

# **Intellectual Property Perspectives of Women's Traditional Knowledge in Bangladesh**

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## **Introduction**

Women's contribution to intellectual creativity in Bangladesh appears greatly in traditional knowledge (TK) based products. Their traditional knowledge has been passed down from generation to generation to continue and thrive the culture and heritage. By tradition, they have applied their ingenuity in different economic-cultural activities including production of foodstuffs, handicrafts, conservation of bio-genetic resources and folk songs. The neoliberal economic policy across the world has been creating new markets of apparently never ending new niche traditional products. Though, the touch of neo-liberalism has created new opportunities for the Bangladeshi marginalized women led enterprises and products, it also requires trade-offs ranging from loss of culture to non-recognition of age-old traditional ingenuity. This paper claims that, though the mass commercialization of traditional knowledge-goods have brought positive changes to the lives of millions of poor female artisans, misappropriation of traditional ingenuity by giant dealers and middlemen have also thwarted huge potentials including exploitation of economic returns of intellectual property of the traditional artists. The paper has found, through the value chain of traditional knowledge-based goods e.g. handicrafts, intermediaries ride-on the intellectual property of the female artisans on the ground. While generally giving in to the proposition that TK could not be protected under intellectual property, this paper cites some models for protection of traditional ingenuity within the rubrics of intellectual property and TK. This paper concludes with a demand of equitable benefit sharing by the intermediaries and buyers unless they acknowledge the intellectual property rights of the traditional artisans. So far as social construction of knowledge is concerned, like other forms of property, intellectual property has also male bias. In the Bangladeshi society, the problem is perhaps worse due to socio-cultural stereotypes. However, the Bangladeshi women's ingenuity and entrepreneurship at small and medium enterprises (SMEs) and informal sectors could hardly be denied. Further, the Bangladeshi textile crafts, behind which more often than not women are involved, has the great market potentiality even at the global level.

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### **Introducing Women's Traditional Knowledge as Intellectual Property Rights to Incentivize Women**

Historically, women have played the stellar role to carry the traditional knowledge of society due to their connection with nature and community. However, the age of free market have posed new challenges to the women's traditional knowledge since the unique demand of women's traditional knowledge based goods in world market gives rise to misappropriation of them. To get rid of such misappropriation of TK based goods, recognition and reward of women's TK as intellectual property right is a way out for the economic incentivization of TK based niche products and also for ensuring greater freedom for women.

### **How Traditional Knowledge qualifies as Intellectual Property Rights**

Traditional knowledge is a living body of knowledge passed on from generation to generation within a community.<sup>1</sup> "Traditional knowledge," as a broad description of subject matter, generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities.<sup>2</sup> Protection of traditional knowledge became an issue at the international level because of misappropriation of traditional knowledge through biopiracy and other unscrupulous techniques. In response to that threat, different methods of protecting traditional knowledge-positive and defensive has been developed. Protection of traditional knowledge-as a positive form of protection has got much attention in the international discourse. Among the international platforms, Convention of Biological Diversity (CBD), WTO- TRIPS Agreement and most importantly WIPO are the most prominent. The CBD has provided recognized traditional knowledge as "farmers rights" and devised mechanisms for Access to Benefit Sharing (ABS) and Prior Informed Consent (PIC) to prevent biopiracy. WTO TRIPS Agreement has provided a wide range of IPRs and prescribed minimum requirements to be protected as such. Since TK is dynamic and living in nature, it could be protected as IPRs. Among the IPRs, Geographical Indications seems to be most relevant in terms its collective nature. WIPO-IGC has been playing the key role to find out the normative aspects to protect TK.<sup>3</sup>

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<sup>1</sup> <<http://www.wipo.int/tk/en/>> (10 April 2016).

<sup>2</sup> WIPO, Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, Dec7, 2012 (WIPO/GRTKF/IC/20/INF/13)

<sup>3</sup> <<http://www.wipo.int/tk/en/igc/>>(10 April 2016).

### **How Women's Knowledge qualifies as Traditional Knowledge vis-a-vis Intellectual Property Rights**

Customarily, women's traditional knowledge has been regarded as feminine or traditional "essentially due to its perceived connection to nature and instinctive, pre-modern knowing".<sup>4</sup> For example, due to patriarchal social structure of Bangladesh, women have historically been engaged themselves in household based creative works including making traditional crafts, unique culinary goods and preservation of seed varieties. In this free market age their ingenuity based-products have got cutting edge and have been utilized by business like BRAC Aarong through the Fair Trade regime. Women's traditional knowledge-based goods could be protected under the intellectual property regime of Bangladesh by way of patents, trademarks, copyright, design, geographical indications and farmers' rights regime. In practice, however, big fashion houses are branding the goods of the women on the ground as their own. Recognizing and ensuring equitable benefit sharing for the traditional ingenuity of the women is the moot point for the policy discourse. Recognizing women's authorship and ownership of their traditionally-held knowing serves feminist imperatives of empowerment, equality, and recognition, imperatives incorporated into the United Nations Millennium Development Goals.<sup>5</sup>

### **Incentivising Women's Traditional Ingenuity through Intellectual Property Rights**

Since recognition and rewarding women's traditional ingenuity would result in their empowerment by way of elimination of poverty, ensuring better bargain and insulating the power of independent decision-making, protection of their TK based ingenuity is demanding. Proper protection of their Intellectual property would avail them to diversify their rights by way of licensing and other tools. For example, when the women who weave *nakshikantha* would get their product registered under the Geographical Indications regime, they would be able to licence their GI tag and get revenue in return. Economic return through exploitation of IP rights would have impact on their livelihood and freedom of choice. Most importantly, IP protection would prevent misappropriation and loss of culture. Thus incentivizing through IP protection would go beyond recognition of authorship and would help to promote sustainable development of tradition.

<sup>4</sup> Terra L Gearhart-Sema, 'Women's Work, Women's Knowing: Intellectual Property and the Recognition of Women's Traditional Knowledge' (2009) 21(2) *Yale Journal of Law & Feminism* 373, 382.

<sup>5</sup> UN Dept. of Econ. & Soc. Aff.[DESA], *The Millennium Development Goals Report 2009*, 20-25 (2009), available at [http://www.un.org/millenniumgoals/pdf/MDGReport\\_2009\\_ENG.pdf](http://www.un.org/millenniumgoals/pdf/MDGReport_2009_ENG.pdf)[hereinafter MDGs]. For information on the MDGs generally and current work being done to reach them, see United Nations, Millennium Development Goals, <http://www.un.org/millenniumgoals/> (10 April 2016).

### **Introducing Bangladeshi Women's Traditional Ingenuity**

Except the readymade garments (RMG) sector, women in Bangladesh are traditionally engaged in the home-based cottage industries including pottery, kantha embroidery, carpet weaving and other handicrafts.<sup>6</sup> Given their natural and traditional expertise in handicrafts, at present 90% of the total work force involved in handicraft are women not only as a workforce but also as entrepreneurs and managers.<sup>7</sup> As the cottage-industry based products are generating revenues for the women on the ground, they also illustrate women's traditional ingenuity in artistic excellence.<sup>8</sup> Besides, the pecuniary value, the traditional knowledge based handicrafts or other cottage industry goods could have value as intellectual property.<sup>9</sup> This paper particularly focuses on the intellectual property aspects of the women's handicrafts including nakshikantha (embroidered quilts) hand-loom based textiles, carpets, rugs, terracotta and pottery, baskets and jute crafts. As a sample the paper has given a detailed account on NakshiKantha, dry fish industry and culinary goods in the following chapters.

### **NakshiKantha: A Foremost Example of Women's Traditional Ingenuity**

Nakshikantha<sup>10</sup> or embroidered quilt, exclusively<sup>11</sup> made by women, has long been recognized as one of the foremost examples of living traditions, characterized by ingenuity, originality, texture, color, and loveliness.<sup>12</sup> This unique tradition could be compared with a painting in combination of fabric, pattern and color.<sup>13</sup> Ordinary women of Bengal (both Bangladesh and the West Bengal of India) have had been creating extraordinary patterns of mathematical intricacy in combination of color

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<sup>6</sup> Sadia Tasnim and Md Rouf Biswas, 'Role of Cottage Industry in the Economic Development of Bangladesh: An Empirical Study', (2014) 6(28) *European Journal of Business and Management* 192, 198. Home-based production, simple management and small investment are the main reasons of the involvement of women in handicraft. See M Akash, *Women Entrepreneurs Engaged in the Handicraft Sector of Bangladesh* (ECOTA Fair Trade Ltd., 2007) 7.

<sup>7</sup> Akash, *Ibid*, 8.

<sup>8</sup> *Ibid* 7.

<sup>9</sup> See, for example, Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (WIPO, Geneva, 2003).

<sup>10</sup> It is composed of several layers of worn cloths, stitched together and embroidered. Rajshahi, Jessore, Mymensingh and Jamalpur are the main regions where kanthas are made. Though different areas have different type of designs and embroidery styles and stitches. See Niaz Zaman, *The Art of Kantha Embroidery* (UPL, 2000) 124-157.

<sup>11</sup> Nomination File No. 00972 by Bangladesh for Inscription on the representative list of the Intangible Cultural Heritage of Humanity, (Intergovernmental committee for the safeguarding of intangible cultural heritage, 2014) 6.

<sup>12</sup> Henry Glassie and Firoz Mahmood (eds.), *Living Traditions, in Cultural Survey of Bangladesh Series* (Volume 7, Asiatic Society of Bangladesh, 2007) 363.

<sup>13</sup> *Ibid*.

and design.<sup>14</sup> The NakshiKantha depicts the life of a Bengali craftswoman –she thought, feelings and imagination.<sup>15</sup> It has also a great artistic value in terms of skill of needleart as well as socio-cultural content of designs.<sup>16</sup> Given that kantha has a basic design, it is liable to constant changes due to the ingenuity of neddlewomen who could make any innovation they fancied.<sup>17</sup> As Zaman<sup>18</sup> puts it: ‘While most kanthas have some initial pattern, none of the finest kanthas proceeded exactly according to a set pattern. Traditional motifs are repeated, but in an endless variety of stitches and colours and shapes, and always some touch of the individual is revealed.’

Since every piece of kantha is unique in terms of design and originality<sup>19</sup>, under traditional design or copyright legislation an individual craftswoman could claim their intellectual property rights.

Though the art and knowledge of of weaving nakshikantha may rest in the public domain, an individual craftswoman or an association of them may weave a sufficiently “new” pattern of kantha with uniquely innovative design and get up. In such cases, craftswomen may have copyright or design right in their ingenious crafts based on traditional knowledge.<sup>20</sup>

### **Women’s intellectual property Rights in Culinary Goods**

Rural women have played a major role in conserving indigenous varieties, and they are the ones who possess the knowledge necessary for survival.<sup>21</sup> Women’s indigenous varieties in culinary items may include aromatic rice, turmeric, Desi Ghee etc.

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<sup>14</sup> Ibid.

<sup>15</sup> Perveen Ahmed, *The Aesthetics and Vocabulary of NakshiKantha* (Bangladesh National Museum, 1997) ii.

<sup>16</sup> Ibid, viii.

<sup>17</sup> Zaman, above n 5, 19-20.

<sup>18</sup> Ibid, 74.

<sup>19</sup> Glassie and Mahmood, above n7, 365. According to them : ‘[N]o two nakshikanthas are ever alike; each is an original creation, although nakshikanthas from one region follow certain types and have more in common than those from another region.’ See.

<sup>20</sup> According to WIPO Intergovernmental Committee on TK and TCEs: “[c]ontemporary, tradition-based expressions and representations of traditional cultures are generally protected by existing copyright and industrial designs law for which they are sufficiently “original” or “new” as required”. WIPO, “Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions”, May 2, 2003, WIPO/GRTKF/IC/5/3, p.4.

<sup>21</sup> Fabio Parasecoli, *The Gender of Geographical Indications: Women, Place and Marketing of Identities*, (2010) 10(6) *Cultural Studies* 467-478.

Aromatic rice varieties<sup>22</sup> like Kaligira, Kataribhog used in Bangladesh for delicious traditional foods e.g. Polau and Biriani, have been specially taken care of by women for centuries. Women's traditional know-how in conservation of these rice varieties deserves to be protected by a biodiversity protection legislation providing provision of access to benefit sharing while commercially using those varieties. These aromatic rice varieties have a niche market in the parts of the world where the Bangladeshi diaspora live.

As a culinary item, turmeric is used in Bangladesh for culinary or other purposes like marriage rites etc. It has also medicinal value. In Bangladesh women have been playing the main role to conserve turmeric for centuries.

Desi Ghee (*Gaua Ghee* in Bengali) is another culinary item widely used in Bangladesh for preparing different types of dishes.<sup>23</sup> The knowledge of making ghee from the cow's milk exclusively belongs to women.<sup>24</sup> Though desi ghee/ asli gee is made for non-commercial purpose in rural non-organized sector because of its unique<sup>25</sup> taste, favour and ingredients, qualifies it as a geographical indications (GI) from Bangladesh. So, incentives for marketing and branding of desi ghee could a good source of income for the rural women with unique traditional knowledge. Like aromatic rice varieties, it would also have appeal in all Bangladeshi residing regions of the world. There is a risk that, the name desi ghee ( orghaua ghee) would become generic if it is not protected by law.<sup>26</sup>

### **Intellectual property rights, biodiversity and women: The unheard victims of biopiracy**

At the rural farm level especially in the tribal community, women are the key keepers and conservers in selecting and storing of seeds on the basis of their utility uses.<sup>27</sup> In Bangladesh, women at the community level are now becoming entrepreneurs' under the International Rice Research Institute (IRRI) 'Super Bag' initiative.<sup>28</sup> In a changed male out-migration scenario in Bangladesh due to climate change or other modalities, women now have to play more active role in maintaining seeds and other

<sup>22</sup> T Das and M A Baqui, 'Aromatic Rices of Bangladesh' in R K Singh, US Singh and GS Khus (eds.) *Aromatic Rices* (Oxford and IBH Publishing, India, 2000) 184-187.

<sup>23</sup> <<https://en.wikipedia.org/wiki/Ghee>> 20 April 2016.

<sup>24</sup> S K Soam, Analysis of Prospective Geographical indications of India, (2006) 8(5) *The Journal of World intellectual property* 679-705, 695.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> ChozuleKikhi and kedilezokikhi, *Role of Women in Natural Resouce Management* (UNDP India, 2011) 45.

<sup>28</sup> MG Neogi, 'Women Seed Entrepreneures at Communnity Level', *The Financial Express* (online) 11 January 2015 <<http://old.thefinancialexpress-bd.com/2015/01/11/75285/print>> 15 January 2016.

genetic materials.<sup>29</sup> So, indifference and policy gaps to rural women's contribution to conserve and carry forward plant genetic resources for generations would have a great impact on food security.<sup>30</sup> Patenting or otherwise monopolizing of traditional biological resources predominantly hurt women's right to genetic resources, for they play the role of mother<sup>31</sup> of biological resources.

### **Refuting the limitations on the protection of traditional knowledge under the existing intellectual property rights: Arguments from Bangladesh's perspective**

The general arguments against the protection of traditional knowledge under the existing intellectual property regime includes lack of novelty and originality, difficulty in identifying the creators or inventors, temporal nature of protection flouting the spirit of TK and property in the public domain. However, all these limitations could be refuted in favor of protecting TK under the existing intellectual property system. The limitation of lack of novelty, for example, could be refuted by arguing that, traditional knowledge is vertically innovative and constantly ingenious based upon the prior art of traditional knowledge. For example, traditional knowledge of basketry or stitching NakshiKantha to depict unique motifs are innovative against the whole world except the artisan community. Moreover, the art of making cushions covers for the niche European Market is innovative, though it is based on the Bangladeshi craftswomen's traditional knowledge of kantha embroidery. Does the patent law have any problem to protect the invention of a community of TK holders? The answer is no, for patent protects 'inventions' and not the 'inventor(s)'. In addition to that, an otherwise non-novel TK could be novel for the purpose of commercial exploitation. Likewise, copyright as envisaged by the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) protects 'works' and not 'authors'. Therefore, folk music or other copyrightable TKs like particular traditional designs and motifs could be protected under the *Copyright Act, 2000* as 'work of art'. Again, original designs and traditional appearance of handicrafts from a vertical perspective could be protected as 'industrial designs' under the *Patent and Design Act, 1911*. Though, the above mentioned intellectual property tools have temporal limitations, geographical indications, trademarks,

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<sup>29</sup> Thelma Romero Paris, *Women's Roles and Needs in Changing Rural Asia with Emphasis on Rice-Based Agriculture* (IRRI, 2009) < <http://www.agnet.org/library.php?func=view&id=20110725165454>> 15 January 2016.

<sup>30</sup> Ibid.

<sup>31</sup> For women's role in preserving biological resources and the impact of biopiracy on their empowerment see, for example, SumanSahai, TRIPS and biodiversity: a gender perspective, (2004) 12(2) *Gender and Development* 58-65; For an overview of women's contribution in homestead crop-based activity in Bangladesh see, for example, Thelma R. Paris, AlamgirChowdhury and ManikLal Bose, *Changing Women's Role in Homestead management: Mainstreaming Women in Rural Development* (CPD Occasional Paper No. 42, 2004).

collective or certification marks do not have such limitations. Accordingly, protection of TK under these tools could be more culturally sustainable.

### **Protection of TK based products under the Existing Intellectual Property Rights: An Overview of the ‘Best Practices’**

In Kazakhstan, the external appearance of national outer clothes, head dresses (saykele), carpets (tuskiiz), decorations of saddles, national dwellings (yurta) and their structural elements, as well as women’s apparel accessories, like bracelets (blezik), national children’s cots-crib-cradles and table wares (piala, torcyk) are protected as industrial designs.<sup>32</sup> The designations containing elements of the Kazakh ornament are registered and protected as trademarks.<sup>33</sup> Venezuela and Viet Nam have referred to the mechanism of geographical indications to protect traditional knowledge (“Cocuy the Pecaya”, liquor made from the agave, in Venezuela, and “PhuQuoc”, fish soya sauce, and “Shan TuyetMocChau”, a variety of tea, in Viet Nam).<sup>34</sup> In addition, Viet Nam has mentioned a patent for a traditional preparation of medicinal plants used in assisting in stopping drug-addiction, and a trademark registered for a traditional balm made of medicinal plants (“Truong Son”).<sup>35</sup> Again, there may be some technical problems to protect pervasive TK based products like NakshiKantha, for there is a remarkable difference in design and weaving technique on the kanthas from different regions.<sup>36</sup> However, the problem of diversity of designs and weaving techniques of kantha could be solved by following the Indian instance of *Ikat-Pochamply* and *Odissalkat* have separately been provided GI registration due to the difference in their weaving technique and design.<sup>37</sup> The distinctiveness of kanthas from Jamalpur and Rajshahi, for example, lies in the particular way the technique is applied in a specific place and not only in the type of design.

### **Protection of Women’s TK Based Handicrafts by Geographical Indications**

Since the intellectual property rights like patents, copyrights or designs have not generally been able to protect traditional knowledge held by a specific group of

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<sup>32</sup> WIPO, *Review of Existing Intellectual Property Protection of Traditional Knowledge*, WIPO/GRTKF/IC/3/7 (2002).

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> On the varieties of *kantha* design and weaving techniques, see, for example, Zaman, above note 12.

<sup>37</sup> GI Application No.4, filed on December 15, 2003, (2006) 13 Geographical Indication J. (PochampollyIkat);40 GI Application No.22, filed on February 1, 2005, (2006) 12 Geographical Indication J. (Odissalkat).



individuals, GI seem to be the most appropriate mechanism to do so.<sup>38</sup> Further, the protection of traditional knowledge by GI provides manifold benefits, including protection of the peculiar designation or other characteristics, documentation of relevant knowledge and continuation of the cultural heritage.<sup>39</sup> In addition to that, GIs recognize the inherent collective dynamics of community based traditional handicrafts. As Vivien puts it:

[T]he collective nature of the know-how results from its being shared within a community located for a long time in a specific area ensures its continued existence in this place. Individuals isolated from the community, or even small groups cut off from the main community, will not be able to note of know-how execute this know-how with equal proficiency. This underlies the prominent collective dimension of GIs, resulting from a group of producers sharing their know-how and cross-controlling the quality of the product.<sup>40</sup>

Further, handicrafts are generally linked to a geographical area due to a combination of both human and natural factors. Jamdani, a hand-made textile from Bangladesh, for example, is manufactured with a combination of traditional know-how and geo-climatic condition on the bank of the river Shitalakhya.<sup>41</sup>

### **Existing law of geographical indications: Does it protect the interest of the traditional producers all the way?**

Following the trends of the other South-Asian Countries<sup>42</sup>, the GI regime of Bangladesh allows the traders in goods to apply for the GIs as 'producers'<sup>43</sup>. Accordingly, besides the actual producers, it allows traders and dealers in relevant handicrafts to become the owners of GIs.<sup>44</sup> This provision may facilitate the giants in traditional handicrafts business to take registration of GIs and furthering the way of perpetually divesting of the real holders of traditional knowledge.

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<sup>38</sup> Delphine Marie –Vivien, 'Protection of Geographical Indications for Handicrafts: How to apply the Concept of Natural and Human Factors to all Products' ( 2013) 4(2) *The WIPO Journal* 191-205.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> IftekharIqbal, *Protection of jamdani as a Geographical Indication in Bangladesh* (Paper presented at CPD, 17 June 2014) 6.

<sup>42</sup> NS Gopalakrishnan, PS Nair and A K Babu, *Exploring the Relationship between Geographical Indications and Traditional Knowledge: An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia* (Geneva: International Centre for Trade and Sustainable Development, 2007).

<sup>43</sup> Geographical Indications (Registration and protection) Act, 2013 s.2(3).

<sup>44</sup> Gopalakrishnan, above note 37.

### **Challenges for the protection of women's intellectual property rights**

The vested interest groups like fashion designers are riding on the ingenuity of real craftswomen from the informal sectors, mainly due to lack of policy gaps to protect traditional knowledge and cultural expressions.<sup>45</sup>

In the case of protection of cultural goods under the traditional knowledge regime, the question of conflict between individual right and collective may arise.<sup>46</sup> For example, in case of *Jamdani* women play a significant role in processing cotton yarns and to weave hand loom design on them. Now the question is whether the women who have unique knowledge of processing cotton yarn or weaving design could separately claim intellectual property right over them, for the output itself (i.e. *Jamdani*) is eligible for protection under the existing intellectual property rights regime. In case of *NakshiKantha*, the knowledge as to the art of weaving may belong to the whole community, but an individual craftswoman may have a skill to produce a embroidered quilt of exclusive design and quality. Once again, the question of individual versus collective rights proprietorship comes in the moot. So, in these cases, traditional goods stakeholders could think about the *sui generis* law to protect traditional knowledge balancing the individual versus collective interest.

Branding of women's cultural goods through logo and marks is an essential marketing tool to enable the product to find its niche market. The GI management regime of Bangladesh has so far taken no initiative for the branding of GI products either through sign (logo) or labeling. Given the wide geographical spectrum of some GIs in Bangladesh like *nakshikantha*, the Government should specify a uniform logo for relevant GIs.<sup>47</sup>

### **Supply chain of the craft products: Identifying intellectual property rights holders**

Input suppliers in the craft industry could be categorized into: independent weavers, employed weavers and contracted weavers. Legally speaking, independent and contracted weavers e.g. the women who independently works in handicrafts at the micro - level or to whom retailers or exporters outsource their orders have intellectual property rights in their creation.<sup>48</sup> Employed weavers, on the other hand,

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<sup>45</sup> RuchiraGoswami and Karubakee Nandi, 'Naming the Unnamed: Intellectual property Rights of Women Artists from India'(2008 ) 16(2) *Journal of Gender, Social Policy and the Law* 257-280.

<sup>46</sup> KimberleeWeatherall, 'Culture, Autonomy Djuliyamurr: individual and Community in the Construction of Rights to Traditional Designs' (2001) 64(2) *The Modern Law Review* 215-242.

<sup>47</sup> Mohammad Towhidul Islam and Md. Ahsan Habib, 'Introducing Geographical Indications in Bangladesh' (2013) 24(1) *Dhaka University Law Journal* 51-82, 80.

<sup>48</sup> *SuraiyaRahman vs. SDUW* 49 DLR (1997) 222

do not have intellectual property rights in their work done for their employers.<sup>49</sup> In addition to that, big fashion houses like *Aarong* claims the design and trademark rights of the handmade textiles even though they buy them from the local *haats* (where wholesale goods are sold by the producers).<sup>50</sup> Again fair trade<sup>51</sup> members employ skilled or semi-skilled women artisans who make goods from jute, bamboo, cane, handloom and embroidery for export.<sup>52</sup> For McArdle and Thomas, the impact on gender relations within producer communities is limited, although there are benefits for some women involved in fair trade production.<sup>53</sup>

### **Exploitation in the name of 'Fair Trade': Does fair trade intermediaries protect intellectual property rights of the traditional artisans?**

The ECOTA Fair Trade Forum (EFTF), the Bangladeshi counterpart of the World Fair Trade Forum works with over 1, 15,000 artisans (with a ratio of 80% women) through its 29 member organizations of whom over 70% are exporters.<sup>54</sup> Its members include famous fashion houses like Aarong, Kumudini, Dhaka Handicraftsetc.<sup>55</sup> The women workers employed in the fair trade organizations include center-based workers, home-based workers and permanent employees.<sup>56</sup> Now a question may arise as to whether these fair trade organizations equitably compensate its employees or other workers for their their physical and intellectual skill.<sup>57</sup> As Barkat and Maksud put it:

‘BRAC advertise for Aarong with the slogan that Aarong is “The World of Rural Artisans”. The question is whether it is really a house of rural artisan, does the rural artisan really own the equitable production share. Rural artisans’ products are selling at a high price in the home and abroad but do these artisans

<sup>49</sup> Ibid.

<sup>50</sup> Arpeeta Shams Mizan and Prabir Kumar Das, ‘The *Tantees*: Traditional Knowledge and Other Intellectual Property Considerations’ in Md. RahmatUllah (eds.) in *The Shadow of Death: The Tantees of Bangladesh* (ELCOP, 2012) 121.

<sup>51</sup> According to World Fair Trade Organization (WFTO), ‘Fair Trade is a trading partnership, based on dialogue, transparency and respect, that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalized producers and workers – especially in the South.’ <<http://www.wfto.com/fair-trade/definition-fair-trade>> 20 April 2016.

<sup>52</sup> Ann Le Mare, Fair Trade in Bangladesh, <<https://www.rgs.org/NR/rdonlyres/A8453D5C-D59F-4A60-B7AD-F7F52D85F64E/0/110201GeographyTodayFairtrade.pdf>> 20 April 2016.

<sup>53</sup> Louise McArdle and Pete Thomas, ‘Fair Enough? Women and Fair Trade’ 2012 8(4) *Critical Perspectives on International Business* 277-294, 277.

<sup>54</sup> <<http://eftfbd.org/web/>> 20 April 2016.

<sup>55</sup> For details, see generally, ECOTA Fair Trade Forum, *ECOTA Member Organizations’ Portfolio* (EFTF, 2006).

<sup>56</sup> Sayeeda Sultana, *Handicraft market Chain in Bangladesh* (Ecota Fair Trade Ltd., 2007) 61.

<sup>57</sup> Ingenious Intellectual skills, once expressed, are entitled to IPRs protection.

getting their reasonable share of production. Though a considerable number of rural women have been able to earn cash involving themselves in the export oriented handicrafts industry, but this process have consequently strengthened the “Metropolis and Satellite Relationship”<sup>58</sup>.

For Goswami and Nandi, the mass commercialization of nakshikantha only benefits the urban traders and exporters in the absence of copyright protection due to the absence of signs by the producers on the ground.<sup>59</sup> Under the existing value chain, the real producers are thus rendered to mere weavers producing made-to-order products.<sup>60</sup> Accordingly, absence of intellectual property protection of the traditional handicrafts results in poor economic returns for the traditional authors of creative works.<sup>61</sup> The ‘Fair Trade’ regime in Bangladesh is also not an exception to this scenario, for the real producers’ theoretical benefits from ‘fair trade’ ironically depends on the ‘benevolence’ of the specific owners of the business concerned.<sup>62</sup> Accordingly, where a fair trade mechanism does not have fair distribution chains of intellectual property, “the market fails completely for small-scale designers or owners of IP who receives no revenue at all for IP that is exploited without recognition or royalty payments.”<sup>63</sup> Other studies, elsewhere, also claims that, in the fair trade system the intermediaries are primarily benefited despite the cutting edge demand of fair trade goods.<sup>64</sup> The causes of such ironical results includes, non-regulation of fair-trade certification mark and absence of harmonized standards to use fair trade certifications.<sup>65</sup>

Legally speaking, in the absence of an employer-employee relationship, Aarong has no right to use the intellectual property rights of its artisans on their relevant goods unless Aarong got it licensed from them.<sup>66</sup> Now who will compel Aarong to pay for

<sup>58</sup> AbulBarkat and AKM Maksud, *Impact of Globalization on Women in Bangladesh: An Exploratory Study* (HDRC, 2001) 22.

<sup>59</sup> RuchiraGoswamiandKarubakee Nandi, ‘Naming the Unnamed: Intellectual Property Rights of Women Artisans from India’ (2008 )16(2) *Journal of Gender, Social Policy and the Law* 257, 267

<sup>60</sup> Ibid. See also, Mizan and Das, above note 45, 121.

<sup>61</sup> Ibid.

<sup>62</sup> JavedHussen, ‘Basic Features of the Fair Trade Producer Groups’ in ArshadSiddiqui (eds), *Fair trade Practice in Bangladesh* (Ecota Fair Trade Forum,2007) 161.

<sup>63</sup> Ron Layton, ‘Enhancing intellectual property exports through Fair trade’ in J Michael Finger and Philip Schuler eds., *Poor People’s Knowledge: Promoting Intellectual Property in Developing Countries* (The World Bank, 2004).

<sup>64</sup> Teshager W Dagne, *Intellectual Property and Traditional Knowledge in the Global Economy: translating Geographical Indications for Development* (Routledge, 2014) 94.

<sup>65</sup> Ibid.

<sup>66</sup> UNCTD and WIPO, ‘Marketing Craft and Visual Arts: The Role of Intellectual Property’ (ITC, WIPO, 2003).

the intellectual property rights of the poor craftswomen? Here is the real policy space for the regulatory authorities. In case of Geographical Indications, if some government authorities like Bangladesh Small & Cottage Industries Corporation (BSCIC) takes registration of GIs in the relevant product, it could proceed against intermediaries like Arong on the ground of misappropriation. In cases, when an association of producers of traditional cultural goods holds a certification or collective mark or GI (as an authorized user), they could also proceed for misappropriation. Again, TK or traditional cultural expressions (TCE) protection law incorporating Convention on Biological Diversity (CBD) principles like access to benefit sharing could solve the position in a more balanced way.

### **Capitalizing women's traditional ingenuity to foster empowerment: Evidence from around the World**

The relationship between intellectual property and empowerment of women has been evidenced in different countries from around the world.<sup>67</sup> In Fiji, for example, women's traditional skills have been used to make products such as masi cloth, handmade paper, magimagi (binding material used for decorative and construction purpose) leading the way of empowering women in traditional communities thanks to an SME named 'Pure Fiji Export Ltd.'<sup>68</sup> Women's traditional skill of kneading and rolling the dough into a thin, round wafer has been capitalized by Lijjat<sup>69</sup> to manufacture papad (or pappadum) – a crispy-thin cracker or wafer that is a staple food in India having command in local, national and international food market.<sup>70</sup> Further, the Himalayan Bio Trade Private Limited (HBTL) based in Kathmundo, Nepal has been dominating national and international markets in handmade paper, bags, embroidery and herbal cosmetics by using traditional knowledge of rural community, especially rural women.<sup>71</sup> Again, the Moroccan Berber Women have relied on their traditional knowledge to prepare high quality 'Argane oil' having

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<sup>67</sup> For case studies on IP and empowerment of women, see generally, WIPO 'Women and IP: Case Studies on Intellectual Property' <[http://www.wipo.int/ipadvantage/en/search.jsp?ins\\_protection\\_id=&focus\\_id=2292](http://www.wipo.int/ipadvantage/en/search.jsp?ins_protection_id=&focus_id=2292)> 20 April 2016.

<sup>68</sup> WIPO, 'Empowering Rural Communities in the Pacific' <<http://www.wipo.int/ipadvantage/en/details.jsp?id=3712>> 20 April 2016.

<sup>69</sup> ShriMahilaGrihaUdyogLijjatPapad (Lijjat) is a cooperative established by Indian women that has developed a unique model for development and empowerment for low income female workers.

<sup>70</sup> WIPO, 'Pappadums and the Path to Empowerment' <<http://www.wipo.int/ipadvantage/en/details.jsp?id=3619>> 20 April 2016.

<sup>71</sup> WIPO, 'Promoting Traditional Crafts in the 21st Century'.

culinary and cosmetic use.<sup>72</sup> To protect the niche market of the Oil, Morocco has sought GI protection of ‘Agrane’ in the European Union. If ‘Agrane’ is provided with a Protected Designation of Origin (PDO), it would help to protect traditional knowledge and collective right of the women having peculiar knowledge to extract ‘Agrane’. In addition, *soleRebels*, a women-led SME has embraced the Ethiopia’s craftsmen and women and capitalized their rich and environmentally sustainable manufacturing tradition for handmade products to inspire new creations for a regional and international footwear market.<sup>73</sup> The *soleRebels* has been able to contribute to the fortune of the community while sharing the benefits of its success with the people at the heart of its operations.<sup>74</sup> This benefit sharing approach could be a model to follow by SMEs in other countries having parallel use of women’s traditional ingenuity.

### Conclusion

Women’s stellar role in the cottage and handicraft industry of Bangladesh is as old as the patriarchal social structure. Women are the depository of traditional know-how and they have applied this in the context of a given age. In line with the development of neo-liberal state ideology, different bottom-up mechanisms like the fair trade movement have developed to commercialize women’s TK based goods with a promise to do equity to the women. Though new business models and transborder niche markets are benefiting the real TK holders on the ground, they have some vivid policy gaps. Non-recognition of the intellectual property rights of the traditional holders of knowledge is a major hurdle. While it transpires that women’s intellectual property rights could be recognized within the existing regime with necessary modifications, the policy gap as to equitable reward of the TK holders is the crux for the future discourse.

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<sup>72</sup> WIPO, ‘Protecting Society and Environment with a Geographical Indications’ <<http://www.wipo.int/ipadvantage/en/details.jsp?id=2656>> 20 April 2016.

<sup>73</sup> WIPO, ‘Treading a New Path for IP and Development in Africa’ <<http://www.wipo.int/ipadvantage/en/details.jsp?id=2915>> 20 April 2016.

<sup>74</sup> Ibid.