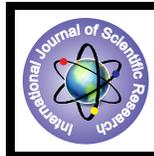


Protecting Indian Traditional Knowledge as Intellectual Property



Management

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ABSTRACT

Traditional knowledge has always played an important role and will continue to do so in creating a competitive advantage for India, primarily since the rich indigenous knowledge of communities is the country's core competency. Knowledge such as of Ayurveda, Yoga, use of Neem and Turmeric for medicinal purpose, etc. existed in the indigenous communities of India since generations. However, attempts by some individuals and countries to claim ownership by exploiting these traditional knowledge of Indian origin, has raised concerns. The concern emerges from the fact that a large number of patents have been granted for traditional knowledge related inventions that do not fulfill the novelty criteria if the "traditional knowledge" is taken into consideration as "prior art". The term "prior art" refers to any published content available in the public domain before the filing date of a patent application. Protection of the Traditional Knowledge of the indigenous communities seems to be one of the most argumentative issue. The historical development of the protection of intellectual property in the wake of individual private property rights, pushed, the traditional knowledge and the innovative practice based on it outside the purview of the formal intellectual property protection regime. This calls for a comprehensive strategy with community, national, regional and international dimensions. This framework should ensure that the control over biological resources rest with the local community and that they receive adequate compensation when these resources are utilized by outsiders. In the light of the prevalent loss and threatened future of traditional knowledge, it is important to preserve it in a format that would be useful for future generations, to protect its knowledge from misuse and utilize it for better development. This paper attempts to highlight some major initiatives that aim at preserving and safeguarding traditional knowledge as intellectual property.

Introduction:

Traditional knowledge is the knowledge that an indigenous community accumulates over generations of living. Indigenous communities possess knowledge, innovations and peculiar practices developed from experience gained over centuries and adapted to the local culture and environment. Traditional knowledge can involve cultural expressions, ecology, agriculture, medicine, construction technologies, environment, etc. and have generally been passed on from generation to generation pertaining to a particular community, which is constantly evolving in response to the changing environment. It is always considered as a prior art existing since generations in a society. An intensive search to find such prior art is conducted as a part of examination process of the patent application before it is granted, but the problem remains as that content can only be considered "prior art" if it exists in a documented form. Most of the traditional knowledge has been orally transferred down over a number of years and there may not necessarily be documented evidences for it. This has led to the granting of a number of erroneous patents due to lack of prior art. Use of these erroneously granted patents for commercial gain by individuals and corporations without proper sharing of benefits obtained from such use with the originators of the traditional knowledge has led to blatant exploitation of the rights of indigenous peoples. Thus, concerns regarding protection of traditional knowledge are growing around the world

Understanding Traditional Knowledge:

According to the World Intellectual Property Organization (WIPO), traditional knowledge is defined as, "tradition-based literary, artistic, or scientific works; performances; inventions; scientific discoveries; designs; marks, names, and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields." In light of the above definition it can be inferred that traditional knowledge is vast enough to encompass indigenous knowledge related to various categories like agricultural knowledge, medicinal knowledge, biodiversity-related knowledge, and expressions of folklore in the form of music, dance, song, handicraft, designs, stories and artwork. Existence of traditional knowledge can be broadly divided into two categories: recorded and oral knowledge. Recorded knowledge is often referred as codified and is available mainly in the form of ancient texts and books. Contemporary books, jour-

nals and reports that focus on traditional knowledge are also the sources of recorded knowledge. Another significant category of traditional knowledge is the oral knowledge that is not recorded or codified anywhere. It is widely dispersed; remains confined to the local communities and is transferred verbally from generation to generation. Identifying and preserving verbal knowledge needs utmost attention as it is the basis of livelihood for many indigenous communities and the threat is not only towards losing it but also because of its gross misuse by corporates and private institutions.

Protecting traditional knowledge in India:

Today's IPR regimes do not have any mechanism to protect or reward the public-domain foundations on which the innovations may be based. The corporate and multinational companies, mostly from the developed world use traditional knowledge of developing countries as a basis for their commercial products, which are then patented without sharing any benefit with the source of traditional knowledge. The present patent system gives the entire economic benefit to those who have only slightly altered the traditional knowledge and gives nothing at all to those who developed it over generations. Worst of all is once such patents are granted, Trade Related Aspects of Intellectual Property Rights (TRIPS) obligates all signatory countries to enforce them upon their own people including the indigenous communities that developed and held the knowledge for generations thus restricting their free use and practice. India has had its bitter experiences over the protection of Traditional knowledge. Turmeric and Neem are the classic cases where the country had to fight it hard. These cases provided the driving force for the enactment of the Plant Varieties and Farmers Rights Act, 2001 and the Biodiversity Act, 2002.

The Geographical Indication of Goods (Registration and Protection) Act, 1999 passed by Parliament is another step taken by India. The Act primarily intends to protect the valuable geographical indications of our country. The protection under the Act is available only to the geographical indication registered under the Act and to the authorized users. The Act permits any association of persons or producers or any organization or authority established by law representing the interest of the producers of goods to register a geographical indication. It may be possible to argue that the holders of the traditional knowledge in goods produced and sold using geographical indication can register and

protect their traditional knowledge under this law.

In India, patenting traditional knowledge is not allowed under the patent law. According to section 3 (p) of The Indian Patent Act, "an invention which, in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components", is not considered an invention under the Act. However, for protecting traditional knowledge, India has taken several measures. India is a party to the Convention on Biological Diversity (CBD). India has already enacted the Biodiversity Act to provide for protection of biological diversity, sustainable use of its components and equitable benefit sharing arising out of the use of the biological resources. Additionally, India has initiated an attempt to document traditional knowledge in a written as well as electronic form by means of People's Biodiversity Registers (PBR) and the Traditional Knowledge Digital Library (TKDL).

TKDL is a navigable online repository of traditional knowledge of the country. TKDL has been developed jointly by Controller General of Patents, Design and Trade Marks; National Institute of Science Communication And Information Resources (NISCAIR); Department of Ayurveda, Yoga & Naturopathy, Unani, Siddha and Homeopathy (AYUSH) and is an original database. TKDL aims to translate Indian traditional knowledge originally available in native languages like Hindi, Sanskrit, Urdu, etc. to five international languages namely English, French, German, Spanish and Japanese. TKDL allows access to patent offices around the world to search for "prior art" in the traditional knowledge domain so that patents are not erroneously granted, thereby acting as a defensive tool (<http://www.tkdlib.res.in>)

Certain limitations of the Traditional Knowledge Digital Library:

- 1) TKDL is limited in its coverage as it does not include the non-codified or oral knowledge.
- 2) It is restricted to medicinal knowledge.
- 3) Significant aspect to be noted is that whole of the TKDL database is not available in public domain.
- 4) Only a representative database containing 1200 formulations is made available for public access.

Recognizing traditional knowledge as protectable intellectual property is an historic shift in international law, enabling indigenous and local communities as well as governments to have a say over the use of their knowledge by others. This makes it possible, to protect traditional remedies and indigenous art and music against misappropriation, and enable communities to control and benefit collectively from their commercial exploitation.

Two types of intellectual property protection are being sought:

- Defensive protection aims to stop people outside the community from acquiring intellectual property rights over traditional knowledge. India's PBR and TKDL helped to follow the well-known case in which the US Patent and Trademark Office granted a patent (later revoked) for the use of turmeric to treat wounds, a property well-known to traditional communities in India and documented in ancient Sanskrit texts. Defensive strategies might also be used to protect sacred symbols or words from being registered as trademarks.
- Positive protection is the granting of rights that empower communities to promote their traditional knowledge, control its uses and benefit from its commercial exploitation.

Conclusion:

The era of globalization has allowed the blatant misuse of traditional knowledge and granting of monopolistic rights to a few in spite of the fact that the traditional knowledge has been known and used for centuries by indigenous groups. Documentation activities undertaken by developing countries like India are worth recognition. However, unless there is awareness and strict measures about respecting and valuing traditional knowledge, corporations can always find a way to commercially exploit the traditional knowledge to their advantage. The main concern of protecting traditional knowledge should include equitable distribution of benefits, conservation concerns, preservation of traditional practices and culture, the prevention of misuse by unauthorized parties of traditional knowledge and promotion of its use and its importance in development. Preserving and safeguarding traditional knowledge has assumed great significance in the recent past and a variety of initiatives are being made across the globe towards achieving it. In view of the wider misuse of traditional knowledge, preservation and protection should work hand-in-hand. Documenting non-codified knowledge is not very successful in a larger perspective because of the variety of issues involved. However, urgent measures are required to preserve oral knowledge as it faces a greater risk of loss and misappropriation. Also, documentation of medicinal knowledge has gained prominence in many countries in their fight against bio piracy. However, traditional knowledge involves various sectors such as agriculture, environment, architecture, culture, heritage, etc. that are interlinked and applied to daily living. All this knowledge needs to be preserved in order to achieve inclusive development.

Documentation of traditional knowledge is one means of giving recognition to knowledge holders. But mere documentation may not enable sharing of benefits arising out of the use of such knowledge, unless it is backed by some kind of mechanisms for protecting the knowledge. This necessitates the need for extending some kind of protection to traditional knowledge. Documentation of traditional knowledge may only serve a defensive purpose, namely that of preventing the patenting of this knowledge in the form in which it exists. Documentation could be a double-edged sword. It is assumed that if the knowledge are documented, it can be made available to patent examiners the world over so that prior art in the case of inventions based on such knowledge is readily available to them. It is also anticipated that such documentation would facilitate tracing of indigenous communities with whom benefits of commercialization of such knowledge has to be shared.

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