



Protection of traditional knowledge under IPR regime and SUI generis system: A brief review

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Abstract

The concept of intellectual property right is becoming important at the global level. During the last few decades all over the world after the establishment of WTO & GATT protection of intellectual property has become one of the central issues. Issues of generation, valuation, protection and exploitation of intellectual property (IP) are going to become critically important all around the world. This paper deals with the various concepts and acts with the relevance of the protection of traditional knowledge under intellectual property rights regime and possibilities of Sui Generis system.

Keywords: IPR, novelty & TK, designs act 2000, protection of TK, sui generis

1. Introduction

Intellectual property is a branch of law which protects some of the finer manifestations of human achievements that are of commercial value. The protection of TK under existing form of IPRS raises some of the important issues, which shall be dealt in detail in the following sub-section:

1.1 Patents and Protection of Traditional Knowledge (TK)

Patent refers to a grant of some privilege, property or authority made by the government, by the sovereign of the country to one or more individuals. The instrument by which such grant is made is known as "Patent"^[1].

The term "Patent" acquired statutory meaning in India when the Patent Act, 1970 was enacted. In order to satisfy the requirements of patents three essential criteria should be met under the Patent Act, 1970 as amended by The Patents (Amendment) Act, 2005 are (a) novelty^[2]; (b) Inventive Step^[3]; and (c) Industrial Application^[4].

1.1.1 Concept of Novelty & TK

The most important element of the concept of novelty is the non disclosure of the invention by the public. This presupposes that there should not be prior knowledge of the invention by the public. The two requirements to find out whether an invention is disclosed or not are Prior publication^[5] and Prior use^[6].

The Prior publication include: the publication of the information through the patent claims already filed before the authorities anywhere in the world or the existence of the information in any document available for examination irrespective of whether any member of the public including the person claiming the invention has read it or not^[7].

The prior use is the use of the information in the course of the trade by a person or is within the common knowledge of the public or those involved in the trade^[8]. In the first case the novelty is lost as much as the common public is aware of the invention and that it is in use i.e., there is prior knowledge and

prior use of the invention. Thus, the lack of novelty will disqualify the products based on the knowledge to be treated as invention for the purpose of patent protection.

1.1.2 Invention Step

The patent Act 1970, defines invented step in Sec. 2 (j), as in as inventive step means a feature that makes the invention not obvious to a person skilled in the art. Lord Hoffmann usefully described forms of invention in *Biogen Inc v. Medeva plc*^[9]. In *Windsrfing International Inc v. Tabur marine* (Great Britain) Ltd^[10]. being: (1) Identify the inventive concept embodied in the patent in suit; (2) identify, what, if any, difference exist between the matter cited as being 'known & used' and the alleged invention; (3) the court then asks itself the question whether, viewed without any knowledge of the alleged invention, those differences constitute steps which would have been obvious to the skilled man or whether they require any degree of invention^[10].

Thus, the requirement of the inventive step is to ensure that substantial intellectual labour of the inventor is involved in the creation of the new invention. So, the test applied by the courts is to examine whether there is any application of inventive faculty of the invention^[11]. The quantum of application independent though, ingenuity and skill of the inventor is the matter of inquiry in this regard^[12].

One of the significant features of the TK is the fact of it being passed on to the present generation by the previous one. This gives a prima facie impression that the present custodians of this knowledge are not the creators but the successors in interest of earlier creators. It is thus obvious that the present claimants have not contributed any independent thought, ingenuity or skill to establish a valid patent claim.

1.1.3 Industrial Application

The patent Act of 1970, defines industrial application in sec.2 (ac) as that the invention is capable of being made or used in an industry. Thus another requirement is that the invention is

capable of industrial application. This requirement demonstrates the practical nature of patent law, which requires that the invention should be something which can be made industrially or relate to an industrial process^[9, 12].

2. Copyright and Protection of TK

Copyright is a property right that subsists in certain specified types of works as provided for by the Copyright, Design & Patents Act, 1998. Thus, copyright is an exclusive right given by law for a certain term of years to an author, composer etc. to print, publish and sell copies of his original work^[13]. In order to secure copyright protection what is required that the author must have bestowed upon the work “sufficient judgement, skill, labour and capital”^[14]. Thus to be eligible for copyright protection, work must be original, it must be fixed in some tangible form and it must qualify as a “work of authorship”. Copyright protects the skill and labour by the author in the production of his work^[15].

Thus, in order to get a copyright over the work, that work should be original. The question is whether TK falls within the ambit of originality. Identification of the holders of TK is not easily possible since it has originated over the centuries and it cannot be held by the community collectively. Therefore, TK cannot be given copyright protection. Moreover, the copyright cannot be vested in the entire tribe or community, as the law does not recognize community ownership.

3. Trademarks, Geographical Indications and TK

A trade mark is a visual representation attached to goods for purpose of indicating their trade origin^[16]. Thus, a trade mark serves the purpose of identifying the source of origin of goods. Geographical indication (GI) denotes that the product originates from a particular place, which has a reputation for certain characteristics attributable to that place of production of manufacture^[17].

TK can also not be given protection under both Trade Marks & GI basically for two reasons:

- i) Trademarks and GIs are applied for goods and services provided by certain properties, in form of goods and TK are intangible in nature.
- ii) The purpose of both Trademarks and GI is commercial benefit whereas the holders of TK may not always be interested in monetary benefit but may only want recognition.

4. Other IPRs- The Design Act, 2000 and The Semiconductor Integrated Circuits Layout-design Act, 2000

It is an obvious fact that the very nature of TK is incapable of being given any protection under The Design Act, 2000 aims at protecting the designs which serve the purpose of visual appeal. A design in order to be registerable under The Design Act, 2000 must be of some shape, configuration, pattern or ornamentation or composition of lines or colours applied to such article in any form, by any industrial process or means^[18]. Semiconductor Integrated Circuits Layout-Design, means to sell, lease, offer or exhibit for sale or otherwise distribute such semiconductor integrated circuit for any commercial purpose^[19].

The existing form of IPRs is incapable to protect TK. They are not likely to work because of the inherent mismatch between

the protection that was created for finite, inanimate objects coming out of industrial activity and the flowing, mutable and variable properties of biological materials.

5. Sui Generis Protection of Traditional Knowledge

5.1 Sui Generis

It is a Neo-Latin expression literally meaning of “its own kind” or unique in its characteristics. The term *Sui Generis* is used in the TRIPS Agreement in connection with the protection of plant varieties. It means that an IPR law of its own kind adapted to the specific needs of the crop sector^[20].

In case of TK, it refers to the creation of a new national law or the establishment of international norms that would afford protection to IP dealing with GR or biodiversity and the biotechnology that might result. A Sui Generis system for the protection of the TK must aspire for:

- a) Providing positive protection of traditional knowledge as distinct from defensive protection;
- b) Providing protection of traditional knowledge in the intellectual property sense, through the creation of specific rights in intangible properties;
- c) Protecting the content of TK.

The issue of protection of TK, innovations and practices of indigenous/ local communities is currently on the agenda of different inter-governmental forums, including the WIPO, WTO and the CBD. The discussions at these forums are centered on numerous legal, economic, policy and scientific issues in TK protection under the IP regime.

Since the debate on sui generic of TK has heated up and because of the WIPO’s bottom-up approach to the international protection of TK, based on the national experiences, a number of regional and national initiatives have been taken to protect TK under as sui generic model. As February 2002, at least twenty-two countries and certain regional integration organizations had made or were in the process of making available a *Sui generis* form of legal protection for TK-related subject matter^[20].

5.2 Some of the regional initiatives, to protect TK

5.2.1 The Organization of African Unity (OAU; now the African Union)

This organization recognizes “community rights”, and has introduced community intellectual rights and has specific provisions on farmers’ rights^[21].

5.2.2 The Andean Community

It accepts the sovereign rights of the Andean States over GRs and it lays down that there should be a fair equitable distribution of the profits to the respective indigenous people^[22].

5.2.3 The ASEAN Framework Agreement

This agreement merely reiterates the language of the CBD; however, it also talks about the involvement of local/indigenous communities in decision-making on access to GRs and benefit-sharing^[23].

5.3 Some of the national regimes which have enacted specific TK related laws

5.3.1 The Indian Sui generic measure

In India, provision have been made for protecting TK in Biodiversity Act 2002, protection of Plant Varieties and Farmer's Right (PPVFR) Act, 2001 and patent (Amendment) Act, 2005.

5.3.2 The Brazilian Sui generic measure

The Brazilian sui generis measure was enacted in 2001 to protect the TK associated with biodiversity [24].

5.3.3 Costa Rica law on Biodiversity

It is basically aimed at giving effect to the CBD at the national level and thus is not a specific law on TK. It nevertheless recognizes community rights in TK, which does not require any prior declaration, express recognition or official registration and, as such may include practices which acquire that status [25].

5.3.4 The sui generis regime of Panama

Its objective is to protect the collective intellectual property rights and TK of indigenous communities through the registration, promotion, commercialization and marketing of their rights in such a way as to give prominence to indigenous socio-cultural values and cultural incentives and for social justice [26].

5.3.5 The Indigenous Peoples' Rights Act of 1997 (Philippines)

In its regulation, Executive Order No. 247 dated 18 May 1995, protects the rights of indigenous communities in TK in general, including the rights to limit the access of researchers in their ancestral domains/land or territories and to receive royalties from the income derived from any of the researchers conducted and from resulting publications [27].

5.3.6 Thailand: The Plant Varieties Protection Act 1999 and the Act on the promotion and protection of Traditional Thai Medicinal intelligence

The Plant Varieties Act recognizes communities' rights when a plant variety only exists in a particular community, and registration with the local government organization is mandatory to enjoy the right. The Traditional Medicinal Intelligence Act categorizes "traditional formulas" into categories labelled as "national formula", "private formula" and "general formula". General formula can be used by any citizen whereas private formula can be used by the owner and the third parties with his consent.

A review of the *Sui generis* regimes reveals a great diversity in approaches in the scope and modes of protection of TK. While some of them are comprehensive and include tangible and intangible elements of TK- such as Panama's which includes traditional culture expressions- most of them are limited to biodiversity and genetic resources, access to those resources and benefit-sharing from their utilization.

These laws do not provide any distinct approach towards enforcement of rights or mechanisms and remedies available for the infringement of these rights. Enforcement of rights within a national legal system is an important aspect of any

effective regime, a fact which has been overlooked in these national efforts [28].

6. Conclusion

Thus, the national and regional regimes as examined above suggests a great diversity in approaches, scope, types of rights and modes of implementation. These national/ regional *Sui generis* initiatives for the protection of TK have been constructed on the basis of the special needs of individual countries, depending upon their cultural and political conditions. However, a single all-encompassing Sui generis regime of protection of TK may not be flexible enough to accommodate the local needs of individual countries. Therefore, any international regime on the protection of TK has to take into account this diversity, prompted by individual countries' needs and perceptions towards TK, and also address the more formidable aspects of its enforceability and monitoring.

Conflicts of interest: There are no conflicts of interest.

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