

Traditional Knowledge: Not worth protection?

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ABSTRACT

Traditional knowledge is a result of efforts of indigenous people and has developed over time. Most often it is transmitted from one generation to another as oral knowledge and this is the point which makes traditional knowledge (TK) difficult to protect. The knowledge of TK saves time and investment in research and development sector.

The paper is divided into various sections. First, it introduces what traditional knowledge of indigenous people actually stands for. It then goes on to state as to why traditional knowledge, shall be subject to protection. Further it talks about traditional knowledge under various national intellectual property laws in India. It also states how to protect traditional knowledge, throwing light on the conventional on biological diversity and Traditional Knowledge Digital Library. The paper also discusses the patent objection cases won by India in U.S., fighting for the Indian traditional knowledge. Lastly, the paper concludes by offering certain suggestions if implemented can lead to more protection of traditional knowledge of indigenous people

Keywords: traditional knowledge, indigenous people, patent, Traditional Knowledge Digital Library

I. INTRODUCTION

“Everything you read in newspapers is absolutely true, except for that rare story of which you happen to have first-hand knowledge”¹

Traditional knowledge is a slice of congruence for indigenous factions. There have been strives to account it for commercial benefits. Hence it becomes pertinent to develop ways of nurturing traditional knowledge thereby ensuring sustainable development that goes hand in hand with the targets of the traditional knowledge holders. For many communities, TK is inseparable from their life and cultural existence of these people. Some communities have passed on knowledge from generation to generation. Traditional knowledge is essential to the

¹Erwin Knoll (1931 – November 2, 1994) was an American journalist who was editor of [The Progressive](#) from 1973 to 1994.

food security and health of millions of people in the developing world. In developing countries, up to 80% of the population depend on traditional medicines to help meet their healthcare needs.² Significant dialogues on the subject of safeguarding traditional knowledge as intellectual property, have been happening at the WTO³.

Few cases of traditional knowledge are as follows: Use of plao-noiby the Thai traditional healers; Ayahuasca vine by Western Amazonian tribes; Use of hoodia cactus by the San people to stave off hunger while out hunting.

Knowledge is not displayed traditional because of antiquity but due to its nature that it has been developed within a traditional perpetuity. Thus, it is the correlation of the knowledge with the tribe that makes it traditional. The important links provided by TK save time and money. Accordingly, a part of benefits should go to the creators of traditional knowledge.

II. WHY TO PROTECT TK?

Traditional knowledge bearers go through drawbacks. Interference from outside sources can diminish the power of transferring knowledge on to future generations. A prodigal necessity is to save the acumen held by communities. There is lack of recognition of efforts of the tradition knowledge creators.

There have been times when, patents have been granted for traditional knowledge related inventions which did not complete the requirements of novelty when compared to prior art. This prior art had traditional knowledge that could not be related while granting of patent. The development of new products or new use of existing products enable the industries to get protection for these products through the formal intellectual property laws.⁴

In Merrel Dow pharmaceuticals Inc V. H.N. Norton & Co Ltd, the Court, codified the scenario as follows:⁵ "Imagine a scientist telling an Amazonian Indian about the discoveries of 1820, saying 'We have found that the reason why the bark is good for fevers is that it contains an alkaloid with a rather complicated chemical structure which reacts with the red corpuscles in the bloodstream. 'The Indian replies: 'That is very interesting. In my tribe, we call it the

²<http://www.who.int/medicines/organization/trm/factsheet271.doc>

³<http://www.ip-watch.org/2015/10/15/wipo-assembly-extends-talks-on-traditional-knowledge-design-sets-policy-for-new-offices/>

⁴Speech of Hon'ble Mr. Justice Vijender Jain, Chief Justice, Punjab and Haryana High Court, in a seminar of Asia Pacific Jurist Association (APJA) on 28.04.2008.

⁵John, M. Shandra, et.al. 'Debt, Structural Adjustment and Biodiversity Loss: A Cross-National Analysis of Threatened Mammals and Birds', Human Ecology Review, 17(1), 2010.

magic spirit of the bark'. Does the Indian know about quinine? My Lords, under the description of a quality of the bark which makes it useful for treating fevers, he obviously does. I do not think it matters that he chooses to label it in animistic rather than chemical terms. He knows that the bark has a quality which makes it good for fever.'

III. TRADITIONAL KNOWLEDGE UNDER VARIOUS LAWS

While examining IP protection for Traditional Knowledge, it is prodigal to know as to under which category of IPR, it can be protected.

In the case of TK, the innovators are the indigenous groups societies that accumulated the knowledge through several generations. In such cases, tracing its author is hard. Hence, allocating ownership right to the real innovator is perhaps not possible.

Another complicated issue in TK protection is the locating of beneficiaries. Identification of beneficiary is a tough task and at most times, when the community holds TK as a whole, it is in a way not feasible to find the set of beneficiaries. Intellectual property rights are exclusive rights: the owners have the right to refrain others from making or in any way using the products for commercial profits without due permission. The way knowledge created in the laboratory is taken as the intellectual property of the innovator, the knowledge generated in fields and forests without taking use of technological assets, shall be taken as the property of the creator. Traditional Knowledge is vital and it should have continuous safety, and not limited protection. This shows the central and strong unjust prejudice between traditional knowledge and intellectual property.

To protect TK with Copyright, it is mandatory that the work must be present in a tangible form. In almost every case, traditional knowledge is passed over to new generation in verbal form. These stories cannot be found in fixed form. As per Indian Copyright law, traditional knowledge does not adhere to the requirements that can make it eligible to copyright protection.

Protecting traditional knowledge as Patents under the Indian Patents Law

- While Patents are given to an individual, Traditional Knowledge is community owned knowledge. Therefore no patent protection can be granted to it.
- Patents in India, are granted to invention that is invented by a single act of invention, whereas traditional knowledge is an effort of many generations.

- Moreover, Section 3 (p) excludes from patentability an invention which, is traditional knowledge.

Combining these points together shows that there is no patent protection on traditional knowledge

Protection of Traditional Knowledge as Trade Secrets

Protecting traditional knowledge as trade secrets is very much possible for the indigenous people. All that needs to be done is to make sure that their knowledge is secret. In general, traditional knowledge is intact known to community members only and therefore, can be protected as trade secret.

But it would not be wrong to say, Indian intellectual property laws fail to give sufficient protection to it.

IV. HOW TO PROTECT TRADITIONAL KNOWLEDGE?

The Convention on Biological Diversity is the introductory international agreement accepting the role and value of indigenous communities. The agreement lays down basic principles for protection of traditional knowledge of indigenous people: respect, preserve and maintain knowledge of indigenous communities; promote wider application with the consent and participation of the holders of such knowledge.

This is a general agreement in the international community that focuses on the need to recognize the traditional knowledge. The duty is to admit it, take steps to ensure that communities are involved in its evolution.

Lately modified patent law of India entails provisions for compulsory disclosure of source and geographical origin of the biological material used in creation while registering for patents in India.

Aboriginal and Torres Strait Islander artists in Australia have obtained a national certification trademark⁶ is an example of how intellectual property system can be put to use to safeguard and commercialise traditional knowledge.

The importance of traditional knowledge of the indigenous communities needs to be accepted by the world. With this realised importance will come the need to protect this knowledge.

⁶<http://www.niaaa.com.au/label.html>

Two types of intellectual property protection are being achieved:

- Defensive protection aims to stop people not from the community from gaining intellectual property rights over the knowledge. India has assembled a searchable database of traditional medicine that would help patent examiners in verification of prior art when studying patent applications.
- Positive protection is the granting of rights to communities to promote their traditional knowledge and benefit from its commercial exploitation. For instance, Brazil, Costa Rica, India, Peru, Panama, the Philippines, Portugal and the United States have all made and adopted sui generis laws that safeguard at least some aspect of TK. The law ensures that indigenous communities are able to participate at all degrees of decision-making.

Traditional knowledge should afford effective protection. Such protection should accept the contribution of the original traditional knowledge holders and the unauthorized acquisition of rights by other parties over traditional knowledge.

Certain other legal concepts for traditional knowledge protection are: Prior Informed Consent; Equitable Benefit Sharing; Unfair Competition: false or misleading claims; Distinctive signs: trade marks, collective marks, certification marks, geographical indications; Customary laws and practices which lay down how traditional communities develop their traditional knowledge.

Countries have laws that aren't strong enough to protect traditional knowledge of indigenous people. This has led to some countries developing their own sui generis systems its protection.

V. CONVENTION ON BIOLOGICAL DIVERSITY AND TRADITIONAL KNOWLEDGE DIGITAL LIBRARY

In 1992 the Convention on Biological Diversity (CBD) states the need to encourage and conserve traditional knowledge. Though two decades have spanned, universally acceptable answers for the protection of traditional knowledge have yet not come up.

Due to its nature, it is transmitted orally. In the absence of any reliable written record, a patent examiner in any country is not able to have access to resources that would challenge the novelty of an application, based on traditional knowledge. The only solution for the

holders of the knowledge is to go against the patent either during the process of granting or after grant.

This is exactly what the Indian Government achieved by going against the patents on basmati and turmeric in the US.

In India, after the neem patent controversy⁷, the urgent need to protect the traditional knowledge of India has gained paramount significance. India has taken a step through Traditional Knowledge Digital Library (TKDL), which helps the examiners of Patent Offices to search for any information regarding substance while granting patents and they can dismiss the grant of patent, if the use of substance is already there in the TKDL list.

In 1999, following the revolutionary successful, Indian challenge of the turmeric and basmati patents which were granted by USPTO, it was agreed that the Indian National Institute of Science Communication (NISCOM) along with the Department of Indian System of Medicine and Homoeopathy would come together to form a Traditional Knowledge Digital Library (TKDL). The data is made available in several international languages. It is based on the International Patent Classification system (IPC).

The TKDL gives legitimacy to existing traditional knowledge, and ensures ease of access of traditional knowledge-related information to patent examiners. This will in high probability prevent the granting of patents, such as the turmeric and neem cases.

VI. SUCCESSFUL CASES FOR INDIA

Turmeric

Turmeric is a plant yielding saffron-coloured rhizomes. It has properties that make it an effective ingredient in medicines, traditionally used to heal wounds.

- In 1995, a patent in US was granted: US patent no. 5,401,504 on use of turmeric in healing of wounds.
- The Indian Council of Scientific and Industrial Research (CSIR) requested the US Patent and Trademark Office (USPTO) to re-examine the patent of turmeric.
- They argued that turmeric has been used for thousands of years for healing wounds in India, traditionally.

⁷US patent No 4946681 and US patent No 5124349 were granted by the US Patent Office to W.R. Grace for extraction and storage processes of *Neem*, which is traditionally used in India since ages for its medicinal properties.

- The claim was supported by documentary evidence of traditional knowledge and a paper that was published in 1953 in the Journal of the Indian Medical Association.
- USPTO revoked the patent.

It was a prodigal case, as it was the first time that a patent based on the traditional knowledge had been “successfully” challenged.

Neem

Neem is a tree usually found in India. It has properties that make it natural medicine, pesticide and fertilizer.

- In 1994 the EPO granted European Patent No. 0436257, for a method of controlling fungi on plants.
- Indian's filed a legal opposition against the patent.
- They submitted evidence that the such effect of neem had been known and used for centuries in India.
- The patent was revoked by the EPO in 2000.

VII. SUGGESTIONS FOR PROTECTION OF TRADITIONAL KNOWLEDGE OF INDIGENIOUS PEOPLE

The following steps could be implemented to ensure the effective protection of traditional knowledge:

- Alternative measures like sui generis system must be taken up.
- Benefit-sharing concept must be encouraged throughout the world.
- National and international enforcement departments in the intellectual property system that verify legal access to updated traditional knowledge.
- Implement positive and defensive systems to protect traditional knowledge shall be sustained.
- Influential participation of indigenous communities in all dialogues.
- Uniform importance to traditional knowledge of all countries.
- Consideration should be taken of the unwritten fact of traditional knowledge, to ensure it is applicable in the patent system internationally.

- All applicants for IP rights, should mention the biological resources for proving that they were acquired with the prior informed consent of community.
- TK should not be used by others in an inappropriate manner, without consent.
- Customary laws shall be taken into consideration while ensuring protection of traditional knowledge of indigenous people..

Suggestion for improvement of Indian Patent act for Traditional Knowledge can be:

- The criteria for patentability is properly applied, checked and modified, as per requirements; the granting of erroneous patents shall be avoided in all circumstances.
- Prior art shall also comprise of what is already known to public and has been in use in any country.
- Development of database on traditional knowledge of all countries would ensure patent examiners do not commit any glitch in relation to prior art.

VIII. CONCLUSION

The current IPR system perhaps is not suitable enough to protect traditional knowledge. While the current system of intellectual property is so woven to be held by individuals or corporations, whereas traditional knowledge has collective ownership of a particular community. As the protection granted is time-bound, traditional knowledge by default goes beyond its scope due to its perpetuity from generation to generation. A sui generis system is therefore the only way to protect and uplift traditional knowledge throughout the world.

The call for protection of TK against misuse throws light on deep issues. This means taking greater account of the needs and expectations of traditional knowledge holding communities, is something that needs to be taken seriously. The traditional qualities mean that traditional knowledge can form the basis of a sustainable development of this planet. Indigenous people are asking for respect and support from scientists because the use of their traditional knowledge is necessary for cultural survival, and it is through their cultures that healthy ecosystems are maintained. If an appropriate culture is implemented, it would benefit all the circles of life. There is an urgent need to form new policies for lesser represented, and value their contribution.