

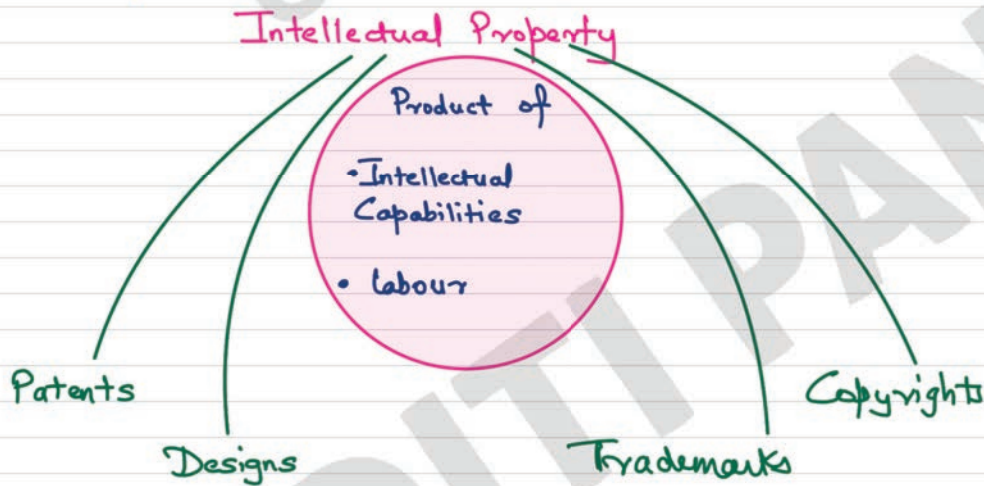


INTELLECTUAL PROPERTY RIGHTS

CHAPTER 1 - INTRODUCTION

Human Beings } Because of the
X
Animals } intellectual capability

- Property coming into existence by application of human intellect is



TWO BROAD CLASSIFICATION



Protects the right of the CREATORS by giving them property rights over their CREATIONS

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- PATENT
- TRADEMARK
- COPYRIGHT
- TRADE SECRET
- OTHERS [Collectively referred to as Intellectual Property Rights]
 - GEOGRAPHICAL INDICATORS
 - PROTECTION OF PLANT VARIETIES
 - PROTECTION OF SEMI-CONDUCTORS & INTEGRATED CIRCUITS
 - UNDISCLOSED INFORMATION
[also have been brought under this Umbrella]

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CONCEPT OF PROPERTY

Some over which property rights cannot be exercised

Some over which property rights can be exercised

TYPES OF PROPERTY

Property can be classified into:

- Real Property: Which is fixed to one location. Ex. Land, Building. Any benefits attached to land.
- Personal Property: Belonging to any person. Ex. Exclusive right.
- Absolute Property: Owned without any Qualifications or Restrictions.
- Qualified Property: Consist of special condition or special interest over the subject matter
[Owner of qualified property lacks the complete bundle or sets of right bestowed upon the absolute owner]
- Corporeal Property: Signifies a property which is perceptible to the senses. Ex. Land, House, Goods...
- Incorporeal Property: Consists of legal rights such as easements etc...

THEORIES OF PROPERTY

• HISTORICAL THEORY → BENTHAM & HENRY MAINE

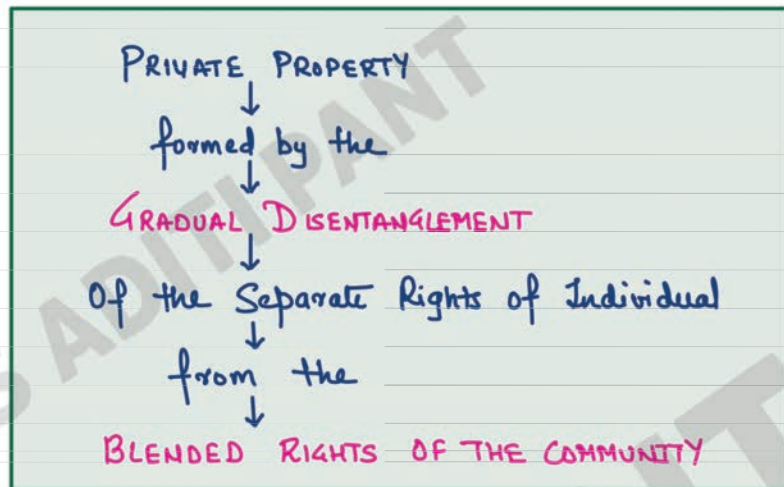
- Concept of Private Property grew out of Joint Property

└ witnessed slow & steady growth, and
grew out of collective property

- Development of Natural Possession - STAGE I
- Development resulted in Juristic Possession - STAGE II
- Development lead to evolution of concept of ownership - STAGE III

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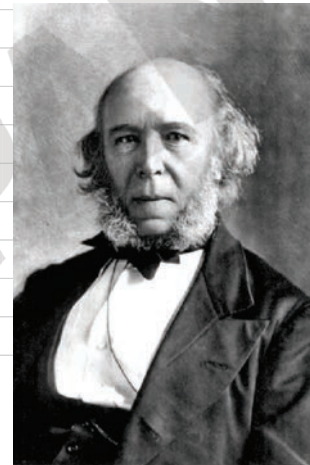
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LABOUR THEORY → SPENCER

↳ Positive Theory

↳ Labour of the individuals is the foundation of property



→ is a property

belongs to the person who takes the pain of bringing into existence

THEORY ON THE PRINCIPLE OF EQUAL FREEDOM

No Person has a moral right to property which he has not acquired by his personal effort.

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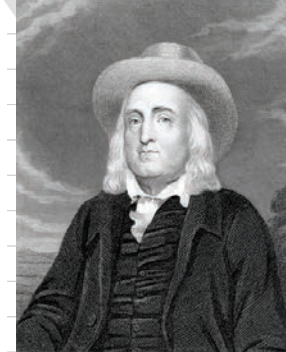


• PSYCHOLOGICAL THEORY (BENTHAM)

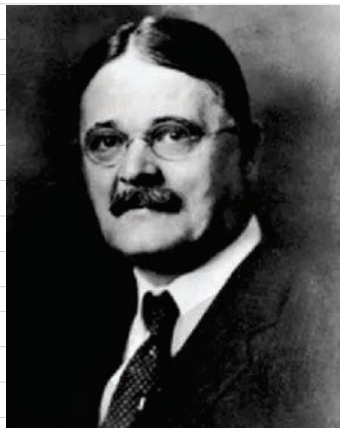
→ Property is the right of acquisitive instinct of the human beings.

Relating to or
invoking acquisition

• Altogether a conception of mind. Hence, nothing more than an expectation → to derive certain advantages from the object according to one's capacity.



ROSCOE POUND



Supported Bentham

(acquisitive instinct of an individual - motivating him to assert his claim over objects in his possession / control)

• SOCIOLOGICAL THEORY / FUNCTIONAL THEORY

JENKS



No one can be allowed to have an unrestricted use of his property, to the detriment to others

&

LASKI



- Property is a social fact.
- It is the character of social facts to alter.
- Capable of changing further with the changing norms of Society.

Assumes the concept → Property should not only be confined to Private Rights but considered as Social Institution

Securing maximum interests of Society.

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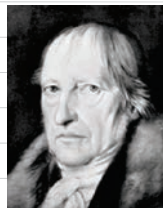


• METAPHYSICAL THEORY



According to Kant

"A thing is rightfully mine when I am so connected with it that anyone who uses without my consent does me an injury."



According to Hegel:

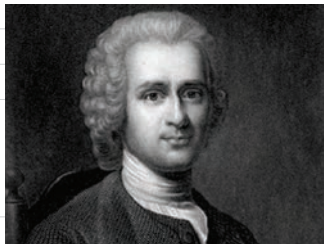
"Property is an object on which person has liberty to direct his will."

• CREATION OF STATE

• Origin of Property to be traced back to the origin of LAW & STATE

• JENKS OBSERVED THAT PROPERTY AND LAW WERE BORN TOGETHER & WOULD DIE TOGETHER

AS PER THIS THEORY, PROPERTY WAS NON-EXISTENT BEFORE LAW



According to Rousseau:

"It was to convert possession into property and usurpation into a right that LAW & STATE were formed"

THE FIRST WHO ENCLOSED

A PIECE OF LAND & SAID — THIS IS MINE

• PHILOSOPHICAL THEORIES

(Property as a means to

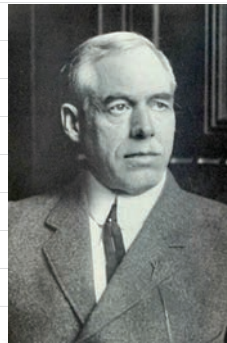
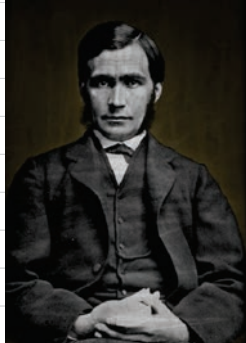
HE WAS THE ^{REAL} FOUNDER OF SOCIETY

According to Aristotle ^{Ethical Ends} it may be a means to the end of Good life of CITIZENS



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According to Hegel and Green, it may be a means to the fulfillment of the Will without which individuals are not full human.

The supporters of UTILITARIAN TRADITION treat, accumulation of property as an end, always meant as a right of unlimited accumulations.

PLEASURE MINUS
PAIN OF THE
MEMBERS OF THE
SOCIETY

- **TANGIBLE PROPERTY** → PHYSICAL PROPERTY that can generally be moved, touched or felt.
- **INTANGIBLE PROPERTY** → Refers to some PERSONAL PROPERTY that cannot actually be moved, touched or felt — BUT represents something of Value. Ex. Negotiable instruments, securities, service and intangible assets including Goodwill.
- **INTELLECTUAL PROPERTY** → PROPERTY which comes into existence by application of human intellect.

BAUDDHIK
SAMPADA

Bauddhik means related to Buddhi or Intellect
Sampada means Property

Under the Intellectual Property law, the owners of such intangible property have been granted & conferred with certain exclusive rights over their respective intangible assets / works: THESE INCLUDE



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PATENTS

- Necessity is the mother of Invention.
- Person who invents something having industrial application is granted Patent on the Invention.

INVENTION MUST HAVE A UTILITY

PATENTS ARE TERRITORY SPECIFIC

THERE IS NOT YET ANY SINGLE
EU-WIDE PATENT SYSTEM
WHICH EXISTS TILL DATE.

MAKING, USING, SELLING OR
IMPORTING THE INVENTION
FOR 20 YEARS FROM THE
DATE OF GRANT
OF PATENT

Protection to certain new products, processes,
apparatus, etc.:

- Provided it is non-obvious in nature in light of what already exists or has already been done before, it is not in public domain, and has not been disclosed anywhere in the world.

TRADEMARKS

- Symbol in the form of logo, words, shapes, jingles etc.
- Employed to provide the product(s) or service(s) with a recognizable identity

IN ORDER TO
DISTINGUISH THEM FROM
THE COMPETING PRODUCTS

CAN BE REGISTERED BY ITS FOUNDER / USER NATIONALLY AS
WELL AS INTERNATIONALLY

- Trademark rights can be enforced through Court Proceedings wherein relief in the form of injunction and/or damages are available.

COPYRIGHT

- Used to protect works like Original Creative Works.
- Published Articles, Sound Recordings, films, and Broadcast.

RIGHTS EXIST INDEPENDENT
OF THE MEDIUM
ON WHICH THE WORK IS
RECORDED.

- Hence, buying a copy does not confer a right to copy the work.
- Mere idea is outside the domain of the protection of copyright.



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DESIGN REGISTRATION




- Helps in protecting the products which can be distinguished by their NOVEL SHAPE OR PATTERN.
- Element of Novelty is of the essence for design registration

DESIGN IS REGISTRABLE BOTH
NATIONALLY AS WELL
AS UNDER THE EU-WIDE
SINGLE REGISTRATION

IN TODAY'S ERA, NOT ONLY THINGS WHICH CAN
BE SEEN OR TOUCHED BUT ALSO THE
THINGS WHICH CANNOT BE TOUCHED
OR SEEN COME WITHIN THE PURVIEW
OF TERM "PROPERTY"



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THEORIES OF INTELLECTUAL PROPERTY RIGHTS

• UTILITARIAN THEORY

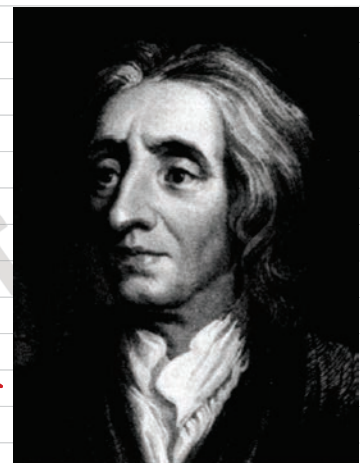
- Advocated by Economist such as Bentham and Mill.
- Primary focus upon attainment of greatest good for greatest number.
- Policy made and implemented by any authority should have power of ensuring greatest good for greatest number.

- Maximization of net social welfare
- Law makers must strike an optimal balance between the power of exclusive rights to stimulate the creation of inventions
 - Creators of works will be empowered to charge prices.
 - Aided in shaping specific Doctrines

• NATURAL RIGHT THEORY / LABOUR THEORY (LOCKE)

Person who labours upon resources
↓
has a natural property right to
the fruits of his / her efforts

↓
State has a duty to respect and
enforce that natural right



LOCKEAN PROPERTY ENTITIES

- Right to use without harm.
- Right to transfer the property
- Right of exclusive usage of the property.

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• PERSONALITY THEORY

- Found place in the writings of KANT & HEGEL
- Private Property Rights are crucial to the satisfaction of some fundamental human needs.

JUSTIN HUGHES TOOK
INSPIRATION FROM HEGEL'S
PHILOSOPHY OF RIGHT RELATED
TO GUIDELINES CONCERNING
IPR.

• ACHIEVEMENT OF JUST & ATTRACTIVE CULTURE THEORY

Property Rights
in general

Intellectual Property Rights
in particular

CAN & SHOULD BE SHAPED WITH THE
OBJECTIVE TO HELP ACHIEVE A JUST
AND ATTRACTIVE CULTURE



An appropriate illustration can be found in Neil Netanel's
essay titled as "COPYRIGHT AND A DEMOCRATIC CIVIL SOCIETY"

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INTELLECTUAL PROPERTY AS AN INSTRUMENT OF DEVELOPMENT

- Though the importance of the subject of Intellectual Property Rights has increased with time, it is still not a global phenomenon.
- Statistics make it clear that developing countries tend to spend much less on R & D activities as compared to the Developed Countries.

One of the major factors responsible for increase in R&D is the growing participation of the Private Sector → WHICH SOMEHOW TRIGGERED THE NEED OF IPR PROTECTION.

EARLY 1980s

- Significant shift in the national policy towards agriculture related research.
- Participation of the Private Sector in agricultural R & D

ERA OF 1990

- Copyright Protection had gained importance for its role in protecting digital information on the Internet.

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NEED FOR PROTECTING INTELLECTUAL PROPERTY

First to give meaning to the moral sentiment that a creator (such as a craftsman) should enjoy the fruits of his creativity.

Second is to encourage investment of skill, time, finance, and other resources into innovation activities in a manner that is beneficial to the society.



Indian Government has provided the exclusive right of Intellectual Property to safeguard the originality of inventor's work.

India has robust IP laws and a strong IP Jurisprudence.

IPR Policy focuses on:

- Improving access to healthcare, food security and environmental protection
- Fostering creativity and innovation

Thus, enhancing Social, Economical, Technological & Cultural Growth.

IPR POLICY

- IPR Awareness : Outreach and Promotion
- Generation of IPRs
- Legal & Legislative Framework
- Administration and Management
- Commercialization of IPR
- Enforcement and Adjudication
- Human Capital Development

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IPR & WTO AGREEMENT

• WIPO 2011 - THE CHANGING FACE OF INNOVATION

World Intellectual
Property Report

Described how ownership of
Intellectual Property Rights
has become central to the
strategies of innovating firms
worldwide.

INTELLECTUAL PROPERTY RIGHTS AS HUMAN RIGHTS

There are conflicting views in this regard:

First Approach finds that there is
a conflict between human rights and
the intellectual property rights.

Reason: IPR is incompatible with
the human rights obligation
especially in the area of
economic, social and cultural
rights.

Hence, suggested the normative
primacy of human rights law
over intellectual property law

Second approach assumes that
human rights and intellectual
property rights are concerned
with the same fundamental
question.

Hence,

Giving appropriate scope of
monopoly power to private
players giving authors &
inventors a sufficient incentive
to create and innovate, while
assuring that the consuming
public has adequate access
to the fruit of their efforts

RIGHTS OF INDIGENOUS PEOPLES

- Since 1990s, the UN Human Rights machinery started emphasizing the rights of Indigenous communities.
- People from such communities started demanding from the States their right of recognition as well as right to control over their culture including traditional knowledge relating to bio-diversity, medicines and agriculture.

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TRIPS AGREEMENT AND HUMAN RIGHTS

- Adopted in the year 1994 as part of the World Trade Organization
- The UN Human Rights system turned its attention to TRIPS in the year 2000

AGREEMENT ON
TRADE RELATED ASPECTS
OF INTELLECTUAL
PROPERTY RIGHTS IS AN
INTERNATIONAL LEGAL
AGREEMENT BETWEEN
WTO MEMBER
NATIONS.

DETERMINING FINANCIAL VALUE OF IPR

- IP protection makes intangible assets "a bit more tangible" by turning them into valuable exclusive assets which are taken into account in all negotiations that happen around any merger or acquisition transactions that take place between the businesses.



Quantitative valuation: As the name itself suggests, this method relies on measurable data or numerical information to produce an estimate of the value of one's intangible assets. It attempts to answer the question by providing a monetary value or contribution that the intellectual property provides, whether directly to the business or indirectly by increasing the value of other parts of the operation or the appeal to investors.

Qualitative methods: The parameters of valuation under this method are very different from the quantitative valuation method. This method provides a non-monetary estimate of the value of an Intellectual Property by rating it on the basis of its strategic impact, loyalty held by consumers, its impact on the company's future growth, and other intangible metrics that do not rely solely on numbers.



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INTELLECTUAL PROPERTY TRANSACTIONS

- The apparent complexity involved in Intellectual Property transactions is on account of recognition of intangible assets as something of very high monetary value.
- Some of the commercial transactions in the intellectual property sphere are:

* LICENSING

A licensing agreement is in the nature of a partnership between the licensor & the licensee and there is a need for assistance in negotiating the terms of licensing of different IPs.

* ACQUISITIONS

Intellectual property is the center piece of many mergers or acquisitions transactions. Critical to ensure that a detailed due diligence is performed & the transaction documents adequately address IP ownership, transfer & licensing issues.

IPR IN THE CYBER WORLD

Cyberspace and IPR concerns

Copyright and Cyberspace - Copyright protection gives the author of work a certain "bundle of rights", including the exclusive right to reproduce the work in copies, to prepare derivative works based on the copyright work and to perform or display the work publicly.

Public Performance and Display Rights - The right that does get affected is that of display. Display of the work is also done by making copies, which are then retailed or lent out. This also falls under the right to display, which the holder of the copyright has.

Distribution Rights - Copyright Law grants the holder of the copyright the exclusive right to distribute copies of the work to the public by sale or by the transfer of the ownership.

Caching (Mirroring) - It is a violation on the internet. Caching may be local caching and proxy caching. In addition, proxy caching may give rise to infringement of the right of public distribution, public policy, public performance and digital performance.

Protection of Database in India - The Indian Copyright Act 1957 protects "Databases" as "Literary Works" under Section 13(1) (a) of the Act which says that copyright shall subsist throughout India in original literary, dramatic, musical and artistic works. The term computer Database has been defined in the Information Technology Act 2000 for the first time. Section 43 of the IT Act, 2000 provides for compensation to the aggrieved party up to one Crore rupees from a person who violates the copyright and cyberspace norms. Also Section 66 of IT Act, 2000 provides for penal liabilities in such a case.

Internet Protection in India - The internet challenge for the protection of internet is the protection of intellectual property. It is still unclear as to how copyright law governs or will govern these materials (literary works, pictures and other creative works) as they appear on the internet. Section 79 of the IT Act 2000 provides for the liability of ISP's "Network Service Providers not to be liable in certain case." Section 79 of the IT Act exempts ISP's from liability for third party information.

Indian Cyber Jurisdiction - Though it is in the nascent stage as of now, jurisprudential development would become essential in the near future; as the internet and e-commerce shall shrink borders and merge geographical and territorial restrictions on jurisdiction. There are two dimensions to deal with.

1. Manner in which foreign courts assume jurisdiction over the internet and relative issues.
2. The consequences of decree passed by a foreign court.

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- So far international copyright law was based upon the Berne Convention for the protection of literary and artistic works and the TRIPS of 1995.
- Since 1974, the international copyright instruments have been managed by a Special United Nations Agency by name WIPO.

WIPO aims at "homogenizing national intellectual property protections with an ultimate eye towards the creation of a unified, cohesive body worldwide international law."

- Piracy of the original works by some organized unscrupulous groups is becoming a universal concern now.

- In India, the law that deals with issues relating to protection of Computer Software(s) is contained in the Copyright Act, 1957.

EXPERIENCE HAS SHOWN
THAT THE PRESENT LEGAL
SYSTEM DOES NOT
ADDRESS THE ISSUE
IN INDIA

- 'CYBER SECURITY' denotes the technologies and procedures which are brought in to safeguard the computer networks and the data from unlawful admittance of weaknesses and attacks transported through the internet by cyber delinquents.

WIPO (World Intellectual Property Organisation) - WIPO is an organization of the United Nations (U.N).

It's activities are of four kinds:-

- (a) Registration;
- (b) Promotion of inter-governmental cooperation in the administration of intellectual property rights;
- (c) Specialized programme activities; and
- (d) Dispute resolution facilities.

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PATENT COOPERATION TREATY

The Patent Cooperation Treaty (PCT) makes it possible to seek patent protection for an invention simultaneously in each of a large number of countries by filing an "international" patent application. Such an application may be filed by anyone who is a national or resident of a PCT Contracting State. It may generally be filed with the national patent office of the Contracting State of which the applicant is a national or resident or, at the applicant's option, with the International Bureau of WIPO in Geneva.

The PCT was concluded in 1970, amended in 1979 and modified in 1984 and in 2001. It is open to States party to the Paris Convention for the Protection of Industrial Property (1883). Instruments of ratification or accession must be deposited with the Director General of WIPO.

PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY

- **WIPO** is also responsible for managing the Paris Convention.
- It was created to bring about some global consistency in Intellectual property Rules and was adopted on March 20, 1883, in Paris and it went into effect on July 7, 1884.

The substantive provisions of the Convention fall into three main categories:

National
Treatment

Right of
Priority

Common
Rules

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HARMONIZATION OF CBD AND TRIPS

The Convention on Biological Diversity (CBD) 1992: Opened for signature at the Earth Summit in Rio de Janeiro in 1992, and entering into force in December 1993, the Convention on Biological Diversity is an international treaty for the conservation of biodiversity, the sustainable use of the components of biodiversity and the equitable sharing of the benefits derived from the use of genetic resources. The interface between biodiversity and intellectual property is shaped at the international level by several treaties and process, including at the WIPO, and the TRIPS Council of the WTO. With 193 Parties, the Convention has near universal participation among countries. The Convention seeks to address all threats to biodiversity and ecosystem services, including threats from climate change, through scientific assessments, the development of tools, incentives and processes, the transfer of technologies and good practices and the full and active involvement of relevant stakeholders including indigenous and local communities, youth, NGOs, women and the business community. The Cartagena Protocol on Biosafety is a subsidiary agreement to the Convention. It seeks to protect biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology.

The TRIPS is a devise with international intellectual property regime that maximizes the potential for both traditional knowledge and modern scientific innovations to contribute to economic progress. To achieve this goal, the TRIPS a need to be reviewed incorporated further;

- i. Establish the concept of community property rights with respect to Traditional Knowledge recognition;
- ii. Recognize communities' rights over their resources and Traditional Knowledge;
- iii. Recognizes safeguards and protect the Traditional Knowledge, innovations, practices and technologies of indigenous and local people and communities;
- iv. Mandate legal protection for Traditional Knowledge;
- v. Recognize the sovereign rights of states over their biodiversity and genetic resources;
- vi. Mandate the principles of prior informed consent and benefit sharing when other countries access the biogenetic resources and local communities.



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