



A Critical Analysis on Protection of Traditional Knowledge Under Intellectual Property Rights Law

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ABSTRACT

The protection of Traditional Knowledge under existing Intellectual Property Right Laws or else to have new law for that matter is the most debatable issue in Indian context. As our Indian Intellectual Property Right Laws are having many hurdles in protecting the Traditional Knowledge in their purview either it maybe patent, copyright, trade mark, trade secrets etc. As the subject matter of Traditional Knowledge is different from the above mentioned IPRs like it is not new one and practicing was from generations, many a times it has been practicing from not by an individual but by a whole community, there is no literal format about the subject matter as they are following it from generation through practice we must think about a separate legislation in this regard which can suit the characteristics of concept of Traditional Knowledge and which should be totally different with existing IPR Laws.

KEYWORDS

Traditional Knowledge, Intellectual Property Rights, Patent, Copyright,

Introduction:

In earlier ages the popular adage, “knowledge is power” has reevaluated and recognized in modern time as “knowledge” is not only a source of power but also the primary source for generating wealth. This particular recognition justifies the protection of Intellectual Property (IP) created either by individuals or by communities. Traditional knowledge is a valuable and sophisticated knowledge, continuously developed over generations by tribal and rural communities in various parts of the world, and transmitted from one generation to the next all about in oral forms. Traditional knowledge refers to knowledge, innovations and practices of indigenous and local communities around the world. Thus it implies mingle of knowledge and experience integrated with a coherent value system which is wholly based on bio-resources. Traditional knowledge means and includes experiences on spiritualism, philosophy, politics, and technology, all activities for livelihood, social systems, customs, traditions and external relationship of all the forest dwellers, whose lifestyle is intensely influenced by their own traditions.¹

Traditional knowledge is considered as the emerging area of Intellectual Property Rights. This concept has added to the category of Intellectual Property later on. For several years only the conventional forms are counted as the real Intellectual Property Rights. But when the power of knowledge has been estimated, the concept of Traditional knowledge came forward. Traditional knowledge is a series of principles, resulted out of experiences which govern the indigenous people and the people of rural and tribal communities. This knowledge of bio-resources has the potentiality, to be transformed into economic wealth in today's herbal era. A shrub in the forest becomes an economic resource when local communities unveil its medicinal and healing properties.²

India is having approximately 8% of world's bio-diversity and one of the greater storehouses of the knowledge and has the potentiality of becoming a leader in the herbs-based global trade. Though such knowledge is not achieved any formal recognition by the international community, the growing episode of bio-piracy indicates the worthiness of the knowledge. Many

agencies are profitably commercializing traditional knowledge without sharing any benefit with the community, whose knowledge has been poached upon. An estimate affirms this as, when total trade in herbal products is over US \$56 billion, the payments to the communities for indigenous knowledge is less than 0.001% of the profit.³

In India there is no specific law regarding protection of traditional knowledge. Only some relevant legislations are partially protect the Indian traditional knowledge. The brief account of the relevant laws regarding protection of traditional knowledge is discussed below;-

The Geographical Indication of Goods (Registration and Protection) Act, 1999

Geographical indication can be used to protect only certain kinds of traditional knowledge. First, geographical indication identifies a ‘good. This would exclude all intangible forms of traditional knowledge such as methods of medical treatment, techniques for dyeing cloth, folk music, and dances. However, a geographical indication may be obtained for, say a resulting medicine or dye or the recorded versions of songs and dances.⁴

Secondly, GI protection is of assistance only where the knowledge is associated with a defined geographical area. For instance, the knowledge of ‘Triphala’ is scattered across the country. ‘Triphala’ is a medicinal powder used for ailments of the stomach. The raw materials for it are grown in a defined geographical area. It may be possible to treat ‘triphala’ as a manufactured goods and argue that the activity of preparation takes place in the defined area. This is because, according to the Geographical Indication Act, a geographical indication can be obtained for a manufactured product if at least one of the activities of either the production or processing or preparation of the goods concerned takes place in the defined territory. Thus it is possible to have a GI for ‘triphala’.⁵

Thirdly, the goods must enjoy a commercial reputation. This is because a geographical indication merely signifies the true source of the good, and if the source is not important to the

consumer, protection by means of a geographical indication is immaterial. It has been suggested that the representatives of interested local communities must first survey the industry and consumers groups regarding the market demands for various indigenous products because significant market for the product is an essential criterion for use of a geographical indication. However, it should be clarified that protection of geographical indications is aimed at protecting the names of goods, and not knowledge as such. Geographical Indications could play a complementary role in protecting traditional products, but it seems to be not possible to protect all forms of traditional knowledge just by using this form of intellectual property alone.⁶

The Protection of Plant varieties and farmers' rights Act, 2001

India decided to include farmer's rights in its legislations apart from the mandatory breeder's rights, which was the condition of the TRIPS. The farmers, rights include the right to save seeds for themselves and the right to sell seeds, even of the protected varieties, but without branding. New breeders are also under the protection. There is provision for a National Gene Fund, to which breeders will have to pay revenues for using farmer varieties. In rural India the breeding of seeds and process of conservation of seeds are practiced through the traditional knowledge. This Act is not doing prominently anything for the protection of traditional knowledge.⁷

The Biological Diversity Act, 2002

Commensuration with the CBD, this Act establishes sovereignty and recognizes the rights of communities over bio-resources. There is provision for National Biodiversity Authority (NBA), as well as Biodiversity authorities at State and Panchayat level comprising of creators and holders of traditional knowledge.⁸

Indian Copyright Act

Indian Copyright Law, as such do not provide for protection of expression of folklore or protection of traditional knowledge of indigenous people, however an inference can be drawn from Section 31A2 of the Indian Copyright law, which protects the unpublished Indian work. The Question that arises is if granted, whether copyright law would be sufficient for the protection of traditional knowledge?⁹

Some of the major drawbacks in protecting traditional knowledge with copyright are as follows:

Authorship: Under the Indian Copyright Law, protection is given to the author or owner of the work. Traditional Knowledge is community owned knowledge and is generally developed and evolved through generations to generation. In such case tracing the author of the traditional knowledge is not only difficult but almost impossible.

Protection for Limited Time: Indian copyright protection is time confined as in it is granted for a particular term of 60 years. Traditional Knowledge is imperative and it should have perpetual protection rather than limited protection.

Fixed form: To protect any work with Copyright under the Indian Copyright Law it is required that the work must be present in a tangible form. Fixed form of traditional knowledge is hard to find. In most of the cases, traditional knowledge is passed over generations in a community in form of stories. These stories are rarely available in fixed form.

As per Indian Copyright law traditional knowledge fails to adhere the requirements that are precedent to copyright protection. Hence, the protection can easily be denied to traditional knowledge for not fulfilling the basic requirements for copyright protection.¹⁰

Indian Patent Act

In India, patents are given to an individual for his invention. Traditional Knowledge is community owned knowledge and not by an individual. Moreover, critics are of the view that traditional knowledge is naturally owned knowledge and not an

invention, therefore no patent protection can be granted to it.

Patents are granted to invention that is invented by a single act of invention whereas traditional knowledge is evolved and developed over generations.

Indian patents are cost bound and their registration and maintenance cost a lot, which is an impossible take on the part of indigenous people as they lack financial assets.

Moreover, it is quite difficult on the part of indigenous people to engage themselves in the legality and technicality of patents.

This is quite clear from the above contentions that patent protection will not work for traditional knowledge.¹¹

Trade Secret

Protecting traditional knowledge as trade secrets is quite possible for the indigenous people as it does not require any cost. All they need is a conscious effort on their part to keep their knowledge as secret. Generally, traditional knowledge is intact with the community members only and therefore, can be protected as trade secret. But the disadvantage of this method is that it is no conducive to widespread usage and exploitation.¹²

The Designs Act, 2000

This Act prohibits registration of certain designs, which are not new or original; or have been already disclosed to public in tangible form prior to the filing date. This way this Act can protect certain areas of traditional knowledge.¹³

Conclusion and Suggestion:

With the above discussion we can conclude that the existing laws are insufficient to deal with all aspects of traditional knowledge. In the aspect of protection of traditional knowledge laws are yet to become fully operational and effective.

By analyzing above discussion we can suggest some points to protect and develop the concept of traditional knowledge are as follows:

As regards Intellectual Property protection of traditional knowledge, it's true that a dilemma prevails about providing patents to products and medicinal formulations, which are developed over hundreds of years. Intellectual Property rights are not the only way to of protecting traditional medicinal knowledge. What we need is a sui generis law combined with certain intellectual property rights.

Legislation can be enacted taking into account the various regional differences in the matter, customary laws of various communities etc. then indigenous people are very much innocent about law and legal protection to their traditional knowledge. Therefore it is very much needed to make them aware about importance of their knowledge, exploitation of knowledge by some companies for monetary benefit, need for its protection etc. This has to be made by government and non-government organizations and also the universities in that concerned areas.

Besides, we should give more priority to collective or community rights instead of individual rights. That way it will become more profitable to the communities to commercialize their knowledge. In this aspect of recognition and protection process the government organization or any NGOs should not misuse monetary benefit as it is happening in some cases of Geographical Indication protection.

While providing protection there has been concern made to protect traditional knowledge in two kinds as 1. Defensive protection which should have aims to protect the traditional knowledge where outsiders should not have right over it, as it had happen in case of neem and turmeric. 2. Positive protection means the granting of rights that empower communities to promote their Traditional Knowledge, control its uses and

benefit from its commercial exploitation.

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