International Journal of Current Advanced Research
ISSN: O: 2319-6475, ISSN: P: 2319-6505, Impact Factor: 6.614
Available Online at www.journalijcar.org
Volume 7; Issue 8(E); August 2018; Page No. 14876-14878
DOI: http://dx.doi.org/10.24327/ijcar.2018.14878.2712

Research Article

PROTECTING TRADITIONAL KNOWLEDGE: IN WHICH WAY?

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ARTICLE INFO

Article History:

Received 04th May, 2018
Received in revised form 16th June, 2018 Accepted 25th July, 2018
Published online 28th August, 2018

Key words:

Traditional knowledge, Sui-generis law, TRIPS, WIPO

ABSTRACT

Traditional knowledge (TK) is the information that people in a given community, based on experience and adaptation to a local culture and environment, have developed over time, and continues to develop. Today TK is being increasingly used in modern researches but without taking formal consent of the TK holders or without sharing any benefit from the use of this knowledge. This practice of misappropriation of TK is tried to be protected by the existing IPR laws. But our experience tells us that the rights of the holders of TK cannot be properly addressed with any single IPR law in existence. Hence the most judicious decision would be to protect the TK with a sui generis legislation.

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INTRODUCTION

Traditional knowledge (TK) is the information that people in a given community, based on experience and adaptation to a local culture and environment, have developed over time, and continues to develop. Article 3 of the World Intellectual Property Organization (WIPO)'s 'Revised Draft Provisions for the Protection of Traditional Knowledge: Policy Objectives and Core Principles' defines TK as the' content or substance of knowledge resulting from intellectual activity in a traditional context, and includes know-how, skills, innovations, practices and learning that form part of traditional knowledge system, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations' (Damodaran, 2008). This knowledge is used to sustain the community and its culture and to maintain the genetic resources necessary for the continued survival of the community (Hansen and others, 2005). The term "traditional" used in describing this knowledge does not imply that this knowledge is old. It is "traditional" because the way by which it is created, preserved and disseminated reflects the traditions of the concerned communities.

Ratinale of Protecting Traditional Knowledge

Today TK is being increasingly used in modern researches, especially in the fields of medicine and agriculture. Sometimes drugs, cosmetics and other products are produced directly using the TK; sometimes valuable clues provided by TK save time and money of research laboratories.

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However, in most of the cases TK is being used without taking formal consent of the TK holders or without sharing any benefit from the use of this knowledge. This practice of misappropriation of TK is generally known as biopiracy. In recent years several incidents of biopiracy have taken place all over the world. Uses of Maca for increased fertility, a TK of Incas or uses of Neem as a pesticide, a TK of Indians, are some examples of TK which were patented by American companies without any acknowledgement or compensation for the communities that developed the knowledge. To bring to an end to these unauthorized misappropriations of TK and to acknowledge the credentials of the torch-bearers of this knowledge some kind of protection must be extended to the torch-bearers. But the problem is that even if TK is an example of intellectual exercise lots of difficulties are there to protect TK under intellectual property rights (IPR) regime in its present structure. Thus finding out a suitable legal framework for the protection of TK is the need of the hour.

Protection of Tk: in Which Way

The knowledge related to biodiversity and medicine is the two most important components of TK. Materials and technical knowledge of traditional medicines, now-a-days, are widely used in the development of new drugs. The subject of ethno botany lost its importance in the 20th century. The story of its resurrection in the 21st century is quite astonishing. According to an estimate world sales of herbal medicine alone stood at 30 billion dollar in the year 2000. Unfortunately however, almost nothing of this huge revenue goes to the holders of TK. To ensure a royalty for the TK holders what is essential first is to establish their legal-right over their knowledge.

The WTO advocated for five modes of protection. Firstly, to use existing IPR laws. Secondly, to disclose utilization of TK

by the patent applicant, besides producing evidence of having obtained prior informed consent from the competent authority in the country of origin of TK and entered into appropriate benefit-sharing arrangements with the community or entity concerned (Damodaran, 2008). Thirdly, to build a *sui-generis* system by the country concerned. The fourth mode is to use contract laws based on bilateral agreements on a case by case method. Lastly, to use environmental laws making provisions for TK protection.

Today most of the countries, however, are using their existing IPR laws, especially patent law and geographical indication law to protect their TK. But IPR laws in general protect individual intellect, not collective intellect like TK. Hence there arises a basic contradiction in protecting TK by IPR laws. Moreover each IPR law has their own limitations. Let us first discuss them in brief.

Patent is actually an exclusive right over the use, production, sale etc. of an invention, innovation or discovery for a specified period of time. One of the criteria that an invention or innovation must meet to get patented is 'novelty'. `Novelty' means non-existence of any a-prior knowledge base that can give birth to the new invention. Any TK thus cannot be protected properly through the existing patent act, since it can never satisfy the 'novelty' criterion. There is, however one more disadvantage of using patent law to protect TK. In order to get patent protection full technical disclosure is essential, which is thereafter placed in the public domain by the patent authority to verify the genuineness of its 'novelty' claim. But once a TK be disclosed in the public domain the holder of the TK will lose their age-old secrecy which eventually might lead them to monetary loss.

Another important IPR law based on which TK is tried to be protected is the geographical indication (GI) act. The GI act gives protection to products, the specificity of which is based ontheir geographical environment. A geographical indicator identifies a good as originating in a territory, where a given quality, reputation or other characteristic of the good is attributable to its geographical origin (Hansen and others, 2005). Bordeaux wine of France or Darjeeling tea of India are examples of GI. In recent past farmers of India and Pakistan could revoke their rights over Basmati rice which was patented by an American company, Rice Tec, and was sold in the US market in the name of Texmati. But the problem lies with protecting TK by the GI act is that under this law TK-based products which have no geographical linkage cannot be given protection.

Most of the TK today are relating to plants and plant materials. Protection to traditional varieties of plants such as landraces nurtured by farmers is very important. There are various international agreements and conventions regarding protection of biological resources like plants and plant materials namely, Convention on Biological Diversity (CBD), The International Union for the protection of New Varieties of Plants (UPOV), The FAO International Undertaking on Plant Genetic Resources etc. The World Trade Organization (WTO) in its Trade Related Intellectual Property Rights (TRIPS) also speaks of protecting the rights of the communities that hold the knowledge relating to biological resources. The problem is that most often their rules and recommendations are contradictory. Some countries, however, formulated their own laws which are examples of intelligent amalgamation of these international agreements and conventions. Plant Varieties and Farmers' Rights Act2001 (PPVFR) of India is an example of such laws. Our brief discussion above thus fails to answer the question we started with. Although TK is basically an intellectual exercise it is seen to be quite impossible to protect them by any single existing IPR law. Not only that, since present structure of IPR laws does not offer protection to community knowledge, it is difficult to extend proper protection to TK with the IPR laws. Hence a *sui generis* system may be the most suitable alternative to give protection to TK.

The Sui Generis System

The notion of a *sui generis* legislation has been mentioned in the article 27(3) of the TRIPS. According to this article '…Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof'. Following this article some countries have made provisions for protection to TK in their existing IPR laws. Some countries, on the other hand, have built up a separate law.For example, in China the Chinese State Intellectual Property Office now has a team of patent examiners specializing in traditional Chinese medicines. In New Zealand trade mark law has been amended to exclude trademarks that cause offence, and this especially applies to Indigenous Maori symbols. (WIPO,--)India, on the other hand, has amended her Patent law to incorporate provisions for TK protection.Except amending Patent law she has also, though did not build up an exclusive law for TK protection, enacted two new laws, namely 'The Protection of Plant Varieties and Farmer's Right Act (PPVFR)' and 'The Biological Diversity Act' in the years 2001 and 2002 respectively (Venkataraman and others, 2008). In the amended patent lawdisclosure of source and geographical origin of the biological materials used in the invention has been made mandatory, innovations which are basically traditional or aggregation or duplication of known properties of traditionally known component or components are excluded from being patented. To protect TK from being patented, provisions have also been incorporated in the law to include anticipation of invention by available local knowledge including oral knowledge, as one of the grounds for opposition as also for revocation of patent (Dayma,). Again in the PPVFR 2001 provisions for compensation and benefit sharing facilities for the holders of TK has been incorporated which provided ample protection to traditional plant varieties and their associated knowledge. The Biodiversity Act 2002, on the other hand, deals with access to genetic resources of the country by foreign companies, individuals or organizations.

The list of countries which, however, enacted exclusive law for TK protection includes Portugal, Peru, Costa Rica, Thailand etc. What makes an IP system a *sui generis* one is the modification of some of its features so as to properly accommodate the special characteristics of its subject matter, and the specific policy needs which led to the establishment of a distinct system (WIPO, op.cit.). In all these laws, more or less, two things are put emphasis on. The first one is the prior informed consent, and the second one is the equitable access and benefit sharing. The first one is required to prevent misappropriation of traditional knowledge and the second one is actually the basic objective of framing a separate law for the protection of the rights ofthe holders of TK.

CONCLUSION

The rights of the holders of TK cannot be properly addressed with any single IPR law in existence. The patent law all over the world, the most important law on of intellectual property, has been framed in the line of Paris Convention of 1783. The organizers of Paris Convention were the developed countries. Their basic interest was to protect the interest of individuals and to ensure of reaping profits from the inventions of individuals for a sufficiently long period of time. Nowhere in their thought serving the interest of human kind as a race found any place. But TK is a knowledge which basically arises to serve the interest of the community. Naturally there must be a basic conflict in protecting an individual intellectual property and anintellectual property owned by a community and naturally therefore these two forms of intellectual property cannot be protected by the same IPR laws. The best way, however, is to formulate a sui-generis legislation through a judicious combination of various IPR laws like patent, GI, trademark, biodiversity etc. However, it should also be remembered in this context that any such law would have no global legitimacy unless it is recognized and accepted by other countries. This is where the proposal to have a 'Development Coalition' of different countries agreeing on a common framework for protection of TK becomes important (Nair, 2011). The effort of WIPO in this direction is thus really praise worthy.

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How to cite this article:

Anindya Bhukta (2018) 'Protecting Traditional Knowledge: in Which Way?', *International Journal of Current Advanced Research,* 07(8), pp. 14876-14878. DOI: http://dx.doi.org/10.24327/ijcar.2018.14878.2712

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