

INTELLECTUAL PROPERTY RIGHTS POLICY

FOR KERALA 2008

1. With India entering the Trips regime under the WTO, and amending the Indian Patents Act 1970 to make it TRIPS - compatible, a number of new issues have emerged in the context of Kerala which need to be addressed forthwith. This requires an Intellectual Property Rights Policy for the state which has to be formulated within the parameters of the existing central legislation, such as the amended Indian Patents Act and the Biological Diversity Act 2002. The main principles informing such a policy are presented below. The detailed provisions will be formulated in due course and implemented through appropriate Government Orders or suitable state-level legislation where necessary.

2. A major issue for Kerala relates to the protection of traditional knowledge, especially Ayurveda. The term "traditional knowledge" is easier to comprehend than define. Its "traditional" nature is expressed not just in its 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; it is expressed also in the fact that it remains largely outside domain of capitalist, especially corporate, operations. Traditional knowledge does not exist merely in books or minds but serves as the basis of practice by a large number of non-capitalist users, many of whom earn their livelihoods from such practice. But while it yields livelihoods to many, or forms the basis for practice for many, the absence of legal property rights over such knowledge creates scope for its private misappropriation. To prevent this, a suitable legal arrangement must be put in place. The contours of such an arrangement are given below.

3. Within the corpus of traditional knowledge, a distinction should be drawn between two components. One component refers to knowledge which is the preserve of particular communities, especially tribal communities, or particular institutions, or particular families, often located in specific regions, and passed down from one generation to the next in a variety of traditional ways. The other refers to knowledge whose practice sustains the livelihoods of many persons scattered across the state, *which does not have any specific community or family custodian*. Thus while Kotakkal Ayurvedic massage clearly belongs to the first category, the knowledge that sustains the daily practice of Ayurvedic medicine by numerous practitioners strewn across the state belongs to the second.

4. The basic elements of the legal arrangement for the protection of traditional knowledge must be the following : i) *all traditional knowledge, including traditional medicine, the practice of which sustains livelihoods, must belong to the domain of "knowledge commons" (to be defined below), and not to the "public domain";* ii) *in the case of knowledge of the first category which has a community or family custodian, this custodian will be deemed to have rights over the knowledge, while in the case of the second category, the Kerala state will be deemed to have rights over the knowledge ;* iii) *no entity that is registered as a medium or large enterprise may be deemed to have any rights over traditional knowledge.* iv) *the right-holders will have two kinds of rights : first, 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 the use of the knowledge;* v) *everybody else, other than the right-holder to the traditional knowledge, who wishes to use this knowledge will have to do so under a "commons license" described below;* vi) *any use of traditional knowledge or practice in violation of the "commons license" within or outside the state of Kerala will be considered a violation of the rights of the right-holders and will invite prosecution.*

5. For operationalizing this legal arrangement a body called the Kerala Traditional Knowledge Authority (KTKA) has to be set up, with which all practitioners of traditional knowledge of the first category will have to be registered. They have to specify what is unique about their actual traditional-knowledge-practice, the details of the nature of their practice, and the details of the nature of the community/group/individual that constitutes the custodian of this practice. The KTKA will give general notice to the public, regarding all applications being made to it by practitioners, so that any contestations of applicants' claims, or challenges to claims of uniqueness, or prevalence of similar practice in more than one location or community, can be brought to its attention. It is only after scrutinizing all such cases of dispute that the KTKA can finally register a community/group/individual as knowledge-practitioner of the first category pursuing a unique set of practices.

6. In addition to creating and maintaining such a register of traditional practitioners, the KTKA will also be in charge of enforcing the rights created under the legal arrangement mentioned earlier, *recommending* legal action against the violators of these rights and of the "commons license", helping the right-holders, both the State and the private communities/

individuals, to negotiate terms with other possible commercial users of traditional knowledge (to be discussed below), and undertaking promotional activities like forming Traditional Knowledge Users' Co-operatives, in order to enable such users to access larger markets for their practices and products. Its activities will be financed from a fund created by the Government of Kerala and it will be administered by a Board consisting of a Chairman and four members, of whom at least one each must be from the TK community and the scientific community.

7. All right-holders of traditional knowledge will be deemed to be holding their rights under a "commons license". Under this license the right-holder permits others the use of the knowledge over which the right is held for *non-commercial purposes*. If any development is made using this knowledge, then under the conditions of this license this development will have to be put back into the traditional knowledge "commons" and cannot be patented anywhere. If any commercial use of traditional knowledge is to be made by any entity other than the right-holder, then the terms and conditions under which this can be done will have to be negotiated between the right-holder and the other potential user. *In the case of traditional knowledge of the second category, where there is no specific knowledge-custodian and the Kerala state is deemed to be the right-holder, it will be presumed that all actual practitioners of this category of knowledge in Kerala, provided they are not classifiable as medium or large enterprises, have an automatic license for right of commercial use given by the Kerala state which is the original right -holder, but are not empowered to transfer this right of commercial use to anybody else. Only the Kerala state, the original right-holder enjoys that right.*

8. The legal framework suggested above however will not be enough to protect the users of traditional knowledge against the loss of livelihood arising from possible corporate appropriation of such knowledge. An obvious reason for this is that the absence of codification of traditional knowledge makes any legal action against the usurpation of the rights of the users of such knowledge difficult. Of course, a whole category of users will be registered with the KTKA. But this will relate to only one component of traditional knowledge, and even here the information provided by those registering is likely to fall short of what is needed for prosecution in cases of corporate misappropriation of traditional knowledge, It is necessary therefore to have additional safeguard. It is true that codification of traditional knowledge, at least in the case of Ayurveda is already taking place, and the

process is bound to gather momentum in the foreseeable future. Such codification however must occur in other field as well. Besides, codification, which prevents its direct misappropriation by making the identification of traditional knowledge possible, cannot prevent its indirect misappropriation, or misappropriation at one remove, after some minor modification. Indeed, paradoxically, codification even facilitates such indirect misappropriation.

9. In the case of traditional knowledge associated with the use of biological resources, which of course is the most important source of livelihood, there is a way of providing additional safeguards by using the Biological Diversity Act 2002. Section 3 of the Act provides that all foreigners must get previous approval of the National Biodiversity Authority (NBA) to “obtain any biological resource occurring in India or knowledge associated thereto, for research or for commercial utilization or for bio-survey or bio-utilization”. The term foreigner here refers to a person who is not an Indian citizen (or is a non-resident citizen as defined in Clause 30 of section 2 of the Income Tax Act of 1961), or a body corporate, association or organization that is not incorporated or registered in India (or even if registered or incorporated in India, has any non-Indian participation in its share capital or management). The state will make it obligatory, whether by asking the NBA to refer all applications by foreigners pertaining to Kerala to the State Biodiversity Board, or by enacting legislation asking foreigners to obtain the additional approval of the SBB, that any innovation based on traditional knowledge associated with the biological resources of the state is put into the realm of “knowledge commons”.

10. While this would prevent the misappropriation of traditional knowledge associated with biological resources *by foreigners*, a similar mechanism would need to be put in place against misappropriation by *Indian corporates*. For this again a possibility contained in the Biological Diversity Act 2002 needs to be utilized. Section 7 of the Act stipulates that “no citizen of India or a body corporate, association or organization, which is registered in India, shall obtain any biological resources for commercial utilization, or bio-survey and bio-utilization for commercial utilization, except after giving prior intimation to the State Biodiversity Board concerned”. This provision however does not apply to the local people and communities of the area, including growers and cultivators of biodiversity, and the practitioners of indigenous medicine. This clause does not cover obtaining “knowledge associated thereto”. *The provision of this Section 7 will be extended, through appropriate legislation if necessary, to cover the acquisition of knowledge as well, for*

which prior approval of the State Biodiversity Board will be made obligatory for Indians other than the local users. The State Biodiversity Board will ensure in this case too, as in the case of foreigners, that traditional knowledge remains within the realm of "knowledge commons". As regards the commercial use of biological resources of the state, where reference to the SBB is obligatory under the Act for Indian non-traditional users, the SBB will give its permission only after consultations with the KTKA, which can go into the question of possible damage to traditional knowledge-users and possible compensation for such damage.

11. When it comes to the commercial utilization of biological resources, foreigners are required to obtain the permission only of the NBA and not of the SBB, i.e. unlike Indian non-traditional users they are kept outside the purview of section 7 of the Biological Diversity Act. Here again, the state will make it obligatory that the cases of foreigners utilizing the biological resources of the State are referred to the SBB, and the SBB in turn can consult with the KTKA regarding possible damage to the interests of traditional knowledge users. *If all potential commercial users, outside the circle of traditional users, are required thus to obtain the permission of the SBB for making commercial use of the biological resources of the state, then we can ensure that the interests of the traditional users are not harmed.* Either through outright proscription of commercial use of biological resources by outsiders, or through arranging equitable benefit-sharing with the traditional users, which would compensate them for any losses they may suffer as a result of such use, the interests of the community of traditional users will be protected. Of course, with the codification of traditional knowledge in this field, the need to take the permission of the State Biodiversity Board for making use of this knowledge gets considerably reduced in practice. But the imposition of obligations on corporate entities of the above kind will act as a deterrent to the misappropriation of traditional knowledge.

12. To recapitulate, our additional safeguard visualizes adding to the provisions of the Biological Diversity Act 2002 in three ways: first, making it obligatory for foreigners' applications for obtaining knowledge relating to biological resources of the state to be referred to the SBB, besides the NBA; second, making it obligatory for Indians, other than traditional users, to get the approval of the SBB for obtaining knowledge relating to the biological resources of the state; and third, making it obligatory for foreigners' applications for making commercial use of biological resources of the State to be referred to the SBB,

besides the NBA. Since all these entail supplementing, and not contravening, the provisions of the Biological Diversity Act, 2002, there should be no legal hurdles to their operationalization, though of course the co-operation of the NBA is essential for success. Indeed any breach by Indian or foreign corporate of the SBB stipulation that developments based on traditional knowledge must be put in 'knowledge commons' can be caught only when they apply for patents through the NBA. Likewise if some traditional users seek to take out patents either of existing knowledge or of any development based upon it, then this too can be detected and prevented only when the patent permission is sought from the NBA. It follows that the entire policy outlined above needs close synergy between the SBB and the NBA.

13. The additional safeguard can exist only for traditional knowledge associated with biological resources. For the protection of other traditional knowledge the KTKA mechanism suggested earlier is all that can be provided but that should be quite enough. For the protection of knowledge associated with biological resources, much responsibility is being placed on the State Biodiversity Board. It will not only have to protect the state's biological resources and preserve its biodiversity, but also act as a watchdog to prevent the misappropriation of traditional knowledge relating to biological resources and the use of such knowledge by outsiders (India or foreign corporate) to squeeze the livelihoods and employment opportunities of the traditional users of such knowledge. The SBB must be strengthened for this purpose. Since its size and composition is specified in the 2002 Act, such strengthening may require legislative intervention.

14. To oversee the activities of the KTKA and the SBB with regard to the protection of traditional knowledge, to provide overall supervision in matters relating to intellectual property rights, and to follow up the recommendations of the KTKA with regard to prosecutions for the violation of knowledge-users' rights, a specialized governmental body called the Supervisory Council on Intellectual Property will be set up under the Chairmanship of the Chief Minister and with the Law Minister as its Vice Chairman. Its membership will comprise a few other ministers, scientists and other experts drawn from various fields. The Chairpersons of the State Biodiversity Board and of the KTKA will be *ex officio* members. The council will have appropriate technical staff, and a wide range of functions. It will pursue all cases of breach of agreement on knowledge-users' right. It will be the conduit through which all patent applications from state government-funded or

state government-aided research institutions will pass. (The reason for excluding private researchers from this obligation, unless they choose to approach it for help, is that this would impose upon them an additional gratuitous burden). It will help any potential patent applicant who asks for its assistance to prepare proper patent applications. It will assist all those who are on the verge of patentable inventions but are held up in their research work and cannot complete it for some reasons (including financial constraints). It will encourage in various ways patentable research in the state. It will disseminate knowledge in the state about intellectual property rights. And it will in general uphold and promote the interest of the state and its people in whatever way it deems fit in the new International Property Rights regime. This Supervisory Council will operate through a number of sub-committees and specialized groups which will meet frequently and deal with specific issues

15. Another major issue that will arise in the new context relates to intellectual property rights over the outcome of research in state government-funded and state government-aided institutions. As regards private institutions or Central government-funded institutions, they will be subject to guidelines which would be common all over the country and over which the state government has little jurisdiction. But it is institutions funded or aided by the state government itself for which a specific state-level policy framework becomes necessary, especially given the current trend of research outsourcing from the West. While such outsourcing, giving rise to collaborative research can be academically productive for the state's research institutions, it is important to ensure that our public research institutions do not simply become providers of cheap manpower to Multinational Corporations. Accordingly, the projects being undertaken in all state-funded and state-aided research institutions must be divided into three categories: those funded by private sources, or by foreign official sources; those funded by the state government or from the general research funds of the institution itself; and those funded by the central government or by other official agencies of the country.

16. In the first set of projects, it should be a condition that the patents taken out on the research output should be in the domain of "commons", so that anyone can use these for whatever purpose, and all useful modifications derived from or based on these will be put back into "commons" available for anyone to use. This would ensure that MNCs and private corporates do not use state-funded institutions as a source of cheap labour for buttressing their monopoly position. In the second set of projects, the research output must

clearly be the property of the state government, but a suitable system, of rewards will be introduced, by the Supervisory Council on Intellectual Property, for the research scientists upon whose work the output is based. The state government may decide to put the research output in many cases in the domain of "commons" but that will be its own decision, to dispose of its "intellectual property" in any manner it deems fit. In the third set of cases, the intellectual property rights over the outcome of research should be left open and decided on a "case-by-case" basis, since the research partners in these cases may well have their own rules regarding the intellectual property status of outcomes of joint research.

17. While these would be the general rules, there maybe specific cases where exceptions may become necessary. All exceptional cases in the first two sets of projects and all cases belonging to the third set where the intellectual property status is decided on a case-by-case basis, should be submitted for approval to the Supervisory Council on Intellectual Property before the start of the project, provided that the projects, in terms of the total required research funds, exceed a certain minimum size. The SCIP will be concerned only with the intellectual property rights issue in all these case, and will give its opinion within a short time so as not to hold up the research project unduly.

18. Since the patent applications on all such projects will have to go through the SCIP, it will at that stage decide whether a patent sought in the case of a project of the second category, i.e. on a state government-funded project, should be put into "knowledge commons". This decision however has to be taken in consultation with the research institution concerned and by the full meeting of the SCIP.