

ISSUES RELATING TO PUBLIC DOMAIN STATUS OF TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS

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INTRODUCTION

An increase in emphasis on the need to safeguard the ‘public domain’ is recognized at the international level as more exclusivities are taken particularly in the form of intellectual property rights. Two parallel international developments set the discourse of the issue of ‘public domain’ and ‘access’; the Convention on Biological Diversity 1992 and the TRIPS Agreement of 1994. The former has the mandate of the common responsibility of countries to conserve and sustainably utilize biological diversity and the latter made intellectual property (IP) a tradable good. While the TRIPS agreement brought in IP as a global obligation for its member countries, the Convention on Biological diversity gave impetus to conservation as a global commitment. The scope of public domain considerations gained attention under the fore of WIPO’s commitment to reach a mechanism for strengthening a cause for traditional knowledge (TK) and traditional cultural expressions (TCEs). The introduction of the voluntary fund for indigenous community participation and expansion of the work programme under the aegis of the intergovernmental committee on genetic resources and TK are important standpoints in the international developments relevant to TK.

Indigenous peoples, local communities, and several developing countries have vociferously argued for the recognition of TK under the IP protection and inclusion of the traditional forms of creativity and innovation. Under the conventional IP system, they are generally regarded as being in the public domain, and therefore free for anyone to use¹. The need to raise traditional knowledge (TK) to the status of one of the Intellectual Properties (IPs) during the TRIPS

agreement is justified as it represents intellectual creation of the human mind which has the maximum public good character among the forms of IP. TK has been preserved through generations. It has not only been accepted but also most effectively used and disseminated. TK has a distinct linkage with the identity of a community concerning culture, tradition, traditional medicine, healing practices, artistic creations, community practices, etc,

Indigenous peoples, local communities, and many countries reject a “public domain” status of TK and TCEs. These are the inalienable aspects that become open to abuse and misappropriation. For instance, a traditional remedy could be appropriated by a pharmaceutical company and the resulting invention patented by that company, without sharing any of the benefits arising from the commercialization and sale of the pharmaceutical product with the community. In the search for unique compositions, an indigenous folk song could be adapted and copyrighted without the consent of the communities. Benefits that are derived out of such exploitation without any acknowledgment of the indigenous community are rarely shared with the community. The ongoing international developments are centered on according appropriate protection of TK and TCEs. This has led to the need to identify how changes should be made to the existing boundary between the public domain and the scope of IP protectionⁱⁱ. An integral part of developing an appropriate policy framework for the IP protection of TK and TCEs is a need for a clear understanding of the role and boundaries of the public domain.

WHAT DOES “PUBLIC DOMAIN” MEAN IN THE IP CONTEXT?

The term “public domain”, in IP law, is generally said to consist of intangible materials that are not subject to exclusive IP rights and which are, therefore, freely available to be used and exploited by any person. It is a versatile, relative, and elastic concept that is not susceptible to a uniform legal meaningⁱⁱⁱ.

According to Black’s Law Dictionary, the public domain is the universe of inventions and creative works that are not protected by intellectual property rights and are therefore available for anyone to use without charge. When copyright, trademark, patent, or trade secret rights are lost or expire, the intellectual property they had protected becomes part of the public domain and can be appropriated by anyone without liability for infringement.”

The public domain is considered to be a valuable resource, as it can be argued that innovation that will result in private property, such as a patent or copyright, depends on the existence of a rich public domain^{iv}. The need to preserve the public domain has been a strong basis for the utilitarian approach and linked to public policy goals. Ensuring longevity of TK and TCEs will help in preserving a vast body of knowledge as well as sustain the livelihoods of communities^v.

KEY ELEMENTS OF THE PUBLIC DOMAIN

The public domain encompasses three important elements, or perspectives: the legal status of materials, the freedom to use materials, and the availability and accessibility of materials. These will be discussed in turn.

The legal status of materials

The public domain consists of resources free from IP rights, that is, every intellectual product that was never or no longer is under IP protection.

This can include: -

- Material that was ineligible for protection in the first place, for example, the material of insufficient originality to qualify for copyright protection, or an invention that did not fulfill the conditions of patentability;
- Material “freed” by invalidation or expiry of an IP right;
- Material that was eligible for protection but, in the case of industrial property, in respect of which protection was not applied for.

The freedom to use

Public domain material is material that is free or available for any member of the public to use for any purpose without having to obtain the consent or permission of a right owner and without charge. There have been several propositions that support greater innovation than proprietary material.

Availability and accessibility of materials

Access to materials in the public domain range from complete access to restrict access subject to permissions. The trustworthiness of the use of information is the basis of making available public domain materials. Therefore, public domain material is not always free from any cost or encumbrances. Access to some public domain material may depend on laws that protect confidential information, trade secrets/know-how. Technical protection measures utilize to protect against unauthorized copying of information.

It must be noted that there is an important distinction in the context of TK is that between TK being in the “public domain” and TK being “publicly available”. The term public domain, which is used to indicate free availability, has been taken out of context and applied to TK associated with genetic resources that are publicly available. The common understanding of publicly available does not mean available for free but that there is a condition to impose mutually agreed terms such as paying for access.

With the introduction of a Glossary on TK by the WIPO, there has been a harmonious interpretation of the definitional aspects of TK. While one notion supports the fact that the unrestricted and general use of TK has helped in its dissemination, another one emphasizes the need for consent principles to be followed for access to TK associated with a genetic resource. With the Access and Benefit Sharing regime is operational it is imperative that not only prior informed consent form a TK holder but also executing an agreement for benefit-sharing^{vi}”.

RELATIONSHIP BETWEEN THE PUBLIC DOMAIN AND CUSTOMARY AND INDIGENOUS LAWS

From the perspective of indigenous peoples and local communities, the public domain operates to exclude TK and TCEs from protection and can be used to justify their misappropriation. As indigenous cultures tend not to make property/non-property distinctions, the concept of the public domain is alien to them. Customary laws provide rules for the sharing of TK and TCEs within a community. Hence, even the use of TK is common, the need to know and/access is defined under the community rules. Indigenous cultural heritage represents several practices

that are secret and have been used in this way from time immemorial. Respecting the TK and TCEs of communities is an important requirement for their responsible use.

THE VALUE OF THE PUBLIC DOMAIN

A strong justification for the ‘common good’ nature of TK and TCEs is that it has been the source of the development of numerous products as well as processes for human value. The public domain has been the main source for innovations. By overprotecting cultural expressions, the public domain diminishes, leaving fewer works to build on^{vii}. The recent past has demonstrated to us the fragility of human life compelling the need to relook at how TK and TCEs have been involved in sustaining human life and well-being. Not surprising is therefore the call for mainstreaming TK for human well-being. Revisiting the context of the public domain calls for the need to foster TK and TCEs and expand their scope for value addition to human life. Recent international discussions on the repatriation of TK is expected to create an opportunity for stakeholders with a ‘shared goal’ to enrich the public domain.

ENDNOTES

ⁱ Scoping Paper No 1.pdf. Accessed December 20, 2020.

<http://www.ris.org.in/fitm/sites/default/files/Scoping%20Paper%20No%201.pdf>

ⁱⁱ Nyhus PJ. Human–Wildlife Conflict and Coexistence. *Annu Rev Environ Resour.* 2016;41(1):143-171.

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ⁱⁱⁱ WIPO, “Note on the Meanings of the Term “Public Domain” in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore” document WIPO/GRTKF/IC/17/INF/8

^{iv} Sen S, Chakraborty R. Revival, modernization and integration of Indian traditional herbal medicine in clinical practice: Importance, challenges and future. *J Tradit Complement Med.* 2016;7(2):234-244.

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^v Padmavati M. Ensuring longevity of traditional knowledge associated biodiversity to address climate change. *J of Intellectual Property Rights* 2018; 23: 35-43

^{vi} The experts at the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing distinguished the terms “public domain” and “publically available” with special reference to TK associated with GRs.

^{vii} Burwell SM, Townsend FF, Bollyky TJ, Patrick SM. *FINDINGS.* Council on Foreign Relations; 2020:19-67. Accessed December 17, 2020. <https://www.jstor.org/stable/resrep26260.7>