

DRAFT INTELLECTUAL PROPERTY RIGHTS POLICY FOR
KERALA 2007

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 possible.

2. A major issue for Kerala relates to the protection of traditional knowledge, especially Ayurveda. Traditional knowledge does not merely exist in books or minds but serves as the basis of practice by a large number of 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, no legal property rights over such knowledge exists, which creates scope for its private misappropriation. To prevent this, a number of steps are necessary. The first is its codification. This process is already on in Kerala in the case of Ayurveda, where 30,000 leaves of Ayurveda manuscripts have been digitized; more than 1900 documents, Manuscripts and Texts, have been identified; a Database has been created in accordance with the guidelines of the World Intellectual Property Organization; and nearly 3100 Medicinal Formulations have been screened and entered into this Database. Such codification must occur in other fields as well. But codification, while making it possible to identify traditional knowledge, which prevents its direct misappropriation, is not enough. It must also be protected from indirect misappropriation, or misappropriation at one remove, through being patented, after some minor modification, as private property, which codification paradoxically facilitates.

3. In the case traditional knowledge associated with the use of biological resources, the Biological Diversity Act 2002, offers some scope for doing so. Section 3 of the Act provides that all foreigners must get previous approval of the National Biodiversity Authority to “obtain any biological resource occurring in India or knowledge associated thereto, for research or for commercial utilization or for bio-survey 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). Through state-level legislation if possible, or through representation to the

National Biodiversity Authority (if state-level legislation is not possible), *the state will make it obligatory for foreigners to seek the approval of the State Biodiversity Board for obtaining any biological resource occurring in the state or “knowledge associated thereto”*. The State biodiversity Board will ensure that the “knowledge associated thereto” can be obtained only on the condition that all useful modifications derived from or based on this knowledge must be available for anyone to use. In other words, *the State Biodiversity Board will see to it that any innovation based on traditional knowledge associated with biological resources is put into the realm of “creative commons”, which has two features: first, while a patent may be taken out on such an innovation, it is licensed for general use; and secondly, this license for general use itself contains the condition that any further innovation based on the original innovation is also put back into the realm of “creative commons”*.

4. 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”. Through state-level legislation if possible or representation to the National Biodiversity Authority (if state-level legislation is not possible), *the provision of this Section 7 will be extended 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 “creative commons”.
5. Of course if the codified traditional knowledge in this case is open to all, then the safeguards suggested above will be infructuous. It is essential therefore that access to codified knowledge for all non-traditional users should be made conditional upon obtaining the approval of the State Biodiversity Board. For this the following mechanism is suggested. *While all codified traditional knowledge will be submitted to the patent office, the codified knowledge associated with biological resources will be kept, apart from at the patent office, only at certain specific locations, where it can be consulted once the clearance is obtained from the State Biodiversity Board*.

6. If traditional knowledge concerning biological resources is put into the realm of “creative commons”, then even though it would not be misappropriated, the possibility remains of its being commercially used by Indian or foreign corporates to the detriment of the community of its traditional users. In the case of Indian non-traditional users, Section 7 of the Biological Diversity Act 2002 stipulates the need for approval from the State Biodiversity Board for the commercial use of biological resources of a state. But foreigners are kept outside the purview of the State Biodiversity Boards and require only the permission of the National Biodiversity Authority. Here again, through state-level legislation if possible, or through arrangement with the NBA (if state level legislation is not possible), foreigners too shall be required to obtain permission from the SBB for commercial use of biological resources of the state. *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 the SBB 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.

7. To recapitulate, our policy visualizes adding to the Biological Diversity Act 2002 in three ways: first, making it obligatory for foreigners to get the approval of the SBB, in addition to that of the NBA, for obtaining knowledge relating to biological resources of the state for purposes of research; second, making it obligatory for Indians, other than traditional users, to get the approval of the SBB for obtaining knowledge relating to biological resources of the state; and third, making it obligatory for foreigners to get the approval of the SBB, in addition to that of the NBA, for making any commercial use of biological resources of the state. Since all these entail supplementing, and not contravening, the provisions of the Biological Diversity Act 2002, state-level legislation, whether *sui generis* or in the form of an amendment to the Act in its application to the state, should be possible. But if it is not, then these additional will be achieved through discussions with the National Biodiversity Authority.

8. In any case, co-operation of the NBA is essential for the protection of traditional knowledge relating to biological resources. Even if state-level legislation is possible, and is undertaken with regard to all the three areas mentioned in 7, any breach by Indian or foreign corporates of the SBB stipulation that developments based on traditional knowledge must be put in “creative commons” can be caught only when they apply for patents through the NBA. Likewise, the provision that all developments based on traditional knowledge must be put back into the realm of “creative commons” must be made applicable, for the sake of *inter se* parity, to the traditional users as well. If some traditional users seek to take out patents

either of existing knowledge or of any development based upon it, then this 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 even when state-level legislation can be enacted. If such legislation cannot be enacted, then the need for synergy will be even greater.

9. The foregoing relates only to traditional knowledge associated with biological resources. For the protection of other traditional knowledge new legislation and new mechanisms will have to be created *ab ovo*, since nothing comparable to the Biological Diversity Act 2002 exists for any other sphere. Such protection will be put in place in due course based on the experience gained from the current attempt to protect traditional knowledge based on biological resources. In any case the latter being the most vulnerable component of traditional knowledge, its protection is a matter of urgent priority.

10. The mechanism suggested for the protection of such knowledge places much responsibility 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 (Indian or foreign corporates) 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, if it is considered necessary for it to encompass these aspects, may require legislative intervention.

11. It will however be too onerous a task for the State Biodiversity Board to follow up individual cases of breach of agreement and to pursue litigation against violators. For this and other activities relating to Intellectual Property Rights a specialized governmental body under the Law Department in Government with autonomous powers called the Supervisory Council on Intellectual Property will be set up under the Chairmanship of the Chief minister and the Law Minister as its Vice Chairman. Its membership will comprise a few other ministers, scientists and other experts drawn from various fields. The Chairman of the State Biodiversity Board will be an *ex officio* member. The council will have appropriate technical staff, and be entrusted with a wide range of functions. It will pursue all cases of breach of agreement with the SBB. 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. The Council will be the high-powered administrative body in the state on all issues concerning Intellectual Property Rights. All other Institutions in the State dealing with Intellectual Property Rights will come under the Council.

12. 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 no jurisdiction. But it is institutions funded or aided by the state government itself where 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.
13. 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 "creative 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 "creative 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 "creative 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.

14. 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.
15. 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 “creative commons”. This decision however has to be taken in consultation with the research institution concerned and by the full meeting of the SCIP.