



Research Paper

Politics of Intellectual Property: An Analysis of Traditional Knowledge System in India.

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Abstract

Intellectual property (IP) is increasingly being recognized the world over as an important commercial asset and a driving force in technological progress and socio- economic development of the country. IPR playing an important role, in providing exclusive rights to protect the interest of the creator and encourage investments in research and information creation. Protection of traditional knowledge, innovation and practices associated with biological resources cannot be fall within the conventional legal systems of IPR protection. Because they are inadequate to protect traditional knowledge as it has collective and large ownership whereas conventional IPR is protecting individual property rights.

The allocation of Intellectual property Rights over biological resources has become an important issue in recent years, both in India and abroad. The current IPR policies of the country are the outcome of the increasing concern over the conservation of traditional knowledge and the increasing economic value of these resources. Hence the control over the conservation and protection of these knowledge has been of concern for a long time in all developing countries for the realisation of economic independence. In this context this paper is analysing the politics of Intellectual Property with special reference to the traditional knowledge system of India.

Key Words: Intellectual Property Rights, Innovation and creation, Economic development. Traditional Knowledge.

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The Intellectual property can be loosely defined as creations of human mind. These could be incorporated in creative or inventive works, including distinctive signs or marks. Intellectual property rights are legal rights governing the use of such creations. Intellectual property is divided into two categories:

- Industrial property – this includes patents for innovations, trademarks, industrial designs, and geographical indications.
- Copyright – it includes literary works such as novel, poems, and plays) films, music, artistic works, (like drawings, paintings, photographs and sculptures) and architectural design. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings and broadcasters in their radio and television programs.

Intellectual property rights

Intellectual property is a class of property emanating primarily from the activities of the human intellect human beings are distinguished from animals by the intellectual faculty endowed by the almighty (handbook of Indian patent law and practice, N.R Subbaram)¹Intellectual property rights are like any other property right. They allow creators, or owners, of patents, trademarks, or copyrighted works to benefit from their own work or investment in a creation. These rights are outlined in article 27 of the universal declaration of human rights, which provides for the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions (wipo publication no- 450(e)).²

¹(Subbaram, 1998)

²(what is intellectual property?)

1. **Copyrights**

Law – Copyrights Act 1957, amended in 2012

Ministry – Copyright Office, Ministry of Human Recourse Development

Copyright is a bundle of rights given by the law to the creators of literary, dramatic, musical and artistic works and the producers of cinematograph films and sound recordings. The rights provided under Copyright law include the rights of reproduction of the work, communication of the work to the public, adaptation of the work and translation of the work. Copyrights of works of the countries mentioned in the International Copyright Order are protected in India, as if such works are Indian works. The term of copyright in a work shall not exceed that which is enjoyed by it in its country of origin.³

2. **Patents**

Law – Patents Act, 1970, amended in 2006

Ministry – DIPP, Ministry of Commerce and industry

The object of patent law is to encourage scientific research, new technology and industrial progress. The price of the grant of the monopoly is the disclosure of the invention at the Patent Office, which, after the expiry of the fixed period (20 years) of the monopoly, passes into the public domain. The fundamental principle of Patent law is that a patent is granted only for an invention which must have novelty and utility. It is essential for the validity of a patent that it must be the inventor's own discovery as opposed to mere verification of what was, already known before the date of the patent. A patentable invention, apart from being a new manufacture, must also be useful.⁴

3. **Trademarks**

Law – Trademark Act 1999

Ministry – DIPP, Ministry of Commerce and industry

A trademark is typically a name, word, phrase, logo, symbol, design, image, or a combination of these elements. There is also a range of non-conventional trademarks comprising marks which do not fall into these standard categories, such as those based on colour, smell, or sound (like jingles). A trademark cannot be offensive.

India joins Madrid Protocol, 2013

The Madrid System for the International Registration of Marks offers trademark owners a cost effective, user friendly and streamlined means of protecting and managing their trademark portfolio internationally.⁵

4. **Designs**

Law – Designs Act, 2000

Ministry – DIPP, Ministry of Commerce and industry

Apple iPhones are manufactured in China. But, China is able to capture paltry 2-5% of its value while overwhelming part is cornered by USA. This is mainly attributed to value added by Designing and Research, which is based in USA. Thus, importance of design protection can't be overstressed.⁶

5. **Geographical Indications**

Law – Geographical Indications of Goods Act, 1999

Ministry – DIPP, Ministry of Commerce and industry

A geographical indication (GI) is a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin. In order to function as a GI, a sign must identify a product as originating in a given place. In addition, the qualities, characteristics or reputation of the product should be essentially due to the place of origin. Since the qualities depend on the geographical place of production, there is a clear link between the product and its original place of production.

A geographical indication right enables those who have the right to use the indication to prevent its use by a third party whose product does not conform to the applicable standards. For example, in the jurisdictions in which the Darjeeling geographical indication is protected, producers of Darjeeling tea can exclude use of the term "Darjeeling" for tea not grown in their tea gardens or not produced according to the standards set out in the code of practice for the geographical indication.

³(intellectual property rights and India, 2016)

⁴(intellectual property rights and India, 2016)

⁵(intellectual property rights and India, 2016)

⁶(intellectual property rights and India, 2016)

6. **Plant Varieties**

Law – Protection of Plant varieties and farmers’ right Act, 2001

Ministry – Department of Agriculture and Cooperation, Ministry of Agriculture

With the advent hybrid and genetically modified plants, it is possible to create different quality of plants of same genus or species. There have been unending quest of developing plant varieties that are more productive, more fortified with nutrients, more resistant to vagaries of nature and are reasonably priced. Such development demands lot of expenditure and time just like any other patentable invention. TRIPS agreement says that either a member should cover plant variety in domestic patent law or it should be provided a sui- generis protection. Accordingly, India’s patent law doesn’t cover plant varieties and POPVFR act provides a sui-generis protection. The Central Government has notified 57 crops with their genera and species eligible for registration as new varieties.⁷

7. **Semi-conductors and integrated Layouts**

Law – Semi-conductors and integrated Layout design Act, 2000

Ministry – Department of Electronics and I.T, Ministry of Communication and I.T.

A semiconductor layout design means a layout of transistors and other circuitry elements and includes lead wires connecting such elements and expressed in any manner in semiconductor integrated circuits.

The first registration under the Semiconductor Integrated Circuits Layout-Design Act, 2000 was granted in October 2014. It is expected that the industry will make increased use of this right to protect integrated circuit layout designs.

Under this, a SICLD registry has been created where layout designs of integrated circuit chips can be registered. The Registrar will determine the originality of the design based on the information available with him as also through the mechanism of advertisement of the application for registration of the layout-design and or any input he may receive. On registration, protection is granted for 10 years.

8. **Traditional Knowledge**

Traditional Knowledge Digital Library

A collaboration – between the Council of Scientific and Industrial Research (CSIR) and the Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy (Dept. of AYUSH), Ministry of Health & Family Welfare, Government of India.

There is considerable unexplored potential for developing, promoting and utilizing traditional knowledge, which is a unique endowment of India. Create a sui generis system for protection of traditional knowledge which will safeguard misappropriation of traditional knowledge as well as promote further research and development in products and services based on traditional knowledge.

The creation of the Traditional Knowledge Digital Library (TKDL) has been a major achievement for India which has a vast pool of traditional knowledge. India has been able to thwart attempts to misappropriate its traditional knowledge. The next challenge is to use India’s strength in traditional knowledge for its effective promotion, development and utilization.

The world has faced much vulnerability and among them large spread of contagious and incurable diseases were caused many deaths. From the initial period itself man has the power to fight and treat to the diseases with his skill to made medicines from the nature itself. As an outcome of spreading of diseases, pharmaceutical and biotech companies continue to search for new and better drugs to treat them. Most of these companies have realised that useful compounds for these purposes may be found in the natural resources that indigenous and local communities use. But the protection of such traditional knowledge through any legal methods is still in a dilemma and very controversial when comes to its legal aspects.⁸

IPR Models for the protection of traditional knowledge.

1. Changing IPR law: Certificates of origin. (Sociedad Peruana de Derecho Ambiental)

Patent applications based on use of genetic resources and/or traditional knowledge should require:

- a sworn statement as to the genetic resources and associated knowledge, innovations and practices of indigenous peoples and local communities utilised, directly or indirectly, in the research and development of the subject matter of the IPR application;

⁷(intellectual property rights and India, 2016)

⁸(intellectual property rights and India, 2016)

- evidence of **prior informed consent** of the country of origin and/or indigenous or local community, as appropriate;
- International standardisation of these conditions through an international certification system. Countries providing resources and/or traditional knowledge to issue certificates indicating that all obligations to the country and indigenous people/local community had been fulfilled e.g. prior informed consent, equitable benefit sharing, etc. Patent applications would include these certificates. Without them, they would automatically be rejected.⁹

2. Transforming traditional knowledge into trade secrets. (IAD-supported project, Ecuador).

- Knowledge from communities wishing to participate in the project to be catalogued and deposited in a restricted access database. Each community will have its own file in the database.
- Checks will be made to see whether each entry is not already in the public domain and whether other communities have the same knowledge.
- To avoid the danger of a price war from competition among communities, there would be a cartel developed among those communities sharing a trade secret.
- The trade secret can then be negotiated in a Material Transfer Agreement with the benefits shared between the government and the cartel members.¹⁰

3. Local innovations databases.

Society for Research and Initiatives for Sustainable Technologies and Institutions (SRISTI),

India, has developed databases of traditional knowledge and innovations in close collaboration with local community members.

- Advocates a global registration system of local innovations. Individual and collective innovators would receive acknowledgement and financial rewards for commercial applications of their knowledge, innovations and practices.
- Links would be built between small investors, entrepreneurs and innovators for mutual financial benefits.
- Individuals or communities could seek IPR protection in such forms as inventors' certificates and petty patents. (*The intellectual property law of Kenya was amended in 1989 to provide for a petty patent for traditional medicinal knowledge.*)
- All national patent offices should be able to access local innovation databases when carrying out prior art searches and examinations.¹¹

Initiatives of Government of India towards protection of IPR

1. The Government has brought out A Handbook of Copyright Law to create awareness of copyright laws amongst the stakeholders, enforcement agencies, professional users like the scientific and academic communities and members of the public.
2. National Police Academy, Hyderabad and National Academy of Customs, Excise and Narcotics conducted several training programs on copyright laws for the police and customs officers.
3. The Department of Education, Ministry of Human Resource Development, Government of India has initiated several measures in the past for strengthening the enforcement of copyrights that include constitution of a Copyright Enforcement Advisory Council (CEAC), creation of separate cells in state police headquarters, encouraging setting up of collective administration societies and organization of seminars and workshops to create greater awareness of copyright laws among the enforcement personnel and the general public.
4. Special cells for copyright enforcement have so far been set up in 23 States and Union Territories, i.e. Andhra Pradesh, Assam, Andaman & Nicobar Islands, Chandigarh, Dadra & Nagar Haveli, Daman & Diu, Delhi, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Madhya Pradesh, Meghalaya, Orissa, Pondicherry, Punjab, Sikkim, Tamil Nadu, Tripura and West Bengal.
5. The Government also initiates a number of seminars/workshops on copyright issues. The participants in these seminars include enforcement personnel as well as representatives of industry organizations.¹²

⁹ (bodeker, 2000)

¹⁰ (bodeker, 2000)

¹¹ (bodeker, 2000)

¹² (adukia)

Traditional medicines and IPR an Indian perspective

Traditional medicines may be regulated as prescription drugs, over-the-counter medicines or dietary supplements and marketed with medical, health or nutrient content claims respectively. Modern regulations on traditional medicine began with the Drugs and Cosmetics Act of 1940, which contained a separate chapter and rules for Ayurveda, Siddha and Unani drugs. The Act, amended in 2000, requires government licensing of manufacturers and sellers of traditional medicines. It contains regulations for misbranded and adulterated drugs, prohibits the manufacture and sale of certain drugs, and stipulates penalties for regulatory violations. The central government is also empowered to inspect and analyse traditional medicines.¹³

Manufacturers of traditional medicines are now required to adhere to good manufacturing practices, as well as requirements related to factory premises and heavy metal contents. Heavy metals are sometimes considered active ingredients of traditional Indian medicines rather than contaminants, but heavy metal testing is now mandatory. In addition, heavy metals may not be present above permissible limits, and labelling must note the presence of heavy metals. Traditional medicine manufacturers are also required to adhere to information contained in national pharmacopoeias and monographs. Safety requirements for traditional medicines are less strict than those applied to pharmaceuticals, and there is generally no submission requirement for clinical trials demonstrating safety and efficacy. The Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy (AYUSH) is primarily responsible for the regulation of traditional medicines in India.¹⁴

Protecting traditional medicine

Current IP regimes were not designed to accommodate traditional knowledge, and many experts have claimed that conventional patent laws are inadequate to protect TK and biodiversity. Patent protection is limited in duration, and that may be problematic for TMK that TMK holders believe should be protected retroactively and/or indefinitely. TMK holders are also presented with significant obstacles in attempting to obtain patents for TMK. The most significant challenge may be the requirement for novelty in any new invention. In the EU, if an invention becomes publicly available in any way before a patent application is filed, the application will be rejected. The U.S. has a similar requirement with a one-year grace period. Making the invention publicly available may include selling the invention, disseminating information about the invention, or documenting the invention in a way that documentation can be accessed by a third party. Because many traditional medicines have been used for generations, disseminated in local communities, and documented in publicly available sources, these medicines may fail to qualify for patent protection. The U.S. patent for turmeric was invalidated when evidence was provided that a traditional use had previously been documented in an ancient Sanskrit text as well as other sources.¹⁵

The requirement for inventiveness is also a significant barrier to patenting traditional medicines. Pharmaceutical drugs derived from natural products involve some form of alteration or purification, and such compounds may be considered a novel and inventive step over naturally occurring substances. Because herbal medicines typically comprise natural products in their raw form, it may be difficult to claim that these remedies are novel and involve an inventive step (or, in U.S. terminology, are non-obvious). It can also be problematic with TM to differentiate between prior art and a claimed invention, and ascertaining that difference is a prerequisite for assessing inventive step. In addition, patent applications require the identification of inventors, and determining inventorship of TMK may be difficult.

Finally, financial and human resource constraints can impair the ability of TMK holders to obtain patent protection. Applying for a patent is a complicated process, requiring technical expertise and the services of trained legal professionals. The cost of applying for a patent can be prohibitive for TK holders within the framework of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC), and WTO.¹⁶

The cost of the Neem case is another interesting issue; according to CSIR, the entire process cost them 500,000 rupees, nearly 14,000 dollars using the average exchange rate during 1997 Patent cases can cost but still sufficiently expensive to exclude many poor indigenous communities from initiating an opposition procedure.

¹³ (abbott, 2014)

¹⁴ ibid

¹⁵ (abbott, 2014)

¹⁶ (abbott, 2014)

IPR POLICY OF KERALA 2008

The major issue being addressed by the Kerala IPR Policy 2008 is with regard to protection of traditional knowledge and biodiversity associated with such knowledge, which demands attention for the following reasons.

- Traditional Knowledge is not sufficiently codified;
- There is no formal mode of transmission of TK; and
- TK is not coming in the ambit of any legally defined Intellectual Property Rights.
- It is an advantageous factor that it largely remains outside the domain of capitalists

The main concern of the Government is that unlike other knowledge categories which are mostly deciphered in books or embedded in the biological system, this kind of knowledge attributes to and forms the basis of livelihoods of many TK practitioners, and hence the absence of any legal property rights on such knowledge may render an opportunity for the private appropriation of the Traditional Knowledge by multinational corporate entities with minor modifications thereon and thus making it eligible for patenting in their name. This will in turn adversely affect the interests of many who practices Traditional Knowledge for their bread and butter.

IPR policy of Kerala 2008 – objectives

- To Institute a Legal arrangement for the protection of traditional knowledge and biodiversity associated with such knowledge, given the fact that traditional knowledge forms the basis of livelihoods of many TK practitioners and the absence of any legal property rights on such knowledge may render an opportunity for the private appropriation of the Traditional Knowledge by multinational corporates. State proposes to commit all traditional knowledge, including traditional medicines, the practice of which sustains livelihoods of many, to the realm of “Knowledge Commons” and not to the “Public Domain”. While the Policy envisages creating property rights on traditional knowledge, all the right holders will be deemed to be holding their rights under an obligation that they shall permit others the use of the knowledge in their possession for non-commercial purposes.
- Setting up of a Supervisory Council on Intellectual Property (SCIP) to provide overall supervision in matters relating to intellectual property rights with Chief Minister as its Chairman and Law Minister as its Vice-Chairman.

SCIP will help any potential patent applicant who asks for its assistance to prepare proper patent applications. It will disseminate knowledge in the state about intellectual property rights.

- To declare the stand of the Government with regard to the ownership of Intellectual property rights over the outcome of research in state government-funded and state government-aided institutions, especially given the current trend of outsourcing from the west.

Initiatives by Kerala government

- TK associated with biodiversity includes both documented (codified) as well as non-documented (oral tradition) information, which are accepted as cultural components of biodiversity. If these are not preserved and documented, they are likely to be lost forever in the modern materialistic world.
- There is scope and urgent necessity to carry out systematic documentation of TK associated with Biodiversity and is also highly essential to protect the TK under sui generis system by establishing different viable models. Systematically documented TK will provide valuable information that is highly beneficial to the research workers for developing new processes, products, patenting, technology transfer, commercialisation, benefit sharing etc. It is also possible to make TK cost effective and helpful for developing appropriate technology.

It will further lead to the integration of the TK into the planning process for the developmental activities at the grass root level. Formulation and implementation of effective technical and legal frame work/policy to check bio-piracy is an area to be looked into.

II. CONCLUSION

“We do not inherit the earth from our ancestors....

.....We borrow it from our children”

(Indian proverb)

The protection of traditional knowledge as of the proverb says is aimed to protect the environment. While saving the traditional medicinal plants, trees etc. it became a wealth to the coming generations also. The natural resources are not only for our usage but we have to preserve them to the coming generations also. As Mahatma Gandhi says we have everything in the nature for our needy but no for our greedy.

Intellectual Property Rights are the area which addresses the protection of innovations and creations and they are protecting traditional knowledge under patents and geographical indication.

Across the cultures, knowledge about use of medicinal plants exists in the form of local folklore available with families, tribes and cultures, handed down from generation to generation. Some of this knowledge also exists in written form as well, but is difficult to interpret due to the local script used.

Due to this improper and unstandardized documentation of traditional knowledge, patents are often granted to parties who are traditionally not the owners of this knowledge, thereby, leading to conflict in trade interests of the parties involved. Moreover, a part of the profits made by the patent holders also does not flow back to the holders of traditional knowledge, thus leading to discontent amongst the latter.¹⁷ With onset of many incurable diseases, medicinal plants provide us with a new hope. Traditional knowledge about wide application of medicinal herbs in various communities has even led to discovery and development of drugs that are now used as therapeutic agents. Some prominent ones are digitalis, morphine, colchicine, artemisinin, podophyllotoxin, salicin, etc.¹⁸

India, a nation having very rich natural resources and traditional knowledge even difficult to believe to be existed. So it is her priority to protect this traditional knowledge because it has been largely misused by many others for other purposes. Traditional medicines are the largely misused knowledge as they are not properly documented and protected under a fine and definite rule and authority.

As I studied about the traditional knowledge and impact of Intellectual Property Rights in the traditional knowledge of Kerala there are many obstacles to the protection of traditional knowledge like the lack of proper definition to traditional knowledge. The findings of the study are below:

Intellectual Property Rights does not protect Traditional knowledge properly. For verification we have these points:

There are three type of barriers in patenting traditional knowledge:

- Substantive barrier- it is turned as inventiveness is treated as isolated or individual inventor but traditional knowledge have collective ownership.
- Evidentiary barrier- is that by the rule it is important to put the exact moment of invention but for traditional knowledge it is very difficult to find a particular moment of invention.
- Administrative barrier- it happening during the granting of patent. The problem is that the judicial and administrative proceedings are long and costly which is turned into a barrier to less developed nations and poor

III. Suggestions

- Proper documentation of traditional knowledge which are orally transmitted to generations should be done.
- Schools, colleges and other educational institutions should include Intellectual property Rights as a part of their syllabus
- Functions of institutions like KTKA, SCIP, NBA, etc. should be promote the welfare of the society.
- Government funded programmes related IPR and traditional Knowledge should not act as an information provider.
- Knowledge developed by the indigenous societies has aided scientists and they should therefore be acknowledged and accordingly rewarded.

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