How to Protect ‘Ancient’ IPR*

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Paper puts forward a case for broadening the scope of intellectual property rights (IPR) in the areas of traditional knowledge, plant varieties, and biodiversity. It also highlights the concerns of traditional communities in developing countries. Describing the general attitudes prevalent among people concerning these issues, it enumerates new avenues of protection for India and suggests some ways of setting up new rules.

The developed nations of the world have promoted the concept that intellectual property is to be protected by assigning IPR to such institutions and individuals who develop (among other things) new processes, new medicines, new germplasms, and basically a new fund of knowledge which will contribute to new health-care. The logic of this argument in favour of such protection is that several million dollars are being spent on research by pharmaceutical companies and other organizations for the development of these new germplasms, processes, applications as well as medical formulations. Their argument runs that even where the raw material is obtained from existing plant species known to the developing countries, and even where knowledge is built upon the foundations that have been laid by the knowledge bank of the Third World, it is the new investment in human resources, time, effort and research that result in these new properties. And so according to them, the rights over these new developments, belong exclusively to them.

Cumulative Traditional Knowledge

The Third World with a rather ‘weak’ voice has raised a very ‘strong’ and pertinent point of view. India, for instance, has two treasures in the context of medicine and these two treasure troves are to be protected. Even as the effort is put in by modern pharmaceutical companies in developing new formulations/drugs/formulae/processes/germplasms/uses, the whole Indian civili-

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* Views expressed in the paper are of the author.
zation has invested its collective wisdom and collective labour in the development of certain systems of knowledge/processes/applications/uses, etc. Just because the investment has been made in the last two decades is to be recognized as resulting in intellectual property, we cannot deny the stature of intellectual property which is the result of centuries of evolution/research and efforts which have resulted in this substantial knowledge bank. Hence, if modern research is to be accepted as intellectual property, then it is morally and ethically imperative to formulate such legal protection by which the traditional cumulative knowledge of a society is equally protected with rights conferred on that society for its intellectual property. This would mean that an Ayurvedic drug/formulation/methodology of treatment, etc. is to be used by any non-Indian entity—be it a pharmaceutical company, an university or any such other organization—a legal framework should be evolved by which (since it is built on the cumulative knowledge of India) a basic royalty must be payable to the Government of India for building on available Indian knowledge.

This should be applicable even where research may result in new innovative products which change the application of Ayurvedic drugs either by presentation or by change of formulae or by change of application or use in the treatment of diseases.

**Indigenous Plant Species**

Similarly, if a germplasm has been produced by modern recombinant DNA methodology, the current widely accepted but somewhat disputed theory is that such a germplasm can be treated as intellectual property of the research organization/individual who has created the germplasm. The legitimate opinion of some people (in which India should take a leading role as one of the most affected parties) is that the Indian Ayurvedic physician or the Indian Siddha physician has contributed substantially over millenia to the preservation of the biodiversity in which thousands of plant variety of medical importance have been identified, cultivated, preserved and used for various applications. If the Indian physician in collaboration with the Indian farmer had not taken these measures over the centuries, many of these plant species and germplasms may have become extinct. These have been preserved by monumental effort over the centuries without deriving commercial benefit.

Patenting plant life as proposed by the developed countries will intensify the inequality between the developing and industrialized nations. The open exchange of seeds and plant material over the centuries has given the western world potatoes and tomatoes from Latin America; soya beans from China; wheat, rye and barley from the middle-east, to name only a few. The Third World has never received compensation (or even recognition) for these intellectual and technological contributions. While centuries of innovation by indigenous farmers have created most of the food crops and medicinal plants grown today, the tinkering by agro-based business entities claiming some plants as their inventions and attempting to make all the profits from them, is historically unfair. This attitude of 'bio-colonialism' should not be allowed to perpetuate the pattern of a few trans-national corporations profiting at the expense of large numbers of farmers and native physicians in the developing world.

It is unfair to the entire community of Indian physicians and medicinal plant farmers, if their right over these germplasm is denied. As much as a new germplasm developed in a laboratory is deemed to be the intellectual property of the new organization which develops it, the entire flora and fauna native to India should be deemed to be the property of the Indian Union.

Thus, if any Indian medicinal plant is to be used in the formulation of drugs outside this...
country, even if it means dramatic change to
the drug or to the germplasm, as long as the
original germplasm is derived from Indian
soil, a royalty should be payable to the Union
of India for the use of medicinal plants pre­
served for generations by Indian physicians.

General Attitudes

At the risk of over-simplification in order to
gain clarity, this author wishes to state that
the following attitudes have been prevalent
among people concerning these issues:
First, an attitude that India should vigor­
ously pursue the path of global competition
in ensuring that we have our own patents for
any new formulations based on research.
This takes the view that we may like to ex­
ploit our formulations globally by our own
promotion. Another shade of this view is
that Indian scientists and organizations in
 collaboration with multinationals can derive
benefit out of globalization by selling our
rights through MNCs. A third view within
the same parameters is that since we have
joined the WTO, we have no alternative but
to be competitive and to ensure the effi­
ciency of our research in developing new
drug formulations which can be patented.

Secondly, an attitude that we should protect
Indian indigenous systems of medicine from
being patented abroad by declaring that this
is already 'in the public domain' - an attitude
which is reflected in the amendment
brought about to the Act recently passed by
the Parliament. This attitude is also preva­
lent among sections of Indian medical prac­
titioners who think that indigenous systems
can be protected merely by declaring them
to be in 'public domain' and by avoiding the
patenting of these by organizations of other
nationalities.

New Avenues of Protection for
India

This author wishes to differ from some of
these concepts. Our systems of medicines
should not be declared to be in the 'public
domain' on a global basis. Suitable legisla­
tion should be enacted to ensure that rights
over these systems are deemed as intellec­
tual property belonging to the Union of In­
dia. If the WTO does not provide for this
collective ownership of a system of knowl­
dedge and of biodiversity now, we should
seek such amendments that can make this
possible. It is not essential to limit our
thoughts to existing WTO arrangements,
but to think in fresh terms of asking for
drastic changes in the WTO so that the
agreement becomes equitable to the inter­
national society instead of this being heavily
loaded in favour of the industrialized, devel­
oped world.

It is important to remember that China has
not signed the WTO and become a member.
We have a lot of things in common with
China in the context of indigenous medicine.
The author happened to be a guest of the
Peoples' Republic of China, where she ad­
dressed several institutions involved in Chi­
nese traditional medicines.

Immediately on her return, more than 10
years ago, she gave a detailed report to the
Ministry of Health, Government of India,
explaining that China has a very pro-active
health policy, the kind of which is lacking in
India. The Chinese policy has much clarity
in terms of the manner in which the Chinese
traditional medicine is practised, the man­
ner in which research in such traditional
medicine is carried on and the working rela­
tionship between the practitioners of Chi­
nese medicine and allopathic western
medicine in China.

It is important that we have a dialogue with
China on this issue because there are many
grounds which we will find in common be­
tween India and China as far as protection of
biodiversity and traditional knowledge is
concerned. In spite of recognizing that the
world is becoming a unipolar world, guided
by the United States, at least in some things
of common interest, if India and China can
come together, the world will not be so completely dictated by the policies of one super power. It calls for diplomatic initiatives. Our policy will be accepted by China also, since the kind of traditional knowledge we are claiming as our 'intellectual property' can be co-equally claimed by China also, giving us bargaining strength in our negotiations with WTO.

The other suggestion which has been forthcoming is that India should develop some kind of a patent or trademark to certify Indian products of indigenous medicine as belonging to the Indian soil and thereby claim its competitive position in the world market.

For instance, it has been argued that merely getting patent for our cumulative knowledge of our systems or for our biodiversity is capable of protection only for a period of 20 years, adding that 20 years is too short a time in the life of a nation. But we have to think afresh. If hypothetically a modern pharmaceutical organization has spent 10 years in research and evolved a certain formulation, a patent is granted for such formulation which is valid for a period of 20 years. If the Indian scientists have worked on indigenous systems of medicine for a couple of thousand years, obviously we cannot apply for a patent which will last just 20 years.

It becomes important to amend international agreements and ensure that we get a patent valid for about two centuries, during which India can build its competitive edge and reach a point of development whereby the nations of the world may be able to compete on an equal footing, without an exploitative tendency of neo-colonialism. Otherwise the developed world is geared to begin a new bio-colonization or a knowledge-colonialism through WTO. Hence it is important that we seek fundamental changes in our government's attitude of tackling the WTO and claim our rights as a nation for our ancient wealth, both in terms of traditional knowledge in relation to indigenous medicine and in terms of our biodiversity which we have preserved over the centuries by the hard work of our indigenous physicians and farmers.

We need not take the 20-year period of patent given for products of modern research as a sacred rule. We can afford to be sacrilegious to attempt a change so that patent can be given for traditional knowledge and for protection of biodiversity for a much longer period—say a minimum of a century, thus protecting India's biodiversity and traditional knowledge of indigenous medicine from international neo-colonialism.

**How Can We Set Up New Rules?**

The concept of our developing a trademark for Indian product and selling it globally amounts to our playing a western commercial game. On the contrary, the author suggests that we should play games of which we can set the rules.

The question is not whether we can do it, but how we can do it. The question is not whether the existing WTO arrangements and agreements have provision to provide for it, but the question is how do we accomplish this by bringing in such amendments that are required by a combination of legal, scientific and diplomatic initiatives to accomplish such protections. The author's idea of one or two centuries of patent is just a beginning point to think differently and is not presented as the only solution that may be found.

If WTO has been drafted a bio-colonial LoC with one-sided control by the developed West, let us take the initiative to effectively make it a bi-polar or two-sided LoC!