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Analysis on the Protection of Traditional Knowledge with Patents

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ABSTRACT

Traditional knowledge (TK) refers to indigenous communities' knowledge systems, which are frequently related to their surrounding natural environment. Globalisation and the increased availability of this knowledge, as well as the implementation of intellectual property systems in the developing world, have made Traditional knowledge and its relationship with the IPR-system a highly debated and complicated issue. Patents have been granted with knowledge that stems from Traditional knowledge, some of these patents have been challenged and accused of being examples of "biopiracy". Working groups affiliated with the Convention on Biodiversity and the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore are primarily in charge of attempting to better adapt the patent system to Traditional knowledge. Because of, among other things, the biopiracy controversy, much of the debate has been mired in what can be seen as postcolonial anger and guilt; it is highly politicised and frequently divorced from the legal issues at hand. The cases highlight issues related to judging the patent criteria of novelty and inventive step in relation to Traditional knowledge, as well as the issue of indigenous communities' moral rights in terms of protection from infringement of their religious identity. This paper attempts to reclaim the issue from the political arena by viewing the imperfect interaction between the two knowledge systems as a legal issue rather than a political one.

Keywords: *Traditional Knowledge, Patent rights, Intellectual property rights, ancient environment.*

I. INTRODUCTION

Traditional knowledge can be defined as knowledge of practise and skills that have been developed or sustained and that have been passed down from generation to generation within a community and are frequently part of its cultural or spiritual identity. Innovations based on traditional knowledge may benefit from a trade mark, geographical indication, patent, or it may be protected as confidential information or even a trade secret. Though all of these are common nowadays, the issue is the successful documentation of traditional knowledge under the Indian

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Patent Act[2]. The Indian Patent Act protects indigenous people's rights in the form of known traditional knowledge. Following the passage of new legislation in India concerning traditional knowledge and the protection of other indigenous products, in recent years, there have been issues with indigenous product documentation, and traditional knowledge of Indian products has been patented in other countries, leading to biopiracy of Indian traditional knowledge by other countries[3].

Patent, trademark, and geographical indication protection may be available for TK-based innovations, or they may be protected as a trade secret or confidential information. This paper aims to investigate the protection afforded to traditional knowledge, as well as the significance of traditional knowledge digital libraries and cases of misappropriation of traditional knowledge[4].

II. TRADITIONAL KNOWLEDGE

There is an African proverb that:

"When an old person of knowledge dies, then a whole library disappears."[5]

Traditional knowledge, according to this proverb, is one that has deep roots in every community around the world. And this knowledge was more beneficial to their long-term development and livelihood. To put it simply, Traditional Knowledge (TK) is a body of knowledge that has been accumulated through the accumulation of a wealth of experience that has been tested and tried over a long period of time in a specific place or community, where the people are well adapted to the local environment and culture, and where they do not seek to maximise their income but instead seek to minimise their risks. It used to provide solutions to the problems faced by the mankind. Traditional knowledge need not be very old in all the cases. Traditional knowledge is knowledge which is traditional only to the extent that its creation and use are part of the cultural traditions of a community. "Traditional", therefore, does not necessarily mean that the knowledge is ancient or static. It is representative of the cultural values of a people and thus is generally held collectively. It is not limited to any specific field of technology or the arts. It is owned by a community and its use is often restricted to certain members of that community[6].

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[2] Cheshta Sharma, Traditional knowledge and Patent Issues, Indian institute of patent and trademark, dec.10.2022,10.30PM, https://www.iipta.com/traditional-knowledge-patent-issues/

[3] Ibid

[4] Greeshma R and Saleem Ahmed, Traditional knowledge and patent issue relating to and in reference with basmati, golden rice, neem and turmeric, (International journal for current advanced research, ijcar),(dec. 11.2022, 10 PM), Traditional knowledge and patent issue relating to and in reference with basmati, golden rice, neem and turmeric | International Journal of Current Advanced Research (journalijcar.org)

[5] Prasanth Reddy t, Sumathi Chandrasekaran, India's Intellectual Property Dilemmas, p.250, (Oxford, 2017)

[6] Daniel Gervais, Traditional Knowledge & Intellectual property: A Trips Compatible Approach,), pp.140-41,

WIPO has rightly pointed out that the bulk of the world's traditional knowledge and biodiversity lies in the developing countries, whereas the capacity to extract commercial benefit from these still resides largely in the developed world[7]. The conventional intellectual property system considers traditional knowledge as part of the public domain and therefore free for anyone to use. This opens up traditional knowledge to unwanted misappropriation and misuse. The issue of protection of traditional knowledge has received increasing importance at international level in the recent past due to various factors, such as the recognition of traditional knowledge as a valuable resource, misappropriation of traditional knowledge, rapid loss of traditional knowledge, conservation of biological diversity, protection of the rights of indigenous communities, etc. The traditional knowledge has been debated at many international fora, such as during the negotiation of Convention on Biological Diversity and Nagoya Protocol. TRIPS Council, Intergovernmental Committee Folklore, Traditional Knowledge and Genetic Resources, etc[8].

There are several other terms to denote traditional knowledge, such as "indigenous cultural and intellectual property", "indigenous heritage" and "customary heritage rights". etc. WIPO uses the term "traditional knowledge" to refer to 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. "Tradition-based" refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment[9].

For an instance, the Neem and its use can be registered under traditional knowledge by indigenous people of India for its medical uses which includes first aid, cosmetic nature and for curing inflammation and redness caused by any medical issue. In South India, the anti-fatigue agent based on a medicinal plant called “Jeevani” is a piece of traditional knowledge known within „Kani Tribes‟. This is based on an herbal plant used for medical purpose and it is called “arogyapaacha”. Certain another traditional knowledge are as follows:

- Ulcer treating medicine in Thai traditional healing method is by the use of “platonic‟

MICHIGAN STATE LAW REVIEW (Spring 2005).

[7] WIPO, Technology Based on Traditional Knowledge and Genetic Resources, p. 10, WIPO Magazine (Geneva, April 2007)

[8] V K. Ahuja, Law relating to Intellectual Property Rights, 3rd edtn. P.664, (Lexis Nexis, 2022)

[9] ibid

- The Western Amazon tribes prepare various kind of medicines by using a plant called "Ayahuasca" vine.
- The San people stave off hunger by using „hoodia" cactus while out hunting.

III. Patent laws

Patent is an exclusive right (practically, a monopoly right) conferred by Patent Office on an inventor to exploit his invention subject to the provisions of Patents Act, 1970 for a limited period of time. During this period, the inventor is entitled to exclude anyone else from commercially exploiting his invention. The right of patent is statutory in nature and the said right stems from the statute, i.e., Patents Act. Patent relates to invention. As per Halsbury's Laws of England, the word patent is used denoting a monopoly right in respect of an invention[10]. In Telemecanique & Controls (I) Limited v. Schneider Electric Industries SA[11], the Division Bench of Delhi High Court observed that patent created a Chapter statutory monopoly protecting the patentee against any unlicensed user of the patented device. "A monopoly of the patent is the reward of the inventor.

The expression "patent" connotes a right granted to anyone who invents or discovers a new and useful process, product, article or machine of manufacture, or composition of matter, or any new and useful improvement of any of those. It is not an affirmative right to practice or use the invention; it is a right to exclude other from making, using, importing, or selling patented invention, during its term. It is a property which the state grants to inventors in exchange with their covenant to share its details with the public. The exclusive rights conferred by the Patents Act on the inventor can be exercised by a person other than the inventor with the latter's previous authorization. The person to whom a patent is granted is known as patentee.

If the patent is granted for a product, the patentee has the right to prohibit others from manufacturing, using, offering for sale, selling, or importing the patented product in India. If the patent is for a process, the patentee has the right to prevent others from using the process, using the product obtained directly from the process, offering for sale, selling, or importing the product obtained directly from the process in India.[12]

Before filing an application for patent grant in India, it is critical to understand "What is Not Patentable in India?" Any invention that is (a) frivolous, (b) obvious, (c) contrary to well-established natural laws, (d) contrary to law, (e) morality, (f) injurious to public health, (g) a

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[10] Bajaj Auto AG v. TVS Motor Company Ltd, 2008 (36) PTC 417 (Mad.) at p. 439
[11] Telemecanique & Controls (I) Limited v. Schneider Electric Industries SA, 2002(24) PTC 632 (Del) (DB)
[12] See supranote 7

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mere discovery of a scientific principle, (h) the formulation of an abstract theory, I a mere discovery of any new property or new use for a known substance or process, machine or apparatus, (j) a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof, (k) a mere arrangement, rearrangement, or duplication of known devices, (l) a method of agriculture or horticulture, and (m) inventions relating to atomic energy are not patentable in Indian.[13]

IV. Traditional knowledge and patent issues

Traditional knowledge, genetic resources, and folklore have sparked a lengthy and fascinating debate between developed and developing countries. Traditional knowledge is in the public domain, and there is no such thing as "biopiracy," so it can be patented, according to developed countries[14]. On the other hand, developing countries argue that the current intellectual property right system creates unfair situations such as misappropriation of traditional knowledge, biopiracy, and unsustainable use of biodiversity; they demand disclosure of origin, benefit sharing, and are not liable to be patented. There have recently been several cases of bio-piracy of Indian traditional knowledge.[15] First, it was the patent on wound-healing properties of haldi and now patents have been obtained in other countries on hypo glyceimic properties of karela, brinjal, etc.

Indigenous people face numerous challenges when attempting to protect their traditional knowledge under intellectual property laws because they fail to meet the requirements for intellectual protection. For a set period of time, patents grant a legal monopoly on the use, production, and sale of an invention, discovery, or innovation. To be patentable, an invention or innovation must generally meet three criteria: novelty, non-obviousness, and industrial application. It must meet all three criteria, and if any of them can be refuted, the patent will be denied. [16] As a result, because most traditional knowledge is ancient and has been used for a long time, it cannot meet the requirements of novelty and inventiveness and thus does not qualify for patent protection may be difficult to meet[17].

Many patents have been granted for traditional knowledge that did not meet the patentability

[13] Vijay Pal Dalmia, India: Patents Law in India - Everything You Must Know, Mondaq, (dec. 11.2022, 12 .00 AM), https://www.mondaq.com/india/patent/656402/patents-law-in-india--everything-you-must-know
[14] Jay Erstling, "Using patent to protect traditional knowledge", Texas Wesleyan Law Review, vol. 15 available at open.wmitchell.edu/cgi/viewcontent.cgi?article=1187&context=facsch (visited on 11 DEC. 2022, 11.30 PM)
[15] Intellectual property and traditional knowledge, genetic resources and folklore, available at www.mpil.de/shared/data/pdf/pdfmpunyb/14_thesis_rosa_12.pdf (visited on 11TH DEC 2022)
[16] Traditional knowledge and intellectual property, available at shr.aaas.org/tek/handbook/handbook.pdf (visited on 11th Dec. 2022, 11 .30 PM)
[17] See supra note 14

criteria when compared to the relevant prior art. This prior art, which consisted of traditional knowledge, was not recognised by the patent granting authority during the patent application examination. Because requirements such as novelty and inventive step are established by comparing the claimed subject matter with the relevant prior art, identifying prior art is a cornerstone for the substantive examination of applications for these titles.[18]

The entire vocabulary of western legal practises and intellectual property protection law carve out exclusive rights to an individual to exploit specific works of human ingenuity. A patent, for example, grants an inventor the exclusive right to develop, control the use of, and market an innovative industrial process or product for a specific period of time. In general, these forms of intellectual property protection do not provide the necessary protection for indigenous and local people's Traditional Knowledge, innovations, and rights. One of the primary reasons is that the locus of ownership for knowledge systems that are essentially intergenerational and products of communal endeavour cannot be clearly identified.[19]

By making this TKDL information available, via Access and Non-Disclosure Agreements, to six major international patent offices, the TKDL, coupled with India’s global bio-piracy watch system, has, according to Indian authorities, achieved dramatic success in preventing the grant of erroneous patents, at minimal direct cost and in a matter of a few weeks. The World Intellectual Property Organization (WIPO) is also very active, with work currently underway in its Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. WIPO‟s 184 member states are negotiating an international legal instrument intended to ensure the effective protection of traditional knowledge and traditional cultural expressions, and to regulate the interface between IP and genetic resources.[20] The database, which took 200 researchers eight years to compile by meticulously translating ancient Indian texts, will now be used by the European Patent Office to check against "bio prospectors".[21]

Turmeric case:

In 1995, two Indian nationals at the University of Mississippi Medical Centre were granted US

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[18] Dr Elizabeth Varkey, Traditional knowledge- the changing scenario in India, available at www.law.ed.ac.uk/ahrc/files/67_varkeytraditionalknowledgeinindia03.pdf (visited on 11th dec.2022, 11.45 PM)

[19] Rajshree Chandra, “Knowledge as Property, Issues in The Moral Grounding of Intellectual Property Rights”, Oxford University Press,2010, New Delhi, p.292.

[20] PROTECTING traditional knowledge, available at http://oami.europa.eu/ows/rw/pages/OHIM/OHIMPublications/newsletter/1103/MORENEWS/morenews2.en.do (visited on 11th dec 2022 at 12.00AM)

[21] India moves to protect traditional medicines from foreign patents available at http://www.guardian.co.uk/world/2009/feb/22/india-protect-traditional-medicines (visited on 11th dec 2022, 12.05AM)

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patent no. 5,401,504 on "use of turmeric in wound healing".

- The Indian Council of Scientific and Industrial Research (CSIR) requested the US Patent and Trademark Office (USPTO) to re-examine the patent.
- CSIR argued that turmeric has been used for thousands of years for healing wounds and rashes and therefore its medicinal use was not novel.
- Their claim was supported by documentary evidence of traditional knowledge, including an ancient Sanskrit text and a paper published in 1953 in the Journal of the Indian Medical Association.
- Despite arguments by the patentees, the USPTO upheld the CSIR objections and revoked the patent.

Neem:

In 1994 the EPO granted European Patent No. 0436257 to the US Corporation W.R. Grace and USDA for a "method for controlling fungi on plants by the aid of hydrophobic extracted neem oil". • In 1995 a group of international NGOs and representatives of Indian farmers filed a legal opposition against the patent.

- They submitted evidence that the fungicidal effect of extracts of neem seeds had been known and used for centuries in Indian agricultural to protect crops, and thus was the invention claimed in EP257 was not novel.
- In 1999 the EPO determined that according to the evidence "all features of the present claim have been disclosed to the public prior to the patent application… and [the patent] was considered not to involve an inventive step"

V. Conclusion

The entire vocabulary of western legal practises and intellectual property protection law carve out exclusive rights to an individual to exploit specific works of human ingenuity. A patent, for example, grants an inventor the exclusive right to develop, control the use of, and market an innovative industrial process or product for a specific period of time. In general, these forms of intellectual property protection do not provide the necessary protection for indigenous and local people's Traditional Knowledge, innovations, and rights. One of the primary reasons is that the locus of ownership for knowledge systems that are essentially intergenerational and products of communal endeavour cannot be clearly identified. Traditional knowledge holders must be able to participate actively in the procedure without bearing the burden of combating those seeking patents. Misappropriation of traditional knowledge will be reduced and the gap between

developing and developed countries will be narrowed once traditional knowledge is protected from foreign intellectual property rights and the original holders of the knowledge benefit from its commercialization.

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