

CAN INTELLECTUAL PROPERTY RIGHTS REGIME PROTECT THE INTERESTS OF TRADITIONAL KNOWLEDGE?

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ABSTRACT

Traditional knowledge (TK) has been transformed into global knowledge with the pace of globalization which is not threat of TK. Nevertheless; western countries' exploitation of monopoly rights over this TK without acknowledgement is a crucial matter of concern. Therefore, the World Intellectual Property Organization's Intergovernmental Committee (WIPO's IGC) recently is playing a significant role to develop a text based negotiation to protect TK. After analyzing the shortcomings of the existing intellectual property (IP) system, this article scrutinizes the current controversial challenges on TK protection and examines the current IGC's discussions. This article mainly analyzes the major recommendations of IGC in order to propose guidance for protecting TK through IP in better ways or through alternative forms such as sui generis system. WIPO's IGC is the prime area in which both developing nations and indigenous communities have claimed their desired aims concerning the interests of TK holders. It ends with some propositions for achieving a result and suggests that now it's time to go beyond intellectual property rights to settle this controversial issue.

I. INTRODUCTION

Traditional knowledge (TK) is nothing but the inheritance of ideas from generation to generation. Moreover, it is geographically local as well as culturally specific. All these features make TK different from other objects of intellectual property (IP) law. TK has been transformed into global knowledge with the pace of globalization which is not threat of TK, but western countries' exploitation of monopoly rights over this TK without acknowledgement is a crucial matter of concern.¹ There are many reasons for which developing countries want to protect TK such as- to improve the livelihoods of TK holders and communities, to benefit national economy, to conserve the environment and to prevent bio-piracy.² Therefore, the developing and least

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¹ J. Janewa O., 'Emerging Scholars Series: A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law', (2011) *15 Intellectual Property L. Rev.* pp150-165.

² Dutfield G., *Intellectual property, biogenetic resources and traditional knowledge* (Earthscan Publications, London, 2004) at p 97.

developed countries effectively take part in the significant negotiations regarding TK in the World Intellectual Property Organization's (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).³

The commercial value arising from TK generates the opportunities of economic development for developing and least-developed countries. This is the reason; these countries are struggling to revise the intellectual property rights (IPRs) system for the prevention of misappropriation of such knowledge.⁴ Now economic world face a challenge to make stability between the actual and potential economic achievement derived from the exploitation of traditional knowledge. Developing countries must be consensus in some issues that they should not adopt any proceedings that go against the rights of TK holders. It is apparent that traditional people and communities may not be successful to avail the opportunities of intellectual property rights (IPRs). If the issues relating protection of TK is framed in the discourse of western IPRs, it may not be successful unless it includes broader negotiations between traditional peoples and communities, national government, business and scientists.

II. DILEMMAS ON DEFINITION OF TK

Different scholars defined TK in a different way depending on their special intellectual persuasion but there is no universally adopted definition of TK. Traditional knowledge is a collective knowledge of a society. By the interaction of people for the long histories these are preserved and developed in the natural environment. In a broad sense TK includes Traditional Cultural Expressions (TCE).

Johnson defines TK as:

‘A body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use.’⁵

³ The IGC commenced its life in 2001; following discussions on the WIPO General Assembly at twenty-Sixth (12th Extraordinary) Session. The creation of IGC is a significant step to expand universal adequate and reasonable elucidation for protecting genetic resources, traditional knowledge, and folklore.

⁴ Patel. S. J., ‘Can the Intellectual Property Rights System Serve the Interests of Indigenous Knowledge?’ in Stephen B. Brush & Doreen Stabinsky (eds), *Valuing Local Knowledge: Indigenous People and Intellectual Property Rights* (Island Press, Washington, 1996) at pp 313-314.

⁵ Johnson M., ‘Research on Traditional Environmental Knowledge: Its Development and Its Role’, in Johnson M (eds), *Lore: Capturing Traditional Environmental Knowledge*, (International Development Research Centre, Ottawa, 1992) at pp 3-4.

According to Article 8j of UN Convention on Biological Diversity (CBD) traditional knowledge refers to “*the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles.*”⁶

According to Daniel Gervais-

‘Characteristically, traditional knowledge is thus knowledge that: 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; is representative of the cultural values of a people and thus is generally held collectively; is not limited to any specific field of technology or the arts; is ‘owned’ by a community . . .’⁷

As TK flows from generation to generation, a flexible and unrestricted approach is accurate for TK; instead of limiting and keeping it in a specific area. Since various parts of TK need various kinds of protection, it will be complicated to design a single system for protecting TK. In respect of TCE it needs protection of copyright embracing moral right. However, it is a crucial issue whether copyright is the accurate system for protecting TCE because in most cases TCE does not fulfill the requirements regarding authorship and innovation.⁸ On the other side, controversial views are found in respect of the protection of new varieties plants and traditional medication. Except patent and copyright, even trade secret has been recommended for TK protection.⁹ It is identified that only separate system can provide healthier protection than present IP system.¹⁰ A number of experts have still confused about the

⁶ Convention on Biological Diversity (1992) <<http://www.cbd.int/doc/legal/cbd-en.pdf>> (last visited 25 January 2015).

⁷ Gervais, D., ‘Traditional Knowledge & Intellectual Property: A TRIPS Compatible Approach’, (2005) *MICH. ST. L. REV.* pp 137, 140–141

⁸ Ravi, S., K., ‘Traditional Knowledge and Intellectual Property Rights: A Note on Some Issues, Some Solutions and Some Suggestions,’ (2008) 3 *Asian Journal of WTO & International Health Law and Policy* at p.85.

⁹ Gehl, S., P., *Defining an Intellectual Property Right on Traditional Medicinal Knowledge: A Process-Oriented Perspective* (2003) U.N. University Institute for Technology <<http://www.intech.unu.edu/publications/discussion-papers/2003-4.pdf>> (last visited 20 January 2015).

¹⁰ Bhatti, S., *New Forms of Sui Generis Protection Relevant for the International Regime (GR and/or TK)* (2004) International Expert Workshop on Access to Genetic Resources and Benefit Sharing <http://www.conabio.gob.mx/institucion/cooperacion-internacional/doctos/version_ingles.pdf> (last visited 25 January 2015).