

SAFEGUARDING TRADITIONAL KNOWLEDGE - AN INSEPARABLE PART OF INTELLECTUAL PROPERTY RIGHTS

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Abstract

This paper tries to throw light on the aspect of Traditional Knowledge which is considered as a branch of Intellectual Property Law. It is a body of indigenous knowledge, based upon the traditions, practices of the regional and local indigenous communities (LICs). In other words, we can say that Traditional Knowledge is ardently required to safeguard and promote the interests of the LICs as it tends to be collectively owned by the LICs and reflective of their identity. As there exist no codified body of legislation in the matters of Traditional Knowledge the LICs have been exploited many a times by the new infringers time and again, silently watching their age old culture and traditions being stolen in front of their eyes, without much to do. In many cases, the poor folk are not even aware of their rights being swept away under their noses without any due recognition not to mention any expectation of monetary aid from them. Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was formed by the members of the WIPO in 2000. In 2009 they agreed to develop certain international legal instruments that would render an effective protection to the Traditional Knowledge. But, in trying to do so, the WIPO and the IGC is being faced by numerous procedural challenges. Moreover, there are numerous unanswered questions framed by the WIPO and IGC after consultations with the Governments of various member states and the indigenous people, we have tried seeking answers to those. Basically this has been the aim of the paper to discuss and understand the above mentioned issues in details.

Keywords: *Traditional Knowledge, Intellectual Property Rights, Local and Indigenous Community, Know-How, Folklore.*

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INTRODUCTION

Traditional Knowledge is a branch of Intellectual Property Law, giving rise to Intellectual Property Rights. Traditional Knowledge is generally regarded as a body of indigenous knowledge which is based upon the traditions, practices, of the regional and local indigenous communities (LICs). In other words, we can say that Traditional Knowledge is ardently required to safeguard and promote the interests of the indigenous communities. Since, Traditional Knowledge is related to the nature and environment, it includes within its ambit a tribal form of life, ethics, morality and the day to day practices followed by the local indigenous people. It is also not linked to any scientific inventions and analysis.¹

Though there is still no proper and definite definition of Traditional Knowledge, still some guidelines have been made available by the WIPO, which are as follows:

- Traditional Knowledge is a branch of Intellectual Property Law, giving rise to Intellectual Property Rights.
- Traditional Knowledge is referred to as a knowledge system which tends to be collectively owned by the local indigenous communities (LICs) and reflective of their identity.
- Traditional Knowledge is generally regarded as a body of indigenous knowledge which is based upon the traditions, practices, of the regional and the LICs. In other words, we can say that Traditional Knowledge is ardently required to safeguard and promote the interests of the indigenous communities.
- Since, Traditional Knowledge is related to the nature and environment, it includes within its ambit a tribal form of life, ethics, morality and the day to day practices followed by the local indigenous people. It is however not linked to any scientific inventions and analysis.

BRIEF OVERVIEW

Traditional Knowledge is referred to as a knowledge system which tends to be collectively owned by the LICs and reflective of their identity. Due to its evolving nature, age and the fact that it is collectively owned makes it difficult to protect it from the conventional

¹ Amit Jha, *Traditional Knowledge System In India*, pp.17-18, (Atlantic Ed. 2009)

Intellectual Property Law system. There are very many types of diverse Traditional Knowledge, for instance Folk lore, traditional cultural expressions, music, dance, symbols, designs of cultural manifestations, etc. Traditional Knowledge also consists of the know-how and certain technical knowledge related to bio-diversity belonging to the local indigenous people which in many cases have been misappropriated and used in an unauthorized way by certain pharmaceutical companies and have been patented in their name. As there exist no codified body of legislation in the matters of Traditional Knowledge the LICs have been exploited many a times by the new infringers time and again, silently watching their age old culture and traditions being stolen in front of their eyes, without much to do. In many cases, the poor folk are not even aware of their rights being swept away under their noses without any due recognition not to mention any expectation of monetary aid from them.

Certain Traditional Knowledge is closely related to plants and other biological resources of flora and fauna. Such as medicinal plants, traditional trends in agricultural.

Way of growing crops and animal breeds. Traditional Knowledge often gives the researchers with a lead to isolate valuable active compounds amidst the numerous biological resources. Such genetic and biological resources, which are connected to Traditional Knowledge and Traditional practices through the utilization and conservation of the resources. These have often occurred over generations of generations and through their common use in the modern scientific research and development (R&D). The protection of Traditional Knowledge has often been closely connected to the protection of biodiversity. This has been practiced in particular under the Convention on Biological Diversity (CBD).

The international framework for the protection and promotion of Intellectual Property Laws developed during the period starting from the Industrial Revolution at the West and continued in that fashion with the advancement of science and technology. With more such developments in the recent time, the people of local and indigenous communities and the governments in the developing nations are demanding for such a protection system of Traditional Knowledge which is quite similar to the system of protecting other Intellectual Property Laws like Patent, Trade Mark, Geographical Indication, etc.

In 2000, an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the members of the World Intellectual Property Organization (WIPO). Then on 2009 they agreed to develop certain

international legal instrument or instruments that would render an effective protection to the Traditional Knowledge, genetic resources and traditional cultural expressions i.e. folklore, etc. Such an instrument could be achieved through a recommendation by the WIPO members to form a formal treaty or an agreement that would bind the countries who may choose to ratify it.

Traditional Knowledge also known as the know-how is not so called because of its antiquity. It is a living body of knowledge that is developed, sustained and passed on from one generation to another generation within a particular community, often forming part of its cultural or spiritual identity.² For instance in protecting the traditional remedies and indigenous art and music against misappropriation, and enable communities to control and benefit collectively from their commercial exploitation.³

As such, it is not easily protected by the current Intellectual Property Rights system, which typically grants protection for a limited period to inventions and original works by named individuals or companies. Its living nature also means that it is not at all a static branch of knowledge but rather like a growing organism which changes from time to time. Traditional Knowledge is not easy to define, though certain guidelines have been suggested by the WIPO and other international treaties and organizations.

WIPO's work on traditional knowledge addresses three distinct yet related areas, traditional knowledge in the strict sense includes technical know-how, practices, skills, and innovations related to, say, biodiversity, agriculture or health; traditional cultural expressions; expressions of folklore, cultural manifestations such as music, art, designs, symbols and performances; and genetic resources i.e. the genetic material of actual or potential value found in plants, animals and micro-organisms.

ORGANIZATIONS IN AN INTERNATIONAL BASIS AND AGREEMENTS BASED ON TRADITIONAL KNOWLEDGE

The World Intellectual Property Organization (WIPO) safeguards the Traditional knowledge

² Javier Garcia, *Fighting Bio-piracy: The Legislative Protection of Traditional Knowledge*, Westlaw, p.12 (2007)

³ Susette Biber-Klemm, *Protection Of Traditional Knowledge On Biological Diversity At The International Level: Reflections In Connection With World Trade*, in *Protecting And Promoting Traditional Knowledge: Systems, National Experiences And International Dimensions*, p. 115 (January 19, 2014)

from being copying and used in commercialization and helping in preservation of their cultural and traditional identity. In 2000, an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the members of the WIPO. Then on 2009 they agreed to develop certain international legal instrument or instruments that would render an effective protection to the Traditional Knowledge, genetic resources and traditional cultural expressions i.e. folklore, etc. Such an instrument could be achieved through a recommendation by the WIPO members to form a formal treaty or an agreement that would bind the countries who may choose to ratify it.⁴

Firstly, WIPO along with the IGC facilitates international negotiations taking place between the member states, who have decided to discuss for bringing an international legal instrument that would provide an Intellectual Property like protection, for the Traditional Knowledge. While facilitating this process the member states are those who finally decide on the content of the instrument and in understanding the different issues and options that lie before them. WIPO in accordance with the IGC aids in the process of documentation. Secondly, WIPO and IGC facilitates in setting up of the national systems working with the Governments of the member nations and helping the LICs to understand the Intellectual Property issues better.

In trying to do so, the WIPO and the IGC is being faced by numerous challenges like procedural challenges in which WIPO wants all the nation states to participate and the LICs to get involved in making an international system for granting protection to the Traditional Knowledge under the umbrella of Intellectual Property Law.

Secondly, there is no proper definition of Traditional Knowledge which is yet to be settled upon. There are various questions which are arising, like for instance; Why TK needs to be protected? What are the intended and unintended consequences of such protection? Who should be benefitted from this protection, amidst the different views of various member states? Whether indigenous people should be regarded as the right holders or should the state hold the rights and manage them on their behalf? Exactly what kind of a protection should be provided? A Copyright like or a Patent like protection where an exclusive right is granted to an individual, what should be the kind of penalizing procedure? Or would it be like a system of compensation and punishment? How can TK be actually protected?

⁴ R.M. Dungawat, *Protection of Traditional knowledge: National and International Perspectives*, in *The Law of Intellectual Property Rights*; Introductory WTO, Patent Laws, Copyright Law

POINTS OF DISTINCTIONS BETWEEN TRADITIONAL KNOWLEDGE AND OTHER BRANCHES OF INTELLECTUAL PROPERTY- HIGHLIGHTING ITS SALIENT FEATURES

These are so many of the unanswered questions which have been framed by the WIPO and IGC after consultations with the Governments of various member states and the indigenous people. Similarly, finding out the answers to these many questions is considered as quite a task. No branch of IP gives in a list of so many unsolved questions of which answers are yet to be found out, have also been put forwarded by the WIPO along with the IGC. Trying to find out the answers to these questions makes my research paper quite a novel one.⁵

For example, a pharmaceutical company or a fashion designer who wishes to use a particular Traditional Knowledge is required to ask for a prior informed consent of the LICs or indigenous groups before it could use their Traditional Knowledge in the form of technical biodiversity or folk lore respectively. But this system is somewhat potentially difficult in practice as much of the Traditional Knowledge has been published already and it is also a complicated phenomenon that from whom the consent should have been taken from.

Secondly, the Traditional Knowledge can be regarded not as an exclusive protection. But it is a right to use the Traditional Knowledge, which belongs to the LICs collectively. Hence, it could be used only by acknowledging them and by granting them their due recognition and respect through this gesture. Also by refraining from all kinds of distortions, mutilations, other forms of derogatory practices and used not in such a way which is quite offensive to the indigenous people concerned.

Thirdly, if benefits are generated from the utilization of these resources of the Traditional Knowledge, then a certain portion of that has to be shared with the indigenous people. This kind of a Moral Right concept should exist in this novel idea of protecting the Traditional Knowledge.⁶

Fourthly, there is always a need for the protection of Traditional Knowledge as innovation is good for human welfare hence one should move forward towards the recognition and

⁵ M. Subhramaniam & Balakrishnan, *Traditional Knowledge in Policy and Practice- Approaches to Development and Human Well-Being* (United Nations Publications, December, 2010)

⁶ Christoph Antons, *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International, 2009)

protection of novelties of human beings in the form of folk lore, dance, songs, designs, etc which depict a unique kind of cultural manifestations. This being the rationale of Intellectual Property and here lies its credibility.

Fifthly, TK is something of a very unique kind of Intellectual Property as unlike other Intellectual Property like Copyright, Patent, etc it cannot be protected by granting an exclusive right to an individual. As discussed earlier, Traditional Knowledge is a collective right belonging not only to a single individual but to a community as a whole.

Sixthly, Traditional Knowledge is a wonderful combination of the past, present and the future where these three are amazingly blended giving rise to an innovative idea or thing.

Seventhly, it is a branch of evolving knowledge and is not a static one, hence it has an open scope for addition always. Lastly, Traditional knowledge much unlike other popular Intellectual Properties is passed down from one generation to another, which is quite a unique characteristic.

SOME INSTANCES OF TRADITIONAL KNOWLEDGE AT A GLANCE

The following are some examples of Traditional Knowledge, which have been discussed below:

- ‘Neem’ and ‘turmeric’ is used traditionally in cases of first-aid, curing rashes, healing different types of skin infections and skin allergies like ringworms, psoriasis, eczema etc. Turmeric also has other uses due to its unique qualities like it has cosmetic uses in having fair skin and anti-septic medicinal quality which can be termed various age old know-how or Traditional Knowledge.
- In South India, a sports drug named ‘Jeevani’, has been used from time immemorial as part of the medicinal knowledge of the Kani tribes. This ‘Jeevani’ drug led to the formation of an anti-stress and anti-fatigue agent, which is based upon the herbal medicinal plant known as ‘arogyapaacha’.
- The Thai traditional healers make use of ‘Plao-noi’ for treating ulcers.⁷

⁷ S. Swarna Latha, *Bio-piracy and protection of traditional medicine in India*, European Intellectual Property Review, Westlaw 1 (2009)

- The Western Amazonian tribes use the 'Ayahuasca' vine to prepare various medicines.
- The San people utilize 'hoodia' cactus to stave off hunger while out hunting or doing other work which requires going without food for a longer period of time.
- In Oman, Yemen and in Iran people follow traditional unique techniques of Sustainable irrigation through water systems such as the 'aflaj' and the 'qanat' respectively.
- Unique bodies of knowledge of seasonal migration patterns of particular species in the Hudson Bay region are maintained by Cree and Inuit as a method of safeguarding their Traditional Knowledge against unjust misappropriation and unfair exploitation.

CONCLUDING REMARKS

In conducting any kind of research work there is bound to crop up certain problems while writing down the research dissertation or thesis whatever maybe it. If the research goes so smoothly that it is not faced by any challenges what so ever, then in my opinion there has to be some flaw in the research work, be it in the process, mode of research or may include any other aspect. In simple words, a good research has to have some problems which maybe faced by the researcher in the form of some stern challenges. The work of a good researcher would then be clear and distinct who will not try to dodge away from the problems but would find and seek ways and means to crack those complex issues. Hence, finding answers to unsolved questions.

Likely, in this particular research work of mine, in which I am seeking for a Sui Generis legislation for the protection and development of Tradition Knowledge, me too is facing some difficulties, which I have enlisted below.

Firstly, not much research work has been done in this branch of law, till now. Rather it is better to say that Intellectual Property is yet to dig upon especially in the subject of Traditional Knowledge.

Secondly, too many books solely dealing with Traditional Knowledge, its significance and its protection are also rare. Thirdly, a precise and exact definition of Traditional Knowledge is yet not available till now. Even the CBD and WIPO along with the IGC are yet to come up

with a proper and conclusive definition of Traditional Knowledge. Nevertheless, they have sketched certain guidelines to consider a particular idea or thing under the purview of Traditional Knowledge.

Fourthly, no codified statutes like International legislations and National laws are available in the aspect of Traditional Knowledge.

Fifthly, although there are no proper legislative statutes based upon Traditional Knowledge but there have been some documentations regarding TK in the countries of Peru and some South African states. However, these inter-governmental arrangements in matters of the TK are not much old but came up for about a little more or less than a decade or so. In such a short span of time it is almost quite impossible to understand its working credibility.

Sixthly, there is lack of a clear cut formula regarding what should be considered as a Traditional Knowledge and what should be not. In other words, which things should be covered and brought under the purview of Traditional Knowledge.

Lastly, the local indigenous people are unable to figure out the standards for providing protection to the Intellectual Property in terms of authorship, ownership, and property. But the simple people belonging to these communities are unable to conform to these international standards of protection. These standards do not necessarily supplement to or complement indigenous communities and local people and the nature of understandings regarding the function and role relating to the knowledge and knowledge practices for the protection of Traditional Knowledge under Intellectual Property Rights.⁸

These are some of the major challenges being faced by the Local Indigenous Communities and the Government as a whole in trying to safeguard and protect the Traditional Knowledge and the know-how which is not just a bunch of ideas and beliefs but a rich cultural heritage which is continuously passed on from generations to generations without decay and damage.

SUGGESTIVE MEASURES

Considering Traditional Knowledge, kinds of creativity and innovations protectable by Intellectual Property Laws / Rights if made possible would be regarded as a historic

⁸ N.K. Sachan, *Contribution Of Indian Traditional and Holistic Medicine to New Drug Development in Biodiversity, Biotechnology And Traditional Knowledge*, p. 175 (Aravind Kumar Govind Das) Ed. 2010

revolution in both the International and National levels. This would enable the indigenous and local communities as well as grant authority over the Governments to have a say in matters when their Traditional Knowledge would be used by others. This can only be possible in the ways as discussed underneath.

Traditional Knowledge though for many a community acted as genetic resources and traditional cultural expressions still forms portion of a single integrated heritage. From the standpoint of Intellectual Property, they raise different issues and may require different sets of solutions. In addition to work by an International legal instrument, WIPO is responding to all the three aspects like requests from communities and governments for practical assistance and technical advice for enabling communities to make more effective use of existing Intellectual Property systems. Which would enable the participation more effective in the IGC's negotiations in addition to the work on an international legal instrument. WIPO's task is inclusive of providing aid in developing and strengthening national and regional systems for the safeguard, promotion and awareness regarding Traditional Knowledge. This also includes policies, laws, information systems and practical tools, and the Creative Heritage Project which gives the indigenous people knowledge in terms of training for managing Intellectual Property Rights and interests when documenting cultural heritage. The knowledge of the past and the ways and procedures that have been considered within the purview of Traditional Knowledge have been enriched by experienced old minds through a series of trials and practices for time and again for so long that they prove to be very much applicable even in the modern era.

The definition of Johnson gives more importance to the knowledge, as it is developed because of the close contact of the aboriginals with the nature. His definition is somewhat similar to the definition provided by the Convention on Biological Diversity, as both explains Traditional Knowledge as the body of knowledge, belonging to a group of people, passed on from generations. Though, the definitions of CBD and WIPO has different approaches in protecting traditional knowledge, the CBD's definition on indigenous knowledge gives weight to the practical nature of the knowledge in protecting the biodiversity. Whereas, the definition of WIPO further explains the legal protections related to the Intellectual Property. From all these definitions discussed earlier we can infer that the Traditional Knowledge has the three-fold functions:

1. Traditional Knowledge and biological resources are indispensable for the day-to-day

survival of a great part of humanity, providing sustenance and basic health care, housing, clothing and fuel for cooking and heating.

2. Traditional knowledge, with its capacity to maintain biodiversity and the underlying evolutionary processes, contributes to the long-term survival of humanity as a whole.
3. Traditional knowledge is an asset to international trade.

Intellectual Property Rights should be recognized in the field of Traditional Knowledge by following these points:

- Recognizing the value and promotion of respect for Traditional Knowledge systems is very crucial.
- Responsiveness to the actual needs of the Traditional Knowledge holders.
- Repression of misappropriation of Traditional Knowledge and other forms of unfair practices and inequitable uses.
- Safe guarding of tradition based creativity and innovative practices.
- Supporting of Traditional Knowledge systems and empowering of the holders of Traditional Knowledge.
- Promotion of equitable benefit sharing which arises from the use of Traditional Knowledge.
- Promoting the awareness for the use of Traditional Knowledge for a bottom up approach in the field of development.

Thus, there is a need to protect traditional knowledge in India as it is a collective property belonging to a group. It should be used as a catalyst for development. Since this knowledge is the public domain, it is easily accessible to people in the country or state and so India is morally and socially responsible towards its protection. It is a knowledge which has passed from ages together and its value cannot be measured with time and money. Hence it is required to develop capacity to absorb technology for scientific validation of traditional knowledge. Our research and development sector should be fully occupied to meet stringent international quality standard and should be fully utilised in the interest of country.

Thus it can be concluded with these findings that Traditional Knowledge:

- is a knowledge developed because of aboriginals close contact with nature,
- is a body of knowledge belonging to a group of people, passed on from generation,
- is a collective process of learning and sharing knowledge or exchanging knowledge.

Indigenous communities faces many problems like land issues, extinction of forests, relocation of people from one place to another leading to loss of their interest in protecting the knowledge, whereas the protection of such knowledge encounters all these problems.