

AYURVEDA AND GEOGRAPHICAL INDICATIONS

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Abstract

The article aims to answer two main questions of ‘whether the intellectual property rights bestowed upon Ayurveda medicine is sufficient to protect the centuries’ old traditional knowledge, and the other is how can the hurdles preventing Geographical Indication tags being granted to services be overcome?’ Ayurveda is an ancient Indian practice that is a result of traditional knowledge and the culture of certain specific communities of certain states. There is no proper documentation of such ancient knowledge and the practice is slowly dying down. While the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) does not limit geographical indications to only goods, India has chosen to extend the Geographical Indication tag only to goods and not services. There are other countries who have extended the Geographical Indication tag to services as well, which the author has briefly discussed in the article as well. This article argues that India must provide the GI tag to services as well and by doing so, provide the tag for Ayurvedic practices in India. The author believes that services can also be unique to a place, much like the practice of ayurvedic medicine and massages. Hence, by providing the Geographical Indication tag to services as well, such an action would greatly help the region and the practitioners of such services. The author has taken the example of the Ayurvedic practices in Kerala to better put forth the arguments made herein. The author has followed doctrinal and an analytical research methodology to better understand the intellectual property rights attributed to Ayurveda in India as well as a thorough study of numerous journal articles as well as newspaper articles to gauge the uniqueness of Ayurvedic treatment in different parts of India so as to argue that the GI tag must be bestowed upon the service i.e. Ayurvedic treatment.

Introduction

Ayurveda is a word that is derived from two Sanskrit roots: 'Ayuh' and 'Veda'. The meaning of the term is 'Science of Life'.¹ It is the traditional knowledge that is passed down from the previous generations through the millennia to not only cure ailments of the mind and body but also prevent them. Local herbs, plants and massage techniques are used to aid the human body to become healthier. India is a pioneer in this form of traditional knowledge which is mainly practiced in parts of Kerala. Over the years, certain intellectual property rights have been associated with this form of traditional knowledge. Due to the growing usefulness of the Ayurvedic herbs and formulations, there are an increased number of patents and trademarks being filed based on these herbs and formulations. Section 2 (e)² defines Geographical Indication. While patents protect the drug formulations of Ayurvedic medicines, trademarks protect the goods and services rendered, registered under a particular name or mark, geographical indications aim to protect products that are produced in specific geographical areas with specific characteristics due to its production in a specific geographical location.³ Geographical Indications are given only to products as they have special characteristics, reputation or qualities that are attributable to a particular area or territory. The rationale behind geographical indications is the need to protect traditional knowledge and the culture of the local and indigenous communities.⁴ Therefore, the researcher argues that Geographical Indications must be granted to services as well; services that is unique to a specific geographical origin and is a part of the culture and tradition of the people of that place i.e. Ayurvedic massages and treatments in India, specifically, parts of Kerala. Through this article, the researcher does not aim to provide an alternative framework for the granting of GI tag for services but instead argues that the existing Indian framework of Geographical Indications in India must be expanded to also include services.

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¹ *Ayurveda at a Glance*, TRADITIONAL KNOWLEDGE DIGITAL LIBRARY (Mar. 08, 2018, 3:30 PM), http://www.tkdil.res.in/tkdil/langdefault/Ayurveda/Ayu_Ayurveda-Glance.asp?GL=Eng.

² Geographical Indications of Goods (Registration and Protection) Act, 1999, § 2(e). No. 48, Acts of Parliament, 1999 (India).

³ *Geographical Indications*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (Mar. 08, 2018, 4:00 PM), http://www.wipo.int/geo_indications/en/.

⁴ SUMIT MALIK, INTELLECTUAL PROPERTY RIGHTS MANUAL 54 (1st ed. 2013).

Geographical Indications and Protection of Traditional Knowledge

Traditional knowledge is considered to be the ancient knowledge of communities.⁵ It is a well settled fact that Geographical Indications aim to protect the age-old traditions and indigenous culture of a community of people in a specific geographical expanse and indirectly, also help improve the economic value of the region. Geographical Indications are often viewed as an effective instrument to protect traditional knowledge. Geographical Indications are considered the best way to protect and incentivize traditional knowledge of the communities due to the following unique features inherent in the GI system:⁶

(i) *The knowledge remains in public domain*—As no individual person or organisation has exclusive property rights pertaining to the knowledge of the geographical indication, the knowledge continues to be present in the public domain.

(ii) *Rights shall be held in perpetuity*—The protected geographical indication remains so as long as the link between the good in question, the place where it is produced and its quality is maintained.

(iii) *The scope of protection is consistent with cultural and traditional rights*—Geographical Indications are a collective right that is open to all producers of the said good in the region that observe the specified requirements for the production of the said good and produce in the demarcated geographical region. Also, the underlying link between good and place for the GI protection essentially prohibits producers from outside the specified region from benefitting from the production of the good that has the GI tag.”

It is argued⁷ that the unique characteristics that are specific only to GIs make it reasonable and apt for the protection of traditional knowledge than other forms of intellectual property rights such as trademarks or patents etc. As GIs are collective rights, it is therefore more appropriate to be granted for region-specific goods than TMs for the protection of the traditional knowledge held by the particular community as it is the very essence of geographical indication that the link with the territory be maintained.⁸ Further as the protection of geographical indications involves the collation of traditional practices and favour the local producers of the

⁵ The Convention on Biological Diversity, 5 June 1992, Art.9 (j), 3 I.L.M. 818.

⁶ Dwijen Rangnekar, *The Socio-Economics of Geographical Indications: A Review of Empirical Evidence from Europe*, 8 UNCTAD-ICSTD 1, 6 (2004).

⁷ *Geographical Indications as Trade Related Intellectual Property*, UNDP DISCUSSION PAPER, (Mar. 08, 2018, 5:00 PM), <http://www.snapundp.org/elibrary/Publications/GeographicalIndications.pdf>.

⁸ Babcock B & Clemens R, *Geographical Indications and Property Rights: Protecting Value Added Agricultural Products*, MATRIC BRIEFING PAPER 04-MBP 1, 7 (2004).

goods in the region, it prevents the misuse, unauthorized profiting and the gaining of control of the said knowledge by any entity or individual. Further, the rights granted for geographical indications can be held for an unlimited period of time as long as the link between the products, its origin and its quality is maintained.

Ayurveda and Geographical Indications

(a) Ayurveda in Kerala, India

Ayurveda is that traditional knowledge which is not written down. It is passed down orally through the generations. It is only in recent times that efforts are being made to codify this vast area of untapped knowledge. Due to the lack of codification, so much of this knowledge is forever lost. It is only in few parts of India, that the practice of Ayurveda is prevalent in its many forms i.e. Ayurvedic formulations, massages etc. Ayurvedic services i.e. massages also consist of traditional knowledge passed down from ancestors rather than from some kind of codified material. Kerala is often known as the ‘Home of Ayurveda’.⁹ This age-old system of healing is still prevalent today. Ayurveda is considered to be a healthier alternative to healing as compared to allopathy.

The Vaidyas, who are considered to be the traditional practitioners of Ayurveda – especially the world-renowned Ashtavaidyas who are known for their avid knowledge and consistent practice of Ayurveda have played a pivotal role in maintaining, sustaining and propagating the knowledge of Ayurveda in the State of Kerala.¹⁰ This traditional knowledge has developed over the years on the basis of extensive research conducted by the practitioners on the medicinal plants available in Kerala. Of the original 18 Ashtavaidya families, a few still remain in practice in the State.¹¹ Due to the rich alkaloid content of the Kerala soil, the medicinal plants in Kerala are considered to be more potent and hence the treatments and medicines are proven to be more effective. Kerala is also known for its oil massages which are often used to treat muscle and bone ailments. The oils that are used in such massages are prepared with the help of the traditional knowledge of the practitioners that has been passed down from the older generations.¹²

(b) Why Geographical Indication must be conferred on Ayurvedic treatment

⁹ *Kerala: Home of Ayurveda*, (Mar.09, 2018, 12:45 AM), <https://www.keralatourism.org/ayurveda/kerala-home-of-ayurveda.php>.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

The defining characteristic of geographical indications is the link between the product, the quality and the territory in which the product is produced.¹³ Correlating Ayurvedic with the definition of a geographical indication as enumerated in the GI Act, the Ayurvedic treatment/services originate mainly in specific parts of Kerala. The quality and reputation of these services are attributable to its geographical origin as, it is mentioned earlier that the products required for these treatments and services are formulations or natural products that are specifically grown or found in the surrounding local forests. From the growth of the products required to for the treatments, to the making of the special Ayurvedic formulations or medicines, to the actual rendering of these services by locals who have gained this knowledge from the previous generations of their families, every aspect of the definition of a GI as specified in the Act is satisfied, save one; it is not a good. It is a service rendered. Geographical Indications are not bestowed up on services. But in recent years, there has been an increase in the correlation between Geographical Indications and protection of traditional knowledge. GIs are often considered to be a tool that is used to promote as well as the same time protect archaic traditional knowledge.¹⁴

In the era of allopathy, the art of Ayurveda and its affiliated knowledge is dying. The number of Ashtavaidya families are decreasing and slowly, the knowledge, tradition and culture that has been passed down from generations is getting lost in the sands of time. There is an imminent need to identify and acknowledge this form of traditional knowledge and services provided by relying on this knowledge to provide impetus for people to continue with and keep such a wondrous culture and traditional knowledge from dying out. In 2001, the Government of India set up the Traditional Knowledge Database Library (TKDL) that is the result of the collaboration between the Council of Scientific and Industrial Research (CSIR) and the Ministry of Ayush (till March 2012). The objective of this library is to protect ancient and traditional knowledge of the country from unethical use and exploitation. But this knowledge remains in the public domain and is therefore, open to misappropriation.¹⁵ In light of this, it can argued that the knowledge pertaining to Ayurvedic products and formulations is public knowledge but the

¹³ Felix Addor & Alexandra Grazioli, *Geographical Indications beyond Wines and Spirits- A Road Map for a Better Protection for Geographical Indications in the WTO TRIPs Agreement*, 5(6) J.W.I.P., 865, 865 (2002).

¹⁴ RUCHI PANT, PROTECTING AND PROMOTING TRADITIONAL KNOWLEDGE IN INDIA: WHAT ROLE FOR GEOGRAPHICAL INDICATION, WORKING PAPER, (Indian Institute for Environment and Development, 2015).

¹⁵ Vrunda Kulkarni and Viren Konde, *Pre- and Post- Geographical Indications Registration Measures for Handicrafts in India*, 16 JOURNAL OF IPR, 463, 463 (2011).

services of the Ayurvedic massages and other treatments and the people who render such services must have the right to protect their traditional services from being copied by others or misappropriation in any form. More importantly, traditional knowledge is provided with GI tags. Ayurvedic treatment i.e. massages in particular are forms of Traditional Cultural Expressions (TCE).¹⁶ Communities that practice Ayurveda do not do so as a means of livelihood alone. It is a way of life. The people practice the same on a day to day basis and have done so for generations. TCEs have been discussed further by WIPO at the Intergovernmental Conference.¹⁷

Ayurvedic treatments are an integral part of the culture of the communities in Kerala and other parts of India that practice it. It is tradition that is being followed for centuries. Lately, this knowledge has slowly begun to die. Similar to the reason for the dying of other arts and traditions in India, the younger generations of communities that provide Ayurveda as a service are choosing to move onto other avenues which seem more ‘respectable’ or well-paying according to modern standards. Hence, the numbers of practitioners have reduced drastically and this knowledge is slowly dying with the older generations of practitioners. If the Geographical Indications tag can be bestowed on Ayurvedic treatments and massages, this would prove to be an impetus for the people of the said communities to continue in their line of work thus protecting a major part of India’s cultural and traditional heritage.

The initiatives taken by the GoI to protect the traditional knowledge of Ayurveda is insufficient. All the information that is collected is codified and published in the public domain. But the information so published does not include Ayurvedic services. The knowledge of Ayurvedic treatments via massages is not public knowledge. It lies only with the practitioners and their families. Another aspect that must be taken into consideration is the authenticity of services provided in the market. One of the purposes of a GI tag is so that consumers and/or the buyers and other customers are aware of the pioneers, the origin and the authenticity of the product. In the Ayurvedic services industry, in recent times, there are numerous ‘Ayurvedic massage and treatment’ ventures coming up, but not all of these ventures are authentic. For an interested consumer of the said services, it is difficult to identify the authenticity of all the ventures in the market. Also, the granting of a GI tag for these services would serve as a method

¹⁶ *Traditional Cultural Expressions*, WIPO (Mar. 10, 2018, 1:00 PM) <http://www.wipo.int/tk/en/folklore/>

¹⁷ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth Session, Geneva, July 7-15, 2003. Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, Document prepared by the Secretariat, WIPO document WIPO/6RTKF/IC/5/3 (2003).

to create awareness regarding the same. As of today, due to lack of awareness, most people are unaware that there are such remedies to their medical issues. Even if there are some people who are aware of this, they are unsure of where to go to avail such services and treatment. As of today, the advertisement of the existence of such avenues is based purely on word of mouth. In such a competitive market, there is a need for the consumers to be aware of the authenticity of the services. This in turn would indirectly help the communities of the practitioners.

Critical Analysis

There is a need to expand the scope of the GI Act in India to include services with the sole reason being protection of culture and tradition of the bygone eras. For example, the definition of GI in the TRIPS agreement refers only to goods in general but the Indian definition of the phrase varies to the extent that goods are specified to be “*either agricultural goods or natural goods or manufactured goods*” that can qualify as a GI. This shows that the Indian definition is much more restrictive when compared to the definition as stated in the TRIPS agreement.¹⁸

The main hurdle stopping Ayurvedic treatments and massages to be bestowed with the GI tag is that Ayurvedic treatments and massages are services and GI tags are only provided for goods. This hindrance is causing India to forego a major portion of its traditional knowledge, culture and tradition. Ayurvedic treatments and massages fulfil all the prerequisites to be granted a GI tag except that of being a good. Now, there is no explicit provision stating that a GI tag must not be granted to a service. In fact, the TRIPs Agreement only specifies the minimum protection that every signatory country must provide for every aspect of IPR but every country, if it so chooses, may provide for IPR at any level higher than what is provided by the Agreement. The WTO, while explaining the provisions pertaining to Geographical Indications, states the same. The Agreement only prescribes a minimum level of protection for GIs but the members have the autonomy to enlarge the scope of the protection of GIs. The same may be extended to the same to include services under the ambit of GIs.¹⁹ Owing to this, it can be argued that the GI tag may be granted to services as well. There are numerous countries such as Azerbaijan, Bahrain, Croatia, Singapore etc. that have legislations for the provision of the GI tag for services

¹⁸ Kasturi Das, *Protection of Geographical Indications: An Overview of Select Issues with Particular Reference to India*, 8 CENTAD, 1, 5 (2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1587372.

¹⁹ WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules4_e.pdf (last visited Apr. 04, 2018).

as well as goods. India also can adopt a GI protection regime of a similar manner. Article 1 of the TRIPS Agreement provides some flexibility in the implementation of the provisions of the agreement.²⁰ This provision can be interpreted to mean that a member country can enact its own specific legislations for furthering IPR so long as it is not in contravention to the TRIPS Agreement. Hence, specific legislation to protect traditional knowledge or protect services which are a part of our culture and tradition (GI tags for services) may be enacted. Also, the TRIPS Agreement has provided its signatory countries the freedom to enact legislation to protect non-patent intellectual property rights. Art.27.3 (b) provides for the members to be able to enact their own *sui generis* regimes. This is an opportunity that India can utilize to enact legislation to effectively protect traditional knowledge and other services inherent in our culture such as Ayurvedic treatments and massages.

The TRIPS Agreement in itself does not protect traditional knowledge or traditional and cultural services but the flexibility of the Agreement can be utilized and each signatory country may take the initiative to do as it sees fit to protect the culture and heritage of said country. If India were to incorporate services under the umbrella of the GI Act along with goods, all the registered proprietors and authorized users under the Act, once such license is approved, shall have exclusive right to use the GI with respect to the service for which it is obtained and the right to obtain relief for the infringement of such Geographical Indication by unauthorized users. This shall prevent the traditional services such as Ayurvedic massages from disappearing in the sands of time or being lost due to lack of authenticity. Another aspect which can be taken into consideration for the protection of Ayurvedic treatments is the efficient legislation for the protection of traditional knowledge itself. Very few countries have specific legislation for the protection of traditional knowledge; China being one of them. India does not have any such legislation. China has a specific legislation to protect Chinese Traditional Medicine (CTM) which includes medicine, massages, treatments etc. namely The Law of the People's Republic of China on Traditional Chinese Medicine, 2016. This statute actively aims to set up Government institutions and hospitals to study and improve traditional Chinese medicine and treatments.²¹ India could come up with such a legislation to actively promote and protect traditional

²⁰ PAUL GOLDSTEIN, SELECTED STATUTES AND INTERNATIONAL AGREEMENTS ON UNFAIR COMPETITION, TRADEMARK, COPYRIGHT AND PATENT 436 (The Foundation Press, Inc 1997).

²¹ LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON TRADITIONAL CHINESE MEDICINE, <http://en.pkulaw.cn/display.aspx?cgid=287286&lib=law> (last visited Apr. 08, 2018).

knowledge which not only includes medicines but also treatments and other services such as massages. Currently, all the traditional knowledge is merely being put into the public domain through the TKDL but there is no effort being made to protect the same.

A specific legislation is required to protect such ancient traditional knowledge. The one aspect the researcher believes to be not covered by the Chinese legislation is the protection of the traditional knowledge on a territorial basis, thus giving the original practioners an impetus as a tool to not only promote and protect but also improve the livelihood of the communities that have inculcated such knowledge into their lives and is also a source of income to them. Hence, the researcher believes that in India, not only is there a need for a specific legislation for the protection of traditional knowledge but the same must also be done in the form of bestowing the GI tag on goods and services so that there can be protection of such knowledge on a territorial basis. Protection on a territorial basis will not only help protect such ancient and valuable knowledge but will also help improve the economy by providing incentives for the practioners of such knowledge and improving their means of livelihood. Hence, India must come up with a *Sui Generis* system to protect traditional knowledge effectively; preferably on a territorial basis too.

Conclusion

Ayurveda, to be more specific, Ayurvedic treatments, medicines and massages are an integral part of the rich cultural heritage and traditional knowledge of India. There is an immediate need to protect this knowledge in any form that it is found, be it a good or a service. To better understand the arguments put forth, the researcher has taken an example of the traditional knowledge of medicines, treatments and massages in Kerala. But this does not mean that that is the only example for services that deserve to receive the GI tag in India. There are numerous such practices all over India that are a part of our rich cultural heritage and hence deserve protection. To conclude, the researcher would like to state that the IP rights currently present in India is not sufficient to protect traditional knowledge. Protection of Ayurvedic medicines, treatments and massages cannot be covered under any single one existing protection mechanism. There is a need for a much stricter, *Sui Generis* regime such a special legislation for the specific protection of traditional knowledge in India as well as the inclusion of services under the existing GI regime in India. It is only in recent times that the IP laws in India are slowly developing. It will take time but it is a necessity that India protects her own tradition and culture and in doing so, the citizens and the economy shall benefit. It has already been stated that the

steps being taken to protect traditional knowledge at the moment are insufficient. There is a need for a specific legislation to do the same. Also, it has already been proved that GIs are one of the best and most efficient forms of IP protection for traditional knowledge as not only does it protect such knowledge but it also aids in the improvement of the economy. Hence, the researcher firmly believes that there is a need to reform the GI laws in India to include services just like numerous countries of the world already do and there is also a need to take more efficient steps to protect the traditional knowledge of our vast, culturally and traditionally rich country from misappropriation in the public domain.