



INDIGENOUS COMMUNITIES IN INDIA AND THE PROTECTION OF TRADITIONAL KNOWLEDGE: AN INADEQUATE LEGAL INITIATIVE

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Abstract

Indigenous people in society are theoretically considered to be a part of the marginalized sector among humankind around the world, and have existed in an indistinguishable manner through civilizations in the antiquity of earth. Intellectual property rights and the prerogative surrounding indigenous people has prevailed through cadence and several discourses have taken place over the same arenas. Traditional Knowledge and Traditional Cultural Expressions are the two dominant sites where the rights concerning intellectual property rights of indigenous people are scouted upon, and several cases were trademarks and patents have been claimed by governments. However, the question arises on wherein the rights of these indigenous people advance in this parley and whether they have enough knowledge about their own rights over the tangible or intangible properties that have evolved through the duration of their predecessors. This paper focuses on the rights of indigenous people over intellectual property rights in the guise of traditional knowledge, in India, and how a defect lies in attaining the precise perception of the genesis of certain art, literary, musical, medicinal, etc. forms.

Keywords: *Indigenous, People, Traditional Knowledge, Properties.*

Introduction

Most languages, art forms, literary works, musical notations, and perhaps certain medicines have found its roots through tribes and an indigenous community, which ultimately laid its foundation in an urban world with the help of revenue building bodies. Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE) are two of the most influencing factors that exist when the sheltering of eons of knowledge of tribes and indigenous communities are concerned. Geographical Indication plays and has played a significant role in the past for a multitude number of goods in current market when the part of an epithet for these goods are concerned. However, TK and TCE both do not have enough protection, and have been victims of modern hegemonizing of mammoth brands that profit out of the commodities that are forged together, and in most cases the ideas have been birthed in a tribe or indigenous community. It is very crucial for us as an urban society to understand that knowledge, culture and certain biological resources are weaved together in most traditional communities, and to segregate these out into separate bodies equals to erasing of years of conventional learnings and links. An identity of most things in our current society exist due to the presence of indigenous communities and the taught methodologies of particular aspect by them to our forefathers and colonizers in history. Separation of knowledge and culture, as well as biological heritage has been taking place for a prolonged period and the same is resulting in perennial misappropriation of culture in this aspect. Misappropriation of culture as a phrase, can simply not exist to call out people who indulge in acting out conventions that they are traditionally not a part of, as commonly seen for many people splurging into African American culture,



despite being from completely different socio-religious background. Misappropriation of indigenous communities have been taking place ideally because of the lack of knowledge of rights that these communities themselves hold, and hence, unfortunately have been taken advantage of blatantly at various stages of history. Corporate sectors in developing countries are trying their best to industrialize the countries, and several discourses have taken place on how this commercialization of TK and TCEs are stealing the cultural patrimony of people and this tantamounts to robbing these people of their identities. Concerns surrounding these areas have been addressed to the World Intellectual Property Organization (WIPO) in the year 2000 by committees that had been organized into Inter-Governmental Committee on Intellectual Property and Genetic Resources.¹ The IGC had been made with the intentions to address intellectual property rights and issues surrounding the same, and the context of benefit sharing to be a criteria of discussion for protection of TK and TCEs. The objective of the IGC has been to dispute over international legal agreements that concern the protection of indigenous communities and the knowledge which has emerged from them. Recommendations to Member States of the Paris Convention or ones who abide by the standards laid down by WIPO need to be made surrounding the protection of these communities.² India has always been an operational participant with discussions surrounding the IGC, and being a country with a culturally

rich heritage and background, there is a dire need of conservation of indigenous communities and the TK and TCEs that is associated with their identities. Negotiations regarding the sheltering of these tribes and their heritage need recognition of the current legal mechanisms and the shortcomings that the same hold when it comes to these sectors. Legal initiatives that require improvement on and measures that should be taken on international and national grounds should become a necessary topic in such deliberations.

Research Methodology

The research methodology adapted for this paper has been qualitative in nature, which is the most distinguished form of research for most humanity subjects. References have been taken from non-numerical resources and concepts, opinions and deliberations on the topic surrounding the focal point of this paper. Available Indian legislations surrounding the protection of rights of communities have been taken into consideration alongside those that are correlated with that of protection of intellectual property rights.

Objective and Scope

- To assess and understand the urgency of protecting Traditional Knowledge and Traditional Cultural Expressions of Indigenous Communities.
- To examine the adequacy of Indian legal provisions when it surrounds the protection

¹ Vera Albino, *The Right of Indigenous People to Protect their Intellectual Property*, MONDAQ, (Sept. 11, 2018), <https://www.mondaq.com/trademark/735306/the-right-of-indigenous-people-to-protect-their-intellectual-property>

² Prof. GHC. Bodenhausen, *Paris Convention for the Protection of Industrial Property*, WORLD INTELLECTUAL PROPERTY ORGANISATION, (May. 1968), https://www.wipo.int/edocs/pubdocs/en/intproperty/611/wipo_pub_611.pdf



of Intellectual Property Rights of Indigenous Communities.

- To propose amendments that are necessary for the ultimate protection of the rights of these communities in order to prevent further misappropriation in the future.

Hypothesis

The existing Intellectual Property Rights in the Indian legal context are inadequate for protection of Traditional Knowledge and Traditional Cultural Expressions of Indigenous Communities.

I. Rights of the Indigenous Communities

To understand the rights that have been provided to indigenous communities, an international paradigm can be considered in order get an appropriate grip over the affairs on this field. The protection of the rights of indigenous people, including their intellectual property rights, on international grounds has made significant amount progress in the past few years.³ There has been advancement of the same in legal legislation or literature, and this progress is ideally due to the fact that indigenous names, images, symbols or patterns of commercial products have not been as habitual as they are at the moment in society.⁴ Incorporating verbal and visual constituents of indigenous

people into brands, designs or models, has ended up proving to be a magnanimously effective way to make the commodities more attractive, more distinctive to corporate sectors and therefore they are of more economic value.⁵

However, in this scenario, not only is the utilization of cultural property of indigenous people without their consent economically unfair to these communities, but also this use essentially constitutes an offense to indigenous people who traditionally attribute a spiritual and cultural meaning to certain words, images and patterns and contributed towards the same for generations. Therefore, it is and has been imperative that measures should be taken to protect their economic and cultural rights.⁶

Two prominent examples of rights being granted to indigenous communities from the international front can be seen for tribes in New Zealand and Africa, where legislations ensured that misappropriation does rob the communities from their rights of retaining the genesis of their TK and TCEs.

I.I. The Case of Maori People in New Zealand

The Maori people is an indigenous population of New Zealand who have a rich

³ Katy Riley, Mary Morgan, *Protecting Indigenous Intellectual Property Rights: Tools That Work*, CULTURAL SURVIVAL, (Dec.12, 2000), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/protecting-indigenous-intellectual-property-rights-tools>

⁴ Michael Davis, *Indigenous People and Intellectual Property Rights*, PARLIAMENT OF AUSTRALIA, (Feb.13, 1996), https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp9697/97rp20

⁵ *Traditional Knowledge and Intellectual Property- Brief Background*, WORLD INTELLECTUAL PROPERTY ORGANISATION, (May. 15, 2009),

https://www.wipo.int/pressroom/en/briefs/tk_ip.html

⁶ Simon Brascoupé, Karin Endemann, *Intellectual Property and Aboriginal People: A Working Paper*, WORLD INTELLECTUAL PROPERTY ORGANISATION, (Aug.10, 1999),

https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/ip_aboriginal_people.pdf



and varied culture and include traditional and contemporary arts such as sculpture, weaving, kapa haka (group dancing), whaikorero (oratory) and moko (tattoo), cinema, poetry and theatre.⁷

The use and protection, through trademark registration, of Maori images has been relatively common in the past. For example, there has been a company that registered a butter trademark composed by the face of a Maori chief; and another company that registered a similar image for a trademark of sauces and cucumbers. Although this had been granted in the past, the same trademarks would now be rejected, as a result of the awareness of this problem in the country. The relevant legislation had been modified and, with it, the criteria of registration of a trademark composed by Maori images. Under the new legislation, the New Zealand Intellectual Property Institute (IPONZ) cannot grant a trademark if it thinks that its use or registration may offend the Maori people.⁸ IPONZ also assesses the potential offense of all trademark applications, which is inclusive of abbreviations of foreign words, images and designs, and for the decision to be as appropriate as possible, New Zealand law requires the IP Office to consult a Maori Consultative Committee. Hence, a trademark application which consists of an element, may have some

connection with the Maori community will be referred to the Committee. If the Committee considers that the trademark is not offensive in nature, it shall pass to the substantive examination stage. If the Committee considers that the trademark might be offensive, it will inform IPONZ. It should be noted that, even though the Maori Consultative Committee has only a power of recommendation, IPONZ rarely has decided in disagreement with the Committee.⁹

I.II. African Tribes and Protection of their Traditional Knowledge

South Africa in 2015 had also tabled a Traditional Knowledge Bill, which provides for a sui generis intellectual property approach for protection of different areas of TK. In the bill, several definitions of TCEs includes language, the music or different forms of expressions, which have become an inherent part of the traditional and the indigenous community. The Intellectual Property Policy of the Republic of South Africa Phase I (2018) recognizes the creation of an appropriate system for protection for traditional knowledge which will guard against misappropriation and exploitation as one of the key reforms.¹⁰

I.III. An International Perspective on the Protection of Traditional Knowledge of Indigenous Communities

⁷ *New Zealand: Maori Culture and Intellectual Property Law*, THE LAW LIBRARY OF CONGRESS, (Dec. 2010), <https://www.loc.gov/law/help/nz-maori-culture/nz-maori-culture-and-intellectual-property-law.pdf>

⁸ Jessica Christine Lai, *Māori Culture in the Modern World: It's Creation, Appropriation and Trade*, INTERNATIONAL COMMUNICATIONS AND ART LAW LUCERNE, (Sept. 2010), https://www.unilu.ch/fileadmin/shared/Publikationen/lai_maori-culture-in-the-modern-world.pdf

⁹ *Better Public Services Result 9- Case Study: IPONZ: Delivering Better Public Services Through Business Transformation*, TE KAAWA MATAHO: PUBLIC SERVICE COMMISSION, (May.1, 2018), <https://www.publicservice.govt.nz/resources/bps-result9-cs3/>

¹⁰ George Sombe Mukuka, *Indigenous Knowledge Systems and Intellectual Property Laws in South Africa*, CORE UK, (Feb. 20, 2010), <https://core.ac.uk/download/pdf/39667211.pdf>



As mentioned previously, it is noticeable that the tribes in New Zealand and South Africa has been able to provide rights through legislations as these legal mechanisms have been sui generis in nature. Examples of Brazil, China and South America are also significant in gaining an acknowledgement of the legal mechanism being an unassailable factor in the protection of intellectual property rights of their respective indigenous communities.

China in their legislations, do not have a separate law to protect TCEs and relies on their Copyright Law to protect TCEs and derivative works from tribes and other communities. During the 34th IGC session, China had informed that provisional legislations on copyright protection of folk literary and artistic work have been drafted,¹¹ and would be implemented within a stipulated period of time. A predominant example of Chinese Traditional Knowledge exists in Chinese medicines which are made from herbs and are known to be formulas which have emerged from ancient proficiencies.

In Ecuador, TCEs are administered by the Intellectual Property Law (Consolidation No. 2006-13) law. Article 7 covers certain topics and specifically defines expressions of folklore, whose birth lies in tribes. The scope of protection for these art forms are covered

in Article 9 and that states how economic and moral rights apply to creations and adaptations of expression on folklore.¹²

In Mexico, TCEs are protected under the Federal Law on Copyright. Article 116 of this legislation protects performer rights of anyone, and anyone who performs an expression of folklore, and Article 157 provides protection to literary, artistic works, which are a exhibitions of the original work forming part of the Mexican culture and heritage, and this is inclusive of the ones where the author is not known. Article 158 and Article 160 of the law ideally demarcates the scope of protection to include and protect cultural expressions, which have been eternalizing themselves in the roots of Mexico, and are against any prejudices. The Act also provides for public access to TCEs, however while providing complete protection to the identities of the indigenous communities.¹³

II. Protection of TK and TCEs in India of Indigenous Communities

The Constitution of India under Article 21 reads, '*No person shall be deprived of life or personal liberty except according to a procedure established by the law*'. As Justice Bhagwati has said, Article 21 "*embodies a constitutional value of supreme importance in a democratic society.*"¹⁴ Justice Iyer has

¹¹ AFD China Intellectual Property Offices, *Latest Progress in IPR Protection in China*, MONDAQ, (Jan.8, 2021), <https://www.mondaq.com/china/trademark/1023694/latest-progress-in-ipr-protection-of-china>

¹² Michelle Wein, *You're Ruining it For the Rest of Us: Ecuador and Intellectual Property*, INNOVATION FILES, (Feb.13, 2015), <https://www.innovationfiles.org/youre-ruining-it-for-the-rest-of-us-ecuador-and-intellectual-property/>

¹³ Martha Célis, *Mexico: Traditional Cultural Expressions and Traditional Knowledge*, MANAGING IP, (Nov.21, 2016), <https://www.managingip.com/article/b1kbph2ywsccz/mexico-traditional-cultural-expressions-and-traditional-knowledge>

¹⁴ Francis Coralie Mullin v. The Administrator, UOI, (1981) AIR 746, 1981 SCR (2) 516



also characterized Article 21 as “*the procedural magna carta protective of life and liberty.*”¹⁵ Right to life has been held to be the heart of the Constitution, and it happens to be the most organic and progressive provision in our living constitution, which is the foundation of our laws. Specific rights towards the tribal communities, which are the said indigenous communities has also been specified in our Constitution. India is home to the second largest tribal concentration in the world and these communities are spread across innumerable parts of the country and are mainly found in forests and hilly regions. The most significant characteristics of these communities are their specific geographical location, and distinct culture.¹⁶ However, in the context of TK and TCEs, the economic backwardness and aloofness from the urban society at large have kept them uneducated about the rights that they possess concerning protection of their traditional knowledge. Therefore, on several instances, the rights that belonged to a particular tribe for birthing a form of art or folklore has gone ignored due to lack of knowledge that these indigenous communities have.

II.I. Problems surrounding the Representation of Indigenous Communities in India

According to Article 342 of our Constitution, the Scheduled tribes are the tribes or tribal communities which have been declared the same by the President through a public notification. It has been provided in Article 14 of the Indian Constitution that, “*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*” In India, there have been instances of mistreatment towards the tribal communities due to their stature in society, and therefore, the Constitution of India provides rights to these people for safeguarding their interests. However, there are a number of social problems which still linger around these communities like untouchability, illiteracy etc.¹⁷

Under the Forest Rights Act of 2006, which provides land rights to forest-dwelling communities of the country, only 15 lakh complainants out of the 39,56,262 cases filed were given the legal recognition regarding their property.¹⁸ One of the existing and most concerning problems of these tribes are their own societal norms which persist within their own communities. These indigenous communities are traditional and bound by customs and due to lack of education and development, superstitious beliefs prevail within them and meaningless practices prevent them from being a part of other societies.

¹⁵ Riya Jain, *Article 21 of the Constitution of India: Right to Life and Personal Liberty*, ACADEMIKE, (Nov. 13, 2015), <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/>

¹⁶ Charles H. Norchi, *Indigenous Knowledge as Intellectual Property*, JSTOR, Jan. 2000, <https://www.jstor.org/stable/4532511>

¹⁷ Achal Gupta, *Intellectual Property Rights and Protection of Traditional Knowledge: A General*

Indian Perspective, SCC ONLINE, (June. 22, 2020), <https://www.scconline.com/blog/post/2020/06/22/intellectual-property-rights-and-protection-of-traditional-knowledge-a-general-indian-perspective/>

¹⁸ Ishita Chatterjee, *Intellectual Property Rights and Traditional Knowledge: Indian Perspective*, MANUPATRA, <http://www.manupatra.com/roundup/363/articles/ipr%20and%20traditional%20knowledge.pdf>



The tribes are of noteworthy concern in Indian society due to their general economic backwardness, low technological development and complex problems of socio-cultural adjustment towards distinctive cultural identity.¹⁹ As the tribal communities are spread around different areas of India, the development of tribal people has remained a challenging situation for the Government of India. Most of the indigenous communities living in India are geographically separated from the rest of the population, and therefore lack of representation becomes a magnanimous issue. It becomes very arduous for these communities to establish relations as some of them live in extremely remote areas like dense forests, mountains, hills, deep valleys etc. and hence for them to correlate with the modern society is close to impossible. This specific physical separation or seclusion has declined the development of these communities, and henceforth, unaware about the rights that they must possess.²⁰ The welfare schemes and projects undertaken by the Government are not enough to provide complete protection to these tribes when TK and TCEs of these communities are concerned. Due to their seclusion, representation of these communities is a grueling ultimatum to deal with, and due to same reason, corporate sectors also take supremacy over the condition and create commodities from the TK of these tribes and profit out of the same, and unfortunately,

none of the profits are provided to the concerning communities.²¹

II.II. Inadequate Laws towards Protection of TK and TCEs of Indigenous Communities

Intellectual Property Rights seeks to provide preservation to the '*absolute freedom of the author's imagination*'. The author, thus under IP rights, has the privilege of everything in the world being available to the author so that this author can produce any work of his choice, which could be anything surrounding philosophical texts, and artistic and musical masterpieces, and all of these shape and enrich texts that come up as an invention of the author. However, sometimes the totality of these 'ideas' need protection after they have produced in a tangible format, and perhaps at times in an intangible format, thus allowing IP laws to provide the shelter to these authors, artists, and other persons of the like. The main laws that protect intellectual property in India are The Copyright Act 1957, The Patents Act 1970, The Designs Act 2000 and The Trademarks Act, 1999. All of these provide legal mechanisms that are enough in order to provide inventors, designers, companies, authors and creators to protect their work against any breach of the law. These laws however are limited in their scope when it comes to protection of the indigenous community with their Traditional Knowledge and Traditional Cultural Expressions.²²

¹⁹ Anu Bala, Traditional Knowledge and Intellectual Property Rights: An Indian Perspective, SSRN, (Nov. 5, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954924

²⁰ Zacharius P., Aboriginal Groups in India, Cultural Survival, (Sept. 6, 1981), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/aboriginal-groups-india>

²¹ Michael A. Bengwayan, Intellectual and Cultural Property Rights of Indigenous and Tribal People of Asia, Minority Rights Group International, https://minorityrights.org/wp-content/uploads/2015/07/MRG_Rep_PropRights.pdf

²² Riya Amal, *Protection of Traditional Knowledge Under Intellectual Property Rights Regime*, CNLU REVIEW, <http://www.cnlu.ac.in/2021/CIRF/10%20Riya.pdf>



Copyright law is based on the fundamental premise that only specific individuals can have a copyright over their work. It grants group rights only in a very limited manner. Indigenous art, in contrast, is not owned by the particular artist who created it in the first place. Instead, this art is seen as the property of the group or clan. In this discourse, it is considered as something that has been passed down through the generations for the enrichment of all and moreover, most artwork is actually considered to be executed by a group.²³

In the Australian case of *Yumbulul v Reserve Bank of Australia*²⁴, it became understandable on how the individualistic tendency of copyright law causes issues for the indigenous people. In this case, an aboriginal artist named Terry Yumbulul, had filed a case against the Reserve Bank of Australia because it had used the image of his sculpture, the Morning Star Pole, on a new Australian ten dollar note issued in order to commemorate the bicentennial of the European settlement of Australia. The Bank claimed that apparently the artist, who, significantly, possessed a valid copyright, licensed the Bank to use the image. The artist claimed that he did not contain the authority to grant such a license as approval was also necessary under aboriginal customary law, and essentially from the elders of the Galpu people, to whom the underlying knowledge belonged. This case therefore demonstrates the ideal conflict between indigenous understanding of the rights in artworks and

their own societal norms and the differences provided by the copyright act. However, it is important to understand in this scenario that sui generis laws persist in other countries with protection towards TK and TCEs of indigenous communities, unlike that of India. Therefore, a fallacy lies in the legal mechanism, which needs immediate recognition and amendment in order to provide protection to the knowledge of these communities. A riveting fact that must be mentioned here is that even in India, the concept of property has never been completely individualistic. The concept of property in India is often based on that of 'svatva', which means that a group of person own a property. The same notion however has not been considered in the format of intellectual property rights by jurists as a mode of protection towards tribes and their motifs that they possess as antiques passed through generations.²⁵

Conclusion

Through the paper, the factor that strikes a chord about the misappropriation of indigenous culture in Indian corporate sectors is the inadequacy of the legal system and the legislations that protect intellectual property rights. Are indigenous communities and their art protected by intellectual property laws? When one begins with this question, then rather than proceeding straight to the conclusion that it is not, the resulting study reveals that there are no easy solutions to the problem of the commercial exploitation of indigenous culture by corporate sectors. The

²³ Mahak Agarwal, *IPR and Traditional Knowledge*, iPLEADERS, (Dec. 28, 2020), <https://blog.iplayers.in/ipr-vis-vis-traditional-knowledge/>

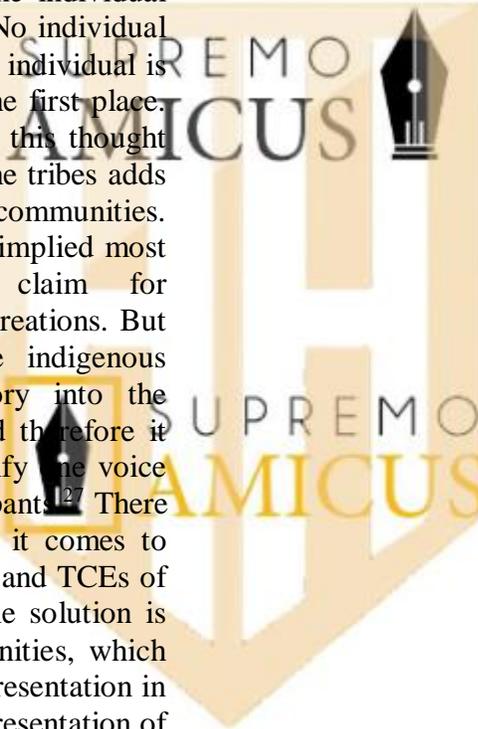
²⁴ Terry Yumbulul v. Reserve Bank of Australia No. D G26 of 1989 FED No. 448

²⁵ Prof. T.C. James, Deepika Yadav, *Protection of Traditional Cultural Expressions in India*, SCOPING PAPER, (Feb. 23, 2019), <http://www.ris.org.in/fitm/sites/default/files/Scoping%20Paper%20No%203.pdf>



study reveals that the problem is far more complicated than any legal regime that discriminates against one culture's art.²⁶ The making of art and folklore in the indigenous community is not a lonely, secluded, individual process that is idealized in the west, but instead it happens to be a group process in which many people participate at various stages. Because indigenous art has not been seen as something created by a singular individual genius, but instead it is seen as something that belongs to an entire clan, and it is the clan as a whole who owns the art and designs, and not the individual artist who executes the work. No individual owns any work because no one individual is thought to have created it in the first place. The fallacy emerges mainly in this thought process, and the seclusion of the tribes adds on to the issues faced by these communities. Protection of copyright can be implied most successfully when artists claim for themselves the rights to their creations. But such an approach will force indigenous people to translate their story into the language of individualism, and therefore it might further isolate and amplify the voice among many legitimate participants.²⁷ There is not a single solution when it comes to providing protection to the TK and TCEs of these communities, but a viable solution is the education of these communities, which will ultimately lead to their representation in urban society. The moment representation of these tribes take place, their rights will become a major concern to the legislators and eventually amendments will be made in order

to incorporate their motifs into the existing laws relating to intellectual property rights. The conclusion that remains is that the temerity that indigenous art is protected by intellectual property law is inaccurate as it fails to distinguish the diversity of interests within these indigenous communities.



²⁶ Siddhartha Prakash, *Indigenous Knowledge and Intellectual Property Rights*, OPEN KNOWLEDGE REPOSITORY, (Mar. 6, 2004), <https://openknowledge.worldbank.org/handle/10986/10819>

²⁷ Shambhu Prasad Chakrabarty, Ravneet Kaur, *A Primer to Traditional Knowledge Protection in India: The Road Ahead*, SPRINGER LINK, (June. 3, 2021), <https://link.springer.com/article/10.1007/s10991-021-09281-4>