exempted in case of new plant varieties since specific provisions are included in the law governing protection of new plant varieties. The NBA is duty bound to impose benefit sharing fee or royalty or both or impose conditions including the sharing of financial benefits arising out of the commercial utilization of such rights while granting approval [BDA, Sections 19(3) & 21(2)]. It is expressly mentioned in the Act that the benefit sharing may include joint ownership of intellectual property, transfer of technology, location of R&D and production units in such areas which will facilitate better living standards to the benefit claimers, association of Indian scientist and local people with R&D, bio-survey and bio-utilization, setting up of venture capital for aiding the cause of benefit claimers, payment of compensation in both monetary and non-monetary terms. In must be noted here that grant of joint ownership of IPRs under the BDA will automatically rest with the NBA where benefit claimers have not been identified [BDA, Chapter, Section 21(2) (a)].

The nature of the NBA’s obligation with regard to regulation of access to genetic resources and associated knowledge thereto is not very clear. The NBA’s only obligation is to ensure that the benefit sharing agreement is equitable and in accordance with the mutually agreed terms and conditions between the persons applying for approval and the local bodies and benefit claimers [BDA, Section 21(1)]. It is however mandatory for the NBA to consult the Biodiversity Management Committees (BMC) before taking decisions relating the use of biological resources [BDA, Section 41(2)]. But there is no obligation on the part of NBA to follow the suggestion or decisions of the BMC since the obligation is only to “consult”. On the occurrence of an instance

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7 See BDA, Chapter V, Section 21 (2) (a) to (f).
8 Section 2 of the Act defines "benefit claimers" as follows: “means the conservers of biological resources, their by-products, creators and holders of knowledge and information relating to the use of such biological resources, innovations and practices associated with such use and application”.
9 The Act is silent about the constitution of the BMC. However, according to class 22 of the Biodiversity Rules 2004, the Biodiversity Management Committee shall be constituted by the local body and shall consist of a Chairperson and not more than six persons nominated by the local body, of whom not less than one third should be women and not less than 18% should belong to the Scheduled Castes/Scheduled Tribes. It appears that the local body is left to decide the members to be included in the committee. There may be a possibility of inclusion of the

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of biopiracy, the NBA is empowered by the Act to take any necessary action to oppose the grant of IPR in any country outside India on behalf of the Government of India [BDA, Chapter IV, Section 18(4)]. However, it has been observed that in the absence of a globally agreed single forum wherein such cases can be challenged, the NBA may be left engaged “in fire-fighting at different patent and or trade mark offices overseas” (Kalpavriksh 2004).

It must be noted that there is no provision under the Indian Biodiversity Act enabling the local bodies to enter into agreement with the person claiming access. There is also no provision in the Act obligating the local bodies to enter into such agreements only with the prior informed consent and participation of the holders of knowledge particularly indigenous and local communities in cases where the knowledge belong to them. Furthermore, unfortunately, the Act is also silent about the ownership and control of genetic resource and associated traditional knowledge by the indigenous and local communities wherever it is clearly associated with them. It must be pointed that some scholars believe the emphasis of the Indian Biodiversity Act is more on the international trade in biological resources, neglecting the rights and interests of local and indigenous communities (Gopalakrishnan 2002: 739). The centralized approach to the grant of consent to use, transfer and commercialization of traditional knowledge without the prior informed consent and involvement of the holders of knowledge, “seems to be against the letter and spirit of the international norms in this regard” (Ibid.). Similar concern over the negation of the rights of local bodies and community representatives has been expressed over the Indian Biological Diversity Rules, 2004.10

IV. Traditional Medicine

Traditional know how and traditional medicines11 make a very important contribution to the holders of traditional knowledge in the Committee though their representation is not made mandatory in the Act or Rules.

10 In 2007, Panchayat and other community representatives from the states of Andhra Pradesh, Meghalaya, Orissa, Tamil Nadu and Uttar Pradesh submitted over 3,000 resolutions to Prime Minister Manmohan Singh expressing serious concerns over the implementation of the said Rules. It is believed by these groups that “the Rules delineating the provisions of the Act limit the power and function of the very same communities to only documentation of their resources and knowledge, with no legal provision to exercise control over what is documented” (The Financial Express, 2007).

11 In the context of health policy, the WHO defines traditional medicinal knowledge as: “the sum total of the knowledge, skills and practices based on the theories, beliefs and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health, as well as in the prevention diagnosis, improvement or
health of a particular community. In some Asian and African countries, 80% of the population depends on traditional medicine for primary health care (WHO Fact Sheet 2008). In China, traditional medicine accounts for around 40% of all health care delivered. In Chile, 71% of the population and in Colombia 40% of the population use such medicine. In India, 65% of the population in rural areas use Ayurveda and medicinal plants to help meet their primary health care needs.

Traditional systems of medicine are generally based on traditional beliefs, norms and practices based on centuries old experiences of trials and errors, successes and failures at the household and community level. These are passed through oral tradition (Correa 2002). India possesses well established system of traditional medicinal practices such as Ayurveda, Unani and Sidha. The knowledge associated with these systems is well documented and has been successfully practiced in India for centuries. In addition to this, there are innumerable varieties of local health practices spread over the villages of India. Majority of the people living in the villages of India still maintain their health care based on these practices. Practitioners of these systems have relied on culture and tradition and the need for a formal legal framework to protect this rich traditional system was never felt.

In India, the national policy on traditional medicine was introduced in 1940. National laws and regulations were also issued in 1940, and updated in 1964, 1970 and 1982. The national programme was issued in 1964. The national office- the Department of Medicine and Homeopathy-was established in 1995 as part of the Ministry of Health and Family Welfare. There are a number of expert committees for different forms of traditional medicine; the earliest of which was established in 1962. There are also a number of national research institutes; the first being the Central Council of Indian Medicine, established in 1970. India also has two multivolume national pharmacopoeias, the Ayurvedic Pharmacopoeia of India and the Unani Pharmacopoeia of India. Both are considered to be legally binding. Regarding national


12 According to the All India Coordinated Research Project on Ethnobotany, the indigenous communities are acquainted with the use of over 9000 species of plants and specifically for the purpose of healing are aware of the use of over 7500 species of plants. See Venkataraman, K. and S. Latha, Swarna (2008), “Intellectual Property Rights, Traditional Knowledge and Biodiversity of India”, Journal of Intellectual Property Rights 13: 326, 328.
monographs, several sources are used, including a national database on medical plants used in Ayurvedic medicine and monographs contained in the national pharmacopoeias.

Manufacturing regulatory requirements include adherence to information contained in pharmacopoeias and monographs and the same good manufacturing practices (GMP) rules required for conventional pharmaceuticals. Drug licensing, inspection and testing are employed to ensure compliance with these requirements. Safety requirements include those required for conventional pharmaceuticals, as well as special requirements of traditional use without demonstrated harmful effects and reference to documented scientific research on similar products. No control mechanism is used for these requirements, as the long standing use of herbal medicines in the Ayurveda, Unani and Siddha systems demonstrates their safety for human use (WHO 2005: 121).

The demand for protection of traditional medicine arose in the context of bio-piracy and patenting of new products based on traditional knowledge using biotechnology (Latha 2008). Western science has acknowledged the usefulness of traditional medicine for the development and commercialization of new pharmaceutical products. However, the relegation of TK in general and traditional medicinal knowledge in particular to the “public domain,” freely available to use by anybody has been of some concern for developing countries like India. While international protection measures are still being debated for traditional medicine, it is relevant to consider Indian laws and the extent to which traditional medicine can be afforded protected.

V. **Indian Patent Act**

As noted above, the terms of the Indian Biodiversity Act in some limited ways may help protect TM, owing to its focus on genetic resources and associated TK. However, since TM is an intricate combination of both tangible and intangible TK resources, the Biodiversity Act alone will not suffice to protect TM. So far as the intangible aspects of TK are considered, the Indian Patent Act (as amended in 2002) acknowledges its value and contains provisions that proscribe the patenting of TK. Under Section 3 (p) of the Indian Patent Act, “an invention which in effect is traditional knowledge or which is an aggregation or duplication of known properties of

13 GMP is that part of quality assurance which ensures that products are consistently produced and controlled to the quality standards appropriate to their intended use and as required by the marketing authorization.
traditionally known component or components" is not patentable. This provision however does not prevent granting of patent to new products and process based on traditional knowledge. The Act also mandates the disclosure of the source and geographical origin of the biological material in the patent specification when the invention claimed is based on biological material [Indian Patent Act, Section 10(d) (ii) (D)]. Since the use of biological material is closely associated with TK the requirement for disclosure is important. Nonetheless, the Indian Patent Act is conspicuous in its failure to require the disclosure of the nature of the traditional knowledge used, the community or the holder it belongs to and the prior informed consent of the community or the holder to use the same. There is also no reference to the provisions of the Biological Diversity Act in this regard at least in cases where the traditional knowledge is based on genetic materials.

The Indian Patent Act acknowledges the oral tradition in TK and accordingly allows opposition to a patent application if the invention claimed in the application is anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in any country [Indian Patent Act, Section 25(k)]. Opposition to patent is also allowed where the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention [Indian Patent Act, Section 25(j)]. Similarly a patent granted can also be revoked on the above-said grounds [Indian Patent Act, Section 64(p) & (q)]. But here again there is no provision to oppose a patent application or revoke a patent granted on the ground that the traditional knowledge is used without the prior informed consent of the community or the patent owner failed to satisfy the terms and conditions including benefit sharing. These provisions are specifically included to prevent the patenting of existing knowledge of the local and indigenous communities but at the same time facilitate the patenting of new products and processes based on traditional knowledge. Given the differences between the traditional medicinal knowledge systems and the new medicines based on western science, the norms for patenting particularly the requirement of inventive step is going to be used in favour of modern pharmaceutical industries to give protection to new products based on traditional knowledge (Gopalakrishnan 2005). Thus the Act while treating the traditional knowledge as public domain property has failed to recognize the customary ownership and rights of the custodians of this knowledge.
VI. Plant Varieties and Farmers’ Rights Act

Another legislation that has a very limited application in case of protection of traditional medicine is the Protection of Plant Varieties and Farmers’ Right Act (PVFA)\textsuperscript{14}, 2001. The PVPA though primarily intended to protect new plant varieties also includes provisions for the registration of existing varieties and payment of compensation and benefit sharing to the community. The law is useful for protection traditional medicine only if there are medicinal plant varieties. The benefit under this law is mainly targeted to the farming community. To protect the traditional knowledge of farming community the PVPA facilitates the registration of extant variety\textsuperscript{15} and farmers’ variety\textsuperscript{16} under the Act. In addition to this the PVPA also includes a separate chapter entitled Farmers’ Rights to protect the interest of the farming community while providing protection for new plant varieties (PVPA, Chapter VI, sections 39-46). There are provisions for recognition of rights of farmers, benefit sharing, paying compensation to communities for their contributions, immunity from prosecution in case of innocent infringement (PVPA, Chapter VI, section 42), payment of annual fee by the breeders and the creation of a Gene Fund\textsuperscript{17} are the special provisions included in the Act. Similar to the Biodiversity Act, there is no provision recognizing the ownership of traditional knowledge with the community. Section 41 of the PVPA allows for any persons, group of persons (whether actively engaged in farming or not) or any governmental or non-governmental organization to file claims “attributable to the

\textsuperscript{14} The PVPA is India’s \emph{sui generis} legislation for the protection of plant varieties giving effect to Article 27(3)(b) of the TRIPS Agreement. The Preamble to the Act outlines some of the basic objectives behind the PVPA. The Act is purportedly for “the establishment of an effective system for protection of plant varieties, the rights of farmers and plant breeders and to encourage the development of new varieties of plants.” The PVPA acknowledges the need to protect plant breeders’ rights to stimulate investment for research and development. The PVPA was also created for the purpose of facilitating the growth of the seed industry in India, “which will ensure the availability of high quality seeds and planting material to farmers.”

\textsuperscript{15} The PVPA defines “extant variety” in Section 2(j), as a variety available in India which is –
  
i) Notified under Section 5 of the Seeds Act, 1966 ; or
  
ii) Farmer’s variety; or
  
iii) A variety about which there is common knowledge; or
  
iv) Any other variety which is in public domain

\textsuperscript{16} The PVPA defines “farmer’s variety” as a variety which
  
i) Has been traditionally cultivated and evolved by the farmers in their fields; or
  
ii) Is a wild relative or land race of a variety about which the farmers possess the common knowledge

\textsuperscript{17} The National Gene Fund is to be constituted by the Central Government which shall be applied for meeting (i) any amount to be paid by way of benefit sharing; (ii) the compensation payable; (iii) the expenditure for supporting the conservation and sustainable use of genetic resources including \emph{in situ} and \emph{ex situ} collections and for strengthening the capability of the \emph{Panchayat} in carrying out such conservation and sustainable use; (iv) the expenditure of the scheme relating to benefit sharing. See Section 45, PVPA, 2001.
contribution of the people of a "village or community...in the evolution of any variety for the purpose of staking a claim on behalf of such village or local community." Such claims are subject to a complex set of verifications by the Central Government and the PVPA seems disproportionately biased in favour of the rights of breeders [PVPA, Chapter VI, Section 41(3)]. The payment of compensation to the community rather than a right of ownership is recognized under the PVPA.

VII. TK Documentation and Traditional Medicinal Knowledge

Documentation of traditional knowledge is one of the defensive forms of protection that has received a fair amount of attention in recent years. To tide over the problem of the open and freely accessible "public domain" and the concomitant instances of "poaching" on traditional knowledge without permission or benefit documentation, mostly in digital format has been seriously considered in recent years. As has been previously elucidated in the Chapter on Non-IP Options for the Protection of Traditional Cultural Expressions, both India and China have emerged at the forefront of documentation efforts to protect traditional knowledge, particularly medicinal knowledge.

The Traditional Knowledge Digital Library in India is a collaborative project between the National Institute of Science Communication and Information Resources (NISCAIR), Council of Scientific and Industrial Research (CSIR), Ministry of Science & Technology and the Department of Ayurveda, Yoga & Naturopathy, Unani, Siddha and Homoeopathy (AYUSH), Ministry of Health and Family Welfare, which is being implemented at NISCAIR. An interdisciplinary team of traditional medicine (Ayurveda, Unani, Siddha, Yoga) experts, patent examiners, information technology experts, scientists and technical officers are involved in creation of TKDL for Indian Systems of Medicine.

The TKDL seeks to provide information on traditional knowledge existing in the country, in languages and format understandable by patent examiners at International Patent Offices (IPOs), so as to prevent the grant of wrong patents. The TKDL thus seeks to act "as a bridge between the traditional knowledge information existing in local languages and the patent examiners at IPOs." The project involves documentation of the TK available in public domain

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18 See TKDL Official website at http://www.tkdl.res.in/tkdl/
in the form of existing literature related to Ayurveda, Unani, Siddha and Yoga, in digitized format in five international languages which are English, German, French, Japanese and Spanish. The project has created the Traditional Knowledge Resource Classification (TKRC), an innovative structured classification system for the purpose of systematic arrangement, dissemination and retrieval for about 25,000 subgroups of plants as against the few subgroups that were available in the previous version of the International Patent Classification (IPC), related inter alia to medicinal plants, minerals, animal resources, effects and diseases, methods of preparations, mode of administration.

Impact of the TKDL project has been felt at the international level. A tangible recognition of India’s strong involvement in the realm of protection of TK, at the WIPO was the adoption of some key technical proposals put forward by the Asian Group of countries concerning databases and registries for protecting TK and genetic resources, and WIPO’s role thereof. In this regard, the Indian TKDL among few other Asian experiences at database protection of TK were taken into accounted by the WIPO and considered in the light of the objectives, functionalities and extent to which they use certain technical specifications like:

i) content and resource identification standards; and
ii) security standards.

Several developing countries like South Africa and African sub-continent represented ARIPO, Mongolia, Thailand, Malaysia have shown keen interest for replicating TKDL for their respective countries. Committee of experts at IPC Union in October 2004 agreed to link/integrate

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19 As of June 2009, the TKDL project has transcribed 2,04,000 traditional medicinal formulations.

20 Presentation on Traditional Knowledge Resource Classification (TKRC) at IPC Union led to the creation of WIPO-TK Task Force consisting of USPTO, EPO, JPO, China and India by (IPC) Union for enhancing the sub-groups in IPC for classifying the TK related subject matter and considering the linking of TKRC with IPC. In February 2002, a Committee of Experts recommended the inclusion of approximately 200 subgroups on TK against the few existing sub-groups on medicinal plants, and linking of TKRC to IPC and thus, a new main group was included in IPC i.e. AK61K 36/00 with 207 subgroups covering different categories of plant.

21 These recommendations to the WIPO were made pursuant to the WIPO Asia Pacific Regional Seminar on Intellectual Property Rights, Traditional Knowledge and Folklore, held in Cochin, India, from November 13 to 13, 2002.

22 Objectives of data protection studied in the light of practical Asian experiences included: conservation and preservation, defensive protection, positive protection, full stakeholder involvement, national and local control of databases, and international recognition of defensive and positive protection of TK.

TKRC developed for TKDL project with international patent classification. Also based on the input provided from the project, the above Committee in February 2003 agreed to include sub-groups on medicinal plants from earlier existing one sub-group to 200 sub-groups in international patent classification. Thus, TK seems to have been given international recognition due to the pioneering work on TKDL. It is however too early to say how far the documentation efforts at TKDL have proven useful to prevent attempts at patenting existing traditional knowledge. On 2 February 2009, the Indian government allowed access to the TKDL, to patent examiners at the European Patent Office. Other countries have also opened their digital archives on traditional medical knowledge to EPO patent examiners. In 2008, the Chinese Patent Office (SIPO) granted the EPO access to its 32 000-entry database on traditional Chinese medicine. While the access to such databases on traditional knowledge have been described as a “win-win situation”24 for all concerned, be it with regard to prior art searches in patent offices or protection against misappropriation, some concerns have remained.25

VII.1. Some Regional Efforts

VII.1.1. Karnataka

Indian states are also actively involved in protecting TK. For instance, initiatives of the State of Karnataka include eco-development project in the Nagarhole National Park that seeks to address the livelihood issues of the forest living communities in and around the National Park. The state has constituted more than 3700 Joint Forest Planning and Management Committees for involving people in management and protection of forest.26 The state is also rich in medicinal plants and has constituted the Karnataka Medicinal Plant Authority to promote medicinal plant conservation and development in the state.27 The Karnataka Forest Department has initiated


25 Scholars like Gopalakrishnan opine that documentation of TK has made the position of developing countries even more vulnerable by taking the “knowledge base that remained within the confines of the community” and “slowly making available for plunder without their knowledge and consent” (Gopalakrishnan 2002: 725). For more see Chapter VI of the study.


27 In Karnataka according to the study of the Botanical Survey of India there are 3924 species belonging to 1323 genera and 199 families in the forests, of which 1493 species are of medicinal value. These belong to 808 genera and 108 families. They occur in different vegetation types across the Western Ghats.
various programmes for the creation of medicinal herbs, shrubs and trees associated with traditional methods of medicines. In Karnataka with the help of Foundation for Revitalization of Local Health Traditions (FRLHT) Bangalore, 13 Medicinal Plant Conservation Areas (MPCA) and Medicinal Plant Development Areas (MPDA) are established and managed with the help of local people.\(^{28}\)

**VII.1.2. Andhra Pradesh**

Documentation and training programmes have been initiated in Andhra Pradesh to enhance awareness of ancient Ayurvedic, herbal and native medicines. For instance, a conscious effort has been made by Laya, an NGO working for the development of tribals in Visakhapatnam and East Godavari districts, to document the knowledge of tribals and to promote their system of medicine. It set up ‘Vanantram’, an Adivasi Moolika Vaidyasala and Training Centre, at Addateegala in East Godavari district for training interested tribal youth\(^{29}\) in scientific methods of preparation of native medicines, delivery and documentation.

**VII.1.3. Kerala**

After consultations for almost 3 years, the State of Kerala, vide Government Order (P) No. 4/2008/Law, came out recently with an IPR policy (hereinafter KTKP) chiefly targeting the lack of protection for traditional knowledge in the state. The policy identifies misappropriation of traditional knowledge in Kerala, especially related to its traditional medicine system of Ayurveda in Kerala as the chief impetus to the formation of the policy (Section 2). The policy outlines the State’s concern about protecting its wealth of knowledge comprising tribal medicines, Ayurveda practices and bio-diversity. Kerala had in the past lost several of its traditional knowledge rights on healthcare, food and food supplements, as well as on designs and cultural properties, because the original inventors or communities that inherited the knowledge over generations were not supported by the government.\(^{30}\)The policy document states that traditional medicinal knowledge

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28 See website for the Karnataka Forest Department, available at http://karnatakaforest.gov.in/English/ forest_glance/medical_plants.htm

29 The tribals are now trained to prepare drugs that can be stored for some months and in some cases a year so that they can be used as and when required. The community health practitioners maintain a record of the cases attended by them and the results obtained. See Gopal, Madhu B. (2009), “Effort to promote Native Medicine”, *The Hindu*, 01 October 2009.

30 Losing the trademark rights on Jeevani tea and nutritional supplements to the US-based NutriScience Inc. is a recent example. Jeevani, a health drink with high medicinal value, was developed by the State-owned Tropical
in Kerala forms the basis of livelihoods of many traditional knowledge practitioners and hence the absence of any legal property rights over such knowledge creates scope for private appropriation.

A study of the Policy is relevant as it claims to provide an adequate model for other forms of TK (Section 13). The Policy seeks to work within the parameters of Central Government Indian legislations such as the amended Indian Patent Act (2005) and the Biological Diversity Act (2002). According to the KTKP, a distinction must be drawn in the corpus of TK-knowledge which is the “preserve of particular communities, especially tribal communities, or particular institutions, families, often located in specific regions, and passed down from one generation to the next” and; the knowledge which sustains the livelihood of many persons across the state, which does not have a specific custodian or family in charge of it. Illustratively, the Policy refers to the famous Kotakkal massage in Kerala as knowledge belonging to the first category and the daily practice of Ayurvedic medicine by numerous practitioners across the state as belonging to the second category (Section 3).

The KTKP reveals an interesting understanding of TK as “traditional” in “not just being insufficiently codified, or in the non-formality of its mode of transmission, or in its not being subject to any legally defined property rights”, but also indicates TK as knowledge that remains largely outside domain of capitalist, especially corporate, operations.” (Section 2: emphasis supplied). Thus, the policy seems to view attempts to commercialize TK, “outside the circle of traditional users” (Section 11) with some degree of suspicion and seeks to subject them to higher levels of authorization for use. “Capitalist” or “corporate” entities are terms used loosely. Section 4 (iii) states that “no entity registered as a medium or large enterprise may be deemed to have any rights over traditional knowledge.” Section 7 of the Policy proscribes “medium and large enterprises” from obtaining autonomous license of use both within the State and outside.

The Kerala TK IPR policy clarifies that the legal arrangement for the protection of all traditional knowledge, including traditional medicine (qualified by “the practice of which sustains livelihoods”), will belong to the “knowledge commons” and not “to the public domain.” The terms “commons” and public domain have often been used interchangeably in scholarly
literature and fair amount of academic discussion has ensued on the consequences of relegating TK to the realm of “public domain” (Dutfield 2000; Boyle 1996). Likewise in the realm of copyrights, the expansion of IPRs and the continuing enclosure of the “intellectual and artistic commons,” under the logic of the marketplace, are believed to negatively affect democracy (Bettig 1996:5). The use of “knowledge commons” in the Kerala TK IPR Policy by clearly distinguishing from “public domain” seems to point towards the commons as the diverse array of publicly owned assets, gift-economies and natural systems that function in tandem with markets.

In an attempt to directly address the community ownership of traditional knowledge, the Kerala TK IPR policy formulates two categories of right-holders: i) community or family custodian of knowledge and ii) where there is no specific custodian of knowledge, the State of Kerala “is deemed to be the right-holder.” The Policy does create property rights, albeit in a restricted manner. The right-holder as identified in the first category, i.e. family custodian or community, has two forms of rights. Firstly, the right where applicable, to a brand name or a name associated with the unique practice of an institution or community or family, such as “Kotakkal massage”; and secondly the right to use the knowledge commercially or non-commercially [Section 4 (iv)]. Everybody else other than the right-holder of the first category who wishes to use this knowledge will have to do so under a “commons license” [Section 4(v)]. This “commons license” is deemed to be held by every right-holder to traditional knowledge (first category right-holders).

In this regard, the recognition of traditional transmission as a commons-based system would help place “innovations and IPRs in a broader context,” and show the contrast between cultural models (Escobar 1998:75). Scholars have observed that without saying that IPRs are inappropriate to all situations, it is important to support local knowledge and innovation “not in the hope of securing individual profit but as a way of helping people to protect their commons.” This might require protecting “community spaces outside the market so that the place for local innovation is preserved and the results may be locally enjoyed” (Gudeman 1996: 118). This logic seems to be the basis of the commons license in the Kerala TK IPR policy. The use of the “commons license” explains the system of “knowledge commons” envisaged by the Policy. Under this license the right-holder permits others the use of the knowledge over which the right is held for non-commercial purposes (Section 7). If any development occurs in the course of use, then under the conditions of the license, such a development will have to be put back into the
traditional knowledge “commons” and cannot be patented anywhere (Section 7; emphasis supplied). Such an arrangement has been considered by some as “a scheme reminiscent of the open source licensing movement and to some extent, even the creative commons license) (Basheer 2008). The ‘creative commons’ licence is a means devised to enable producers of information and/or knowledge to secure widened access while retaining some control over their work. ‘Creative commons’ licences not only allow distributed usage of content, but also, importantly, do not allow its subsequent commodification (or ‘enclosure’) when used in other contexts. The licence is formulated as a menu of options as regards the extent of open access that an author might wish to allow: it allows a selection from a series of increasingly greater ‘freedoms’ to use, modify and distribute (Lessig 2004; May 2005). Recently, the US Court of Appeals for the Federal Court (Robert Jacobsen vs. Mathew Katzer & Kamind Associates, United States Court of Appeals for the Federal Circuit, 2008-1001), the highest IP court in the US upheld the validity of a creative commons license and treated its infringement at par with a copyright.

Furthermore, in the Kerala TK IPR Policy, it must be noted that the “commons license” system is for non commercial purposes. Where commercial use is desired by non-right holders, the terms and conditions are to be negotiated between right-holder and the potential user. As regards knowledge rights falling within the realm of the State, requests for commercial use are not required for “actual practitioners of this category of knowledge in Kerala, provided they are not classifiable as medium or large enterprises” (Section 8). However this automatic license for commercial use does not allow the licensees the right to sub-license. Only the State of Kerala as the original right-holder enjoys such a right (Ibid.). A problematic angle to the Policy that remains unaddressed is who would be considered as “an actual practitioner” “in Kerala.”

The Kerala TK IPR Policy acknowledges the possibility of failure to prevent all potential corporate misappropriation of traditional knowledge (Section 8) and indicates the lack of codification of traditional knowledge as the chief reason that prevents effective challenge to the usurpation of such knowledge. The Policy takes cognizance of the documentation efforts for Ayurveda and expresses hope that many more documentation efforts, covering other forms of TK will take effect in foreseeable future. The Policy also exerts a note of caution that such documentation efforts may in some circumstances “facilitate indirect misappropriation.”
The important point made in the Policy is the fact that indirect misappropriation and misappropriation "after some minor modification" is hard to prevent (Section 8).

The question of enforcement and monitoring of rights is answered by proposing the setting up of a body called the Kerala Traditional Knowledge Authority (KTKA), funded by the State government and administered by a Board consisting of a Chairman and four members, at least one of whom should be a member of the TK community and the scientific community (Section 6). It is unclear if the TK community referred here means the community as identified as the first-category of right holders or members of the wider community in Kerala.

The policy also envisages that all traditional practitioners of TK will register with the KTKA. For the purpose of registration, applicants will be required to supply evidence of the uniqueness of their actual traditional knowledge practice, along with the details of the nature of their practice, and the details of the nature of the community/group/individual that is the custodian of this practice. The KTKA upon receiving such applications would then invite challenges by issuing a general notice to the public. The Policy is realistic in its regard for challenges, thus acknowledging that claims to custodianship of a unique body of traditional knowledge is highly contested owing to the possibilities of the practice being held by others not identified in the application, as also those who may be in another location or community. Apart from keeping a register on the traditional practitioners and their practices, the KTKA is also visualized as the enforcer of the rights created in pursuance of legal arrangements as identified in the Policy. The KTKA is expected to assume a recommendatory role (Section 6) in terms of possible legal action against cases of infringement of rights and "common license." The KTKA may also extend help to right-holders, both the State government and private communities or individuals, in negotiating terms with other possible commercial users (Ibid.).

Section 9 of the Policy seems to highlight the protection of traditional knowledge associated with biological resources, "as one of the most important source of livelihood." Thus, clearly the focus of the Policy remains traditional medicine and biological resources associated with TK. The Policy also addresses the feasibility of "additional safeguards" against misappropriation, although only for "traditional knowledge associated with biological resources, wherein a close working of the KTKA, State Biodiversity Authority and National Biodiversity Authority is envisioned (Sections 10, 11, 12, 13).
On the matter of protection of other forms of traditional knowledge, the Policy simply states: "[f]or the protection of other traditional knowledge the KTKA mechanism suggested earlier is all that can be provided but that should be quite enough" (Section 13). The emphasis of the Policy on traditional medicinal knowledge in some ways indicates how economic considerations in the State have led to the policy initiative. The Kerala TK IPR Policy seems to be more concerned with the commercial utilization of TK, setting up terms of use and right-holders. The concern for ongoing innovation and common benefit also seems to be acknowledged. However, it is questionable whether the mechanism envisaged under the Policy would really help in protecting expressions of folklore owing to the easy permeability and fusion between cultural expressions of different groups within and outside a given State.

VIII. TCEs: The Indian Regulatory Framework

Apart from her wealth in biological diversity, India is also home to a number of traditional arts and skills. Of these, crafts are one of the major industries of "the imagination", involving traditional knowledge and skill. The National Industrial Classification (NIC) identifies thirteen groups of major handicrafts\(^{31}\). The five principal exportable handicrafts are: carpets, embroidery, hand-printed textiles, wood products and decorated metalware (Liebl and Roy 2003: 5368). Handloom weaving of these is the largest crafts industry in India. Indian folklore-based products are one of the highest revenue generating exports of the country (Bhagirathy and Sengupta 2007). For example, the export of handicrafts from India during the year 2006-07 touched Rupees 16,000 crores.\(^{32}\) The size of the markets enjoyed by the copies of their products that are churned out in China\(^{33}\) and Southeast Asia is unknown, but substantial (Liebl and Roy 2004: 54).

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\(^{31}\) In 1989, the office of the Development Commissioner of Handicrafts (DCH) provided a simple, workable definition of "handicrafts" as: "... Items made by hand, often with the use of simple tools, and generally artistic and traditional in nature. They include objects of utility and objects of decoration." See Ministry of Textiles, Office of the Development Commissioner (Handicrafts), *Report on the Task Force on Handicrafts for the VIII Five Year Plan*, New Delhi (1989).


\(^{33}\) Studies have shown that Chinese firms hold an advantage over Indian handicrafts in their ability to reap economies of scale through higher degree of mechanization, in bulk orders, large shipments, timely delivery and quality control, unavailable otherwise to Indian crafts producers. In contrast, Indian crafts do not show factory-type organization because of labour legislation and fear of unionization. See Kathuria (1998): 68-9, 103.
Within India, artisans can be found everywhere but a few states and regional clusters are said to dominate.\textsuperscript{34} The products of these struggling artisans sustain rapidly growing export and domestic markets. Protecting and preserving handicrafts skills and knowledge is a major challenge; ensuring that they provide viable livelihoods for their owners is an even greater one. In recent times, reports of cheap imitation of ‘Gujrati embroidery’, ‘Benarasi brocade,’ ‘Kanjevaram sarees’, ‘Kohlapuri chappals’ and even festival and ritual arts by foreign enterprises have been received. While some believe that much has been said about the cultural heritage element in our folkloric productions, little has evolved by way of a clear government policy to empower and help poor artisans in their struggle for a livelihood. Rapid globalization and changing domestic preferences have brought the handicrafts sector in India face-to-face with a unique set of challenges.

Contrary to popular belief that the obsolescence of handicrafts is inevitable with the growth of mechanized industry, it has been argued that the scope for growth of the handicrafts industry is larger than ever before owing to the expanding potential of domestic and world tourism and changes in the consumer profile from the high upper class to the larger demand from the middle-class consumer with more flexible lifestyle and tastes (Liebl and Roy 2003: 5371-5372). However, the paradox of talented artisans living in unrelenting poverty while their products support a flourishing export trade is the result of the complex, diverse, and pervasive problems that affect the crafts sector in India. Some of the problems are related to the changing context of consumption; others to the social and economic problems of craft communities; and others to the basic character of the crafts sector, which is vast, dispersed throughout India, and totally unorganized (Liebl and Roy 2004: 57).

Other folk arts also are on the decline. Take for instance the case of the State of Andra Pradesh—home to around 140 folk arts. The findings of a Kolkata-based organisation, Durbar Mahila Samanwaya Committee (DMSC) suggest that some folk artistes, owing to their penury being rendered increasingly vulnerable to sexual exploitation (The Hindu 2007). In few such

\textsuperscript{34} Nearly ninety percent of the artisans (excluding handlooms) can be found in two western Indian states (Gujarat and Rajasthan), in Uttar Pradesh and in eastern India. Interestingly, nearly all the commercially successful Indian crafts come from the Gujarat-Rajasthan cluster and UP. The market-success of these states has been attributed to well-developed tourism of which Jaipur, Delhi, Agra form major nodes; relatively low wages; history of royal patronage for high-quality craftsmanship in UP and Rajasthan and a growing partnership between government, private enterprise and NGO collaboration. See Liebl and Roy (2003): 5366, 5370.
cases, like Aruvacode in north Kerala, the government has together with the help of non-governmental agencies been able to intervene in this largely unorganized sector and provide policy and structural support (Jaitly 1997; Jinan CDS, 2004). The need for formal protection for folkloric expressions, artists and performers however remains the need of the hour.

VIII.1. Indian Position on International Protection of TCEs

India has been an active participant in the ongoing negotiations at the WIPO concerning the protection of TK and folklore. According to India, the objective of according IP protection to TCEs should be “to prevent their misappropriation and to ensure economic returns to the communities who had been nurturing and developing them.” Therefore, India has shown a preference for a combination of both economic rights and moral rights for the protection of TCEs. The understanding in this regard is that “economic rights would contribute to capacity building and, thereby, conservation and positive development of the TCEs while moral rights would pave the way for appropriate recognition and acknowledgement by others of the TCEs.”

The need for a legally binding international instrument for the protection of TK and TCEs has been expressed by India. The Indian delegation at WIPO has fleshed out the details of what could be considered misappropriation of TCEs. To summarise, the acts of misappropriation must include instances of acquiring TCEs by theft, bribery, inducement, fraud, misrepresentation, deceit, or breach of confidence or fiduciary relationship. The Indian delegation at the WIPO has stressed the importance of the principle of prior informed consent (PIC) not only for the protection of genetic resources and associated TK but also for TCEs. Accordingly, India has represented that: “[acquisition] of information, including recording for commercial use such as for broadcasting, telecasting, advertisement, without the PIC of the holders and traditional users of such TCEs/EoF, would amount to misappropriation. This would also include unauthorized disclosure of secret or spiritual TCEs. Commercialization of TCEs/EoF without just and appropriate compensation should also be considered an illegal and unacceptable act.” Apart from stressing on PIC for commercialization of TCEs and access to secret or spiritual TCEs, India has also required for equitable compensation to be paid to the communities concerned.

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While considering the possible duration of IP protection for TCEs, India has expressed the need for unlimited protection as in the case of geographical indications. According to India, protection should endure for as long as the TCEs/EoF continue to meet the criteria for protection.\(^{37}\) However in examining the prospects of IP protection, India is not in favour of using traditional IP laws like copyright or design laws since it is "difficult to establish the conditions of originality and novelty requirements."\(^{38}\) Instead India has mooted for a new group of IPRs which encompass all such forms of traditional wisdom.\(^{39}\)

Though the Indian delegation at WIPO has clearly voiced the need for a legally binding international instrument for the protection of TCEs, it has also suggested that the provisions of such an international instrument should be structured flexibly so that the national regulations can take care of the diversity of the problems while implementing the international obligations. India has reserved the right to national regulation for the purpose of complying with international obligations in this regard.\(^{40}\) India believes that all nationals or habitual residents of a prescribed country as defined by international agreements rights should be eligible to become beneficiaries to the protection of TCEs under national measures or laws. India also seeks to extend national treatment to eligible foreign beneficiaries.\(^{41}\)

Considering the fact that India has stressed the need for national regulation in the light of possible international obligations, it is important to examine and analyse how far the current state of Indian laws are capable of protecting TCEs. Accordingly, an analysis to this end follows in the succeeding parts of this Chapter.

VIII.2. Indian Copyright Act and TCEs

A consideration of Indian legislations that cover literary, artistic, musical and performing arts leads naturally to the Indian Copyright Act, which has undergone, five amendments since 1957, with its last one in 1999. The Indian Copyright Act as it stands today does not directly address the protection of folklore. Even within the parameters of its provisions, the ability of

\(^{38}\) WIPO/GRTKF/IC/11/15 Prov., 2007.
\(^{39}\) WIPO/GRTKF/IC/11/15 Prov., 2007.
\(^{40}\) WIPO/GRTKF/IC/11/15 Prov., 2007.
\(^{41}\) WIPO/GRTKF/IC/11/15 Prov., 2007.
TCEs to fit in looks bleak.\textsuperscript{42} The emphasis on “original” works\textsuperscript{43} would clearly remove the possibility of protecting pre-existing traditional cultural expressions, although the scope for derivative works remains open.

The Act affirms the meaning of “literary work” given in common law, which is to cover work expressed in print or writing, irrespective of the question whether the quality or style is high [\textit{University of London Press Ltd. vs. University Tutorial Press Ltd.}, (1916), 2 Ch.D. 601]. According to the commentary to Section 2(0) of the Act, “literary work” is an inclusive definition and, therefore not exhaustive. Literary work also includes computer programmes, tables and compilations including computer databases. Further scrutiny of the Indian Copyright Act suggests that Indian law requires fixation for copyright protection and the term of protection under ordinary circumstances, extends to lifetime of the author and an additional sixty years from the calendar year following his/her demise (Section 22).

Although the Copyright Act protects copyright in anonymous and pseudonymous works, the term of copyright protection in the case of literary, dramatic, musical or artistic work (other than a photograph) subsists until sixty years from the beginning of the calendar year next following the year in which the work is first published [Section 23(1)]. Here again clearly, protection for anonymous expressions of traditional folklore cannot be provided. Despite the opportunity available for India to use Article 15.4 of Berne Convention to designate an authority to protect and enforce rights in expressions of folklore of which the authors are presumed to be Indian nationals, in any other Berne Convention country, the same is not reflected in the Indian Copyright Act.\textsuperscript{44}

\textsuperscript{42} The right of copyright extends to the following: a) original literary, dramatic, musical and artistic works; b) cinematograph films; and c) sound recording, (Section 13(1), subject to succeeding clause (2) of the Act).

\textsuperscript{43} The “originality” which is required relates to the expression of thought but the Act does not require that the expression be in an original or novel form, but that the work must not be copied from another and should originate from the author (\textit{Fateh Singh Mehta vs. O.P. Singh}, AIR 1990 Raj. 8). The threshold for determining “originality” has however been raised by some recent Supreme Court verdicts that refer to a “flavour” or “modicum” of creativity to allow for copyright protection (\textit{Dr Reckewag vs. Mts. Adven}, I.A. 7326/2007 in CS (OS) 1189/2007, Delhi High Court). For instance, in \textit{Eastern Book Company vs. DB Modak & Another}, Civil Appeal 6472 of 2004, 12/12/2007 (Delhi High Court) an interesting copyright case, the Supreme Court of India recently ruled that there can be no copyright in the raw text of court judgments/decisions. Elaborating on the theory of copyright protection, the court held that to claim copyright in a compilation, the author must produce a material with “exercise of his skill and judgment” which may not be creativity in the sense that it is not novel or non-obvious, but at the same time it is not the product of merely labour and capital.

\textsuperscript{44} WIPO Consolidated Analysis, WIPO/GRTKF/5/3, 2003, Annex: 62.
Moreover, although India is yet to sign the WPPT, it has through its 1994 amendment to the Indian Copyright Act, in Section 38, recognised performer’s rights.\footnote{Within the ambit of the Copyright Act, “performance in relation to performer’s right means any visual or acoustic presentation made live by one or more performers” [section 2(q)]. “Performer” includes: “an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance” [section 2(qq)].} According to the Indian Copyright Act, performer’s right shall subsist until fifty years from the beginning of the calendar year next following the year in which the performance is made [Section 38(2)]. During the continuance of a performer’s right in relation to any performance, certain acts identified in the Act, done without the consent of the performer are deemed to infringe the performer’s right. These include making of sound or visual recording of the performance; or its reproduction without permission and similar restriction relating to broadcasting, subject to Section 39 of the Act.\footnote{In 1995, the Ministry of Human Resources and Development, Government of India conducted a study on the extent of copyright piracy in the country and in the process learnt that there is about nineteen to twenty three percent (1995-1997) violation of performers’ rights through unauthorized audio-visual recording and broadcasting (Table 1.1, Study on Copyright Piracy, National Productivity Council, GOI). The study refers to actors, singers, musicians and dancers. It is unclear how far folklorists are addressed within this group. The study is available at http://copyright.gov.in/maincpract7.asp}

Thus, the Indian Copyright Act certainly makes way for some protection of folkloric performances. However, some of its other provisions undermine these gains. Section 38(4) of the Act explicitly states that once a performer has consented to the incorporation of his performance in a cinematograph film, the provisions of sub-sections (1), (2) and (3) shall have no further application to such performances.\footnote{The Act defines “cinematograph film” as “any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and “cinematograph” shall be construed as including any work produced by any process analogous to cinematography including video films [section 2(f)].} However, even the work of a cine artist, his performance as an actor in a cinematograph film does not fall within the definition of “cinematograph film” to be found in Section 2 (f), and hence, is not protected under this Act. It is the cinematograph film that enjoys protection along with its sound track (Fortune Films vs. Dev Anand, AIR, 1979 Bom. 17). This leaves little possibility under the existing circumstances for a poor traditional performer of folk arts, tales and songs to enjoy protection against infringement once his/her performance is fixed. Section 17 of the Act reveals another possibility of how the producer of a cinematograph film can defeat the rights of a music composer, painter and such other artists under proviso (b) and (c) of Section 17 of the Act, when a cinematograph film producer commissions a composer
of music or a lyricist for reward or valuable consideration for the purpose of making his cinematograph film, or composing music or lyric thereof. Unless there is an agreement to the contrary, the copyright for the work subsists in the producer or the one who employed work for hire (Indian Performing Right Society vs. Eastern India Motion Picture Association, AIR 1977 S.C. 1443). In certain ways, there may be a possibility of securing the interests of a folkloric performer or artists through contractual terms, in the light of these provisions however the likelihood for success is low owing to poor bargaining capacity.

A way out of the dilemma concerning the restricted scope of protection for performer’s rights is to consider the consequences of infringement where consent has not been given for incorporation in cinematograph film. In order to protect a performer’s right, the crucial point is to avoid fixation without consent. For this, where a live, public performance is being made, the folklorist may seek the help of organizers to prevent the use of cameras and other devices capable of making cinematograph film or sound recording. Organizers can control the capturing of performances, art and craft during festivals or exhibitions by agreements with visitors attending, so that the rights to photograph, film, record or use in publicity is obtained from event organizers or relevant performers. It has been suggested that using signed performer’s release for authorised filming and recording is necessary. For still photography, Janke- a noted expert in IPR matters pertaining to folkloric and aboriginal expressions recommends some form of written agreement to enforce right of performers that would allow audience conditional viewing (Janke 2008:2).

In conclusion, a brief analysis of Indian constitutional law and copyright reveals that there is limited, indirect protection for expressions of folklore. There is no known case as yet taken up for the purpose of enforcing copyright in expressions of folklore in India (Kutty 2002).

IX. Geographical Indications of Goods (Registration & Protection) Act

Geographical indications amongst IPRs are considered more amenable to the customary practices of indigenous communities (Rangnekar 2004: 19) and believed to be more favourable for the protection of TK in general. GIs are said to allow knowledge to remain in the public, with rights potentially held in perpetuity and collectively (Rangnekar, Ibid). Given the recent trends in the world market, where consumers, especially in the developed world, have become more particular about the quality and authenticity of the products they buy, geographical indications
(GIs) are increasingly being used to secure niche markets (Das 2006: 40; Addor and Grazioli 2002:874). In line with its obligations under the TRIPS Agreement, India has put in place a sui generis system of GI protection by way of enacting a legislation dealing exclusively with GIs, namely 'The Geographical Indications of Goods (Registration & Protection) Act, 1999' (GI Act).

The restricted meaning attached to GIs in the international arena vis-à-vis Article 22 of TRIPS is believed to undermine the protection to beneficiaries of rights in GI. According to some, Article 22 of TRIPS is not good enough. It is simply a law against unfair trade practices and for consumer protection (Correa, 2001:13) and is not really for IPR protection. A producer not belonging to a specific geographical region could still use the GI as long as the product's true origin is indicated on the label. In other words, an Aranmula mirror (registered GI in India since 19/05/2005) could be turned out from the US, thus allowing an American producer to free ride on the reputation and market goodwill created by Keralite artisans over two centuries (Jishnu 2008). Furthermore, presently, there is no guarantee that the WTO Members will recognize the protection of all Indian GIs, since TRIPS does not impose any obligation on the WTO Members to provide Article 23-type (higher level of) protection to GIs other than those designating wines and spirits. Very few Indian GIs belong to these two product categories. The two-tiered protection of GI has been a source of continuing conflict between Europe and the developing world (Srivastava 2003: 4022, 4024).48

While Article 23 of TRIPS accords a higher level of protection only to wines and spirits, the corresponding provisions in the Indian GI Act do not restrict themselves to wines and spirits only. Rather, it has been left to the discretion of the Central Government to decide which products should be granted such higher level of protection. GIs under the Indian law are expected

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48 Aware of the inadequacy of the protection granted for most of the Indian GIs in the international arena, under Article 22 of TRIPS, India has, since 2000, joined with a host of other like-minded countries (e.g., Bulgaria, China, the Czech Republic, the EU, Hungary, Liechtenstein, Kenya, Mauritius, Nigeria, Pakistan, the Slovak Republic, Slovenia, Sri Lanka, Switzerland, Thailand and Turkey) to press for an 'extension' of the ambit of Article 23 to cover all categories of goods. It must however be noted that the participation by these countries on the extension of GIs to other products is nuanced and sometimes also linked with their position on possible amendments to the TRIPS to bring it in line with the CBD (Mara and New, IP Watch 2008). Countries like Australia, Argentina, Canada, Chile, Guatemala, New Zealand, Uruguay and the US are strongly opposed to the 'extension'. The 'extension' issue formed an integral part of the Doha Work Programme (2001) as an 'outstanding implementation issue'. Nevertheless, as a result of the wide divergence of views among WTO Members, not much progress has been achieved in the negotiations so far.

to relate to "specific quality, reputation or other characteristics of which are due exclusively or essentially to the geographical, environment, with its inherent natural and human factors, and the production, processing or preparation of which takes place in such territory, region or locality" [Section 11 (2) (a)]. Thus, the India GI Act amply provides for the possibility of protection of handicrafts and such related goods that involve human factors for quality assurance, in a clear divergence from TRIPS law (Article 22.1) that refers to quality, reputation or other characteristics of a good essentially attributed to its geographical origin. This difference in the Indian legislation is believed to facilitate the recognition of skilled labour in handicrafts products such as Kanjeevaram sarees and Kohlapuri chappals (Das 2006: 50).

Over hundred GIs of Indian origin have already been registered with the GI Registry. These include GIs like Darjeeling (tea), ‘Pochampalli’ Ikat (textiles), ‘Chanderi’ (saree), ‘Kancheepuram silk’ (textiles), ‘Kashmir Pashmina’ (shawls), ‘Kondapalli’ (toy) and ‘Mysore’ (agarbathi). There are many more Indian GIs in the pipeline for registration under the GI Act. Though, studies in developed countries witness to the fact that GIs do have the potential to fetch a significant increase in value-addition through premium pricing (Fink and Maskus 2006: 203), such empirical evidence is however lacking in the developing world. Nevertheless, the list of GI applications in India is growing (Birai 2006; Hindu, Business Line, 2004).

Registration under the Indian GI Act can be done by any association of persons or producers or any organization or authority established by or under any law for the time being and representing the interest of the producers of the concerned goods, who are desirous of registering a geographical indication in relation to such goods (Section 11(1)). For the purposes of the Act, "producer," means any person who:

i) With regard to agricultural products produces the goods and includes the person who processes or packages the goods;

ii) If such goods are natural goods, exploits such goods;

iii) If such goods are handicraft or industrial goods, makes or manufactures the goods, and includes any person who trades or deals in such production, exploitation, making or manufacturing of the good.
GI applications require “proof of origin” and an “historical record” (Geographical Indications of Goods (Registration and Protection) Rules, March 8, 2002, First Schedule, at 45)\textsuperscript{50} of continuous use of the goods or process (Ibid.). Registrants obtain the exclusive right to use the GI and further licensing of the GI is prohibited (GI Act, Chapter IV, Section 24).

While non-registration under the Indian GI Act prevents institution of suit for the purpose of preventing or recovering damages on infringement of the unregistered GI [Section 20(1)], the Act does not affect the right of action against passing off goods as the goods of another person [Section 20(2)]. Registration of GI not only gives relief against infringement but also gives to the “authorised user” (Section 17) the exclusive right to use the GI in relation to the goods so registered [Section 21(a) and (b)].

The Indian GI Act clarifies the conditions under which infringement will be deemed to have taken place. Accordingly, a registered GI is infringed by a person, not being an authorised user who suggests that the goods originate in a geographical area other than the true place of origin in a manner that misleads the persons as to the geographical origin of such goods [Section 22(1) (b)]; or where the GI is used in a manner that amounts to passing off and constitutes an act of unfair competition [Section 22(1) (b)]. Use of another GI to the goods, though literally true as to the territory, region or which the goods originate from yet falsely representing that it represents with a registered GI also amounts to infringement [Section 22 (b)].

Acts considered as unfair practices in the Indian GI legislation have been clearly stated, namely:

i) All acts of such a nature as to create confusion with the establishment, the goods or industrial or commercial activities of a competitor;

ii) False allegations in the course of trade of such a nature as to discredit the establishment, the goods or industrial or commercial activities of a competitor;

iii) Use of GIs which in the course of trade are “liable to mislead the persons as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods” (Section 22, Explanation 2).

\textsuperscript{50} Available at http://ipindia.nic.in/girindia/GI_Rules.pdf
It must however be pointed out that GI registrations by themselves do not assure economic development of poor artisans or for that matter adequately safeguard against counterfeits both within and outside the country. The case of Benarsi sarees is illustrative in this regard. Studies have shown that of the one lakh community of Benarsi weavers, only about 50 percent are employed. The threat of cheap “benarsi-look alike sarees, do not only come from China but also from mills in Surat. Furthermore the market for authentic zardosi Benarsi sarees is also believed to be shrinking (Crafts Revival, 2006). Another instance of GI registration, Chanderi sarees and dress materials from their special location in Madhya Pradesh, has required cluster mapping of craftspeople and developing databases on the same. Furthermore, micro finance schemes and creation of self-help groups are also important to ensure economic and social development as part of a long term vision of development for this dwindling and fast shrinking market (Gulati 2007). Since markets are constantly changing and local artisans find it difficult to capture the varied consumer interests in handicrafts market, the place for design intervention to create products that take advantage of the skill-sets of people is also important (Balasubramaniam 2007). Furthermore, apart from effective enforcement of GIs in the relevant markets (domestic and export), much depends on the strategies adopted for marketing and distribution of the product, and its branding and promotion. It has been suggested that without well-crafted policies and strategies in these spheres the underlying commercial potential of Indian GIs might remain unrealised.

According to a CIPR Report (2002: 90) the economic consequences of GIs for a developing country are difficult to assess. The main economic benefit of GIs would be to act as a quality mark which will play a part in enhancing export markets and revenues. But increased protection, particularly applied internationally, may adversely affect local enterprises which currently exploit GIs that may become protected by another party. Thus there will be losses to countries producing substitutes for goods that become protected by geographical indications. A proliferation of geographical indications would tend to reduce their individual value. Sundar (2007: 115) observes that while GIs may help people reap benefit from their traditional knowledge, within the local limits of their community life it may also inadvertently cause these people to remain within these communities stifling alternate economic opportunities or social relations such as marriage etc. which may require moving out of the physical space of the GI registration. This concern when tested in the course of my brief interactions with some artisans
who work on traditional handicrafts was shown to be true. For instance, one craftswoman learnt the craft of Tanjavur paintings from her husband upon marriage. Paintings thus made were sold in urban settings in Bangalore and Hyderabad, places of residence away from Tanjavur in Tamil Nadu. I also came across cases in which traditional crafts, some of which have obtained GI status in India, are being readily used within India by persons who are not associated or registered for the same (Personal interviews, IGNCA, 27 September 2008). Despite these misgivings concerning the use of GIs to protect TK, it is worth pointing out that restrictions based on location and origin of GI may be necessary so as to prevent the scenario of large multinationals hiring members of a community in the guise of producing “authentic” products elsewhere. Another concern raised over the use of GIs for protecting EoF relates to the threat of reification of traditional hierarchies. Similarly, Coombe (2005: 46) argues that there may be a possibility that GIs if unduly used may result in limiting competition and exacerbate existing inequalities within groups.

X. Summary

A brief analysis of Indian constitutional law and copyright reveals that there is limited, indirect protection for expressions of folklore. While India has legislated on biodiversity-related TK and also protects plant varieties, a specific legislation for the protection of folklore is missing. The weaknesses in the protection of TCEs owing to lack of “originality”, “fixation” and “determinate term of protection” continue to be the case in the Indian Copyright Act. The Indian Copyright Act makes a passing reference to the principle of droit de suite and to some extent accepts moral rights. As far as India’s copyright law is concerned, folkloric expressions find limited protection within the notion of performer’s rights. However, performances once fixed are no more protected under performer’s rights. To obviate this problem it is crucial to avoid fixation without consent. For this, where a live, public performance is being made, the folklorist may seek the help of organizers to prevent the use of cameras and other devices capable of making cinematograph film or sound recording. Organizers can control the capturing of performances, art and craft during festivals or exhibitions by agreements with visitors attending, so that the rights to photograph, film, record or use in publicity is obtained from event organizers or relevant performers. It has been suggested that using signed performer’s release for authorised filming and recording is necessary.
The Indian GI Act of 1999 does provide protection to handicrafts but presently there is no assurance that GIs granted in India will receive adequate protection by other Member States party to the TRIPS Agreement. The higher form of protection to wines and spirits in Article 23 of the TRIPS is a bone of contention for the developing countries and it will be interesting to study the progress made in demands for the extension of GI protection to other products. However, some of the ground realities in India are important to bear in mind while considering the efficacy of GI protection. India is faced with counterfeit handicrafts not only from abroad but also from within India. A socio-economic impact study of GIs on developing countries is yet to come by but scholars writing from a Third World perspective have pointed out that the main economic benefit of GIs would be to act as a quality mark which will play a part in enhancing export markets and revenues. Nonetheless, increased protection, particularly applied internationally, may adversely affect local enterprises which currently exploit GIs that may become protected by another party. Thus, there could be losses to countries producing substitutes for goods that become protected by geographical indications. Other factors which will also affect the usefulness of GIs for the protection of handicrafts include inter alia cluster mapping of craft communities, provision of micro finance, design intervention and training. As regards the protection of other forms of TCEs, particular those of intangible nature, such as folk songs, poems, riddle, visual and performative expressions etc., India seems to relegate these to "preservation" in museum settings and archives.