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Dr. Tejashree P Patankar
R.A. Podar College of
Commerce and Economics,
Matunga, Mumbai,
Maharashtra, India

Study on protection of traditional knowledge and traditional culture expression in India

Dr. Tejashree P Patankar

Abstract

Perpetual Protection can a possible characteristic of traditional knowledge. As well as the protection of useful historical communal cultural works, and protection of knowledge that is not considered to be inventive or creative according to the standards of intellectual property law. This is because this subject matter does not easily fit within the existing categories of intellectual property. Therefore, a Sui Generis regime could result in a new intangible property right that will exclude anyone other than the rights holders from making use of this intergenerational knowledge without consent.

The current system is based on an intellectual property model of the traditional knowledge right of some developing countries and traditional knowledge proponent's support. It has the potential to produce problems not unlike those which have resulted under the current system. Thus, an international sui generis intellectual property right for traditional knowledge may hinder access to affordable knowledge goods, including for indigenous and local communities.

Keywords: traditional knowledge, traditional culture expression, sui generis, positive protection indication, defensive protection indication

Introduction

Even at national level as well as international level, there is a need to frame appropriate and well constructive Intellectual Property rights (IPR) policy. These IPR policy can be a progressive step by the government towards building an effective IPR regime. The effective implementation of the framed IPR Policy can safeguard, protect and preserve our rich Traditional knowledge and Traditional Cultural Expression.

Background of the concepts in the question

In relation to the above situation the understanding of the word 'Sui Generis' according to [1] Black's Law Dictionary defines "Sui generis" as of its own kind or class; unique or peculiar. The term is used in intellectual property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines.

A Sui generis system is a system specifically designed to address the needs and concerns of a particular issue. In other words, what makes an IP system a sui generis one is the molding of its features to properly accommodate special characteristics and specific policy needs.

Issues in research paper

A per the above situation, it is necessary to analyse the shortcome in conventional IP system in relation to TK and TCES. The shortcomings the conventional IP system for TK and TCES has created importance of Sui generis law for TK and TCE [2]. The gap or the shortcomings in the conventional IP system in relation to TK and TCES are as follows:

- According to my understanding the conventional IP systems revolves around novelty, inventive steps, non-obviousness or originality, also knowledged should be Fixed in material. As such the formal requirement of IP protection such as novelty, inventive step or non-obviousness (for TK), or originality (for TCES) are not considered. This is because all the TK and TCES often date back prior to the time periods associated with conventional IP systems, or are developed in a more diffuse, cumulative and collective

Correspondence
Dr. Tejashree P Patankar
R.A. Podar College of
Commerce and Economics,
Matunga, Mumbai,
Maharashtra, India

¹ WIPO Academy Advanced Distance Learning Course on Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions (DL203E20S1) module4

² ibid

manner. It is difficult to establish at a fixed period or time of invented knowledge to making specific steps such as invention or authorship.

- It has been observed that TK and TCE is always in unfixed form or in public domain. In other words, It is unnecessary to convert the traditional knowledge into fixed in material form. It is always found the Traditional Knowledge and Traditional Cultural Expression is preserved and mainly transmitted by oral, narrative and other non-material forms (Unfixed form). It is now high time to convert the traditional knowledge into Fixed In Material Form in IP law .
- The custodianship and guardianship is major issue in TK and TCE protection. This custodianship and guardianship needs to be addressed in protecting the TK and TCE. The Customary laws and protocol frequent informal nature of TK and TCEs that define ownership, or other relationships. Such as custodianship and guardianship that form the basis of claims of custodianship, cultural affinity and community responsibility.

Tentative Solution

On the basis of the above situation and background information ^[3], there are five reasons why TK should be protected; these are: Equity, Conservation of biodiversity, preservation of traditional practices, prevention of bio piracy, and importance of TK in development.

A key initial step, for the development of any legal regime or approach for the protection of TK/TCEs, including SUI Generis Instruments, is to determine relevant policy objectives. The objectives are as follows :

- To prevent and repress the misappropriation and unauthorized exploitation and
- To prohibit, other unfair and inequitable uses of TK/TCEs,
- To recognise the value and promotion of respect for TK/TCEs and the communities that maintains, safeguard and preserve them. This includes prevention of insulting, derogatory and/or culturally and spiritually offensive uses,
- To prevent the false and misleading claims to authenticity and origin;
- To prevent the third party failure to acknowledge the source,
- Wealth creation, trading opportunities and sustainable economic development, including promotion of equitable benefit-sharing from the use of TK/TCEs,

^[4] The fact needs to be highlight regards to the above situation is that India has a rich heritage of TCEs, but, unlike Australia, Panama and Philippines, which have sui generis laws, India relies on other laws to protect the same. Even, United States of America has separate legislation for the cultural preservation of the indigenous communities, referred to above. However, at IGC, India has always championed the cause of sui generis laws for protection of TCEs. Following are the policy in India as follows:

^[5] Indian Intellectual Property Rights Policy

^[6] In India, the first ever Intellectual Property Rights (IPR) policy was approved with a vision to encourage creativity and innovation and to promote advancement in science and technology, arts and culture, traditional knowledge and biodiversity resources. The policy lays out seven broad objectives and they are as follows:

- Awareness: outreach and promotion;
- Generation of IPRs;
- Legal and legislative framework;
- Administration and management;
- Commercialization of IPR;
- Enforcement and adjudication; and
- Human capital development.

The following positive considerations are provided with respect to traditional knowledge

Positive Protection indication: Awareness and Promotion

- It is necessary to frame a appropriate national level IPR Policy. This IPR policy can takes a systematic approach to achieve its objectives. It specifically aims at creating public awareness relating to Geographical Indications, Traditional Knowledge, Genetic Resources, Traditional Cultural Expressions and Folklore.
- As after awareness, the necessary step is that The IPR Policy should seeks to stimulate generation of IPRs, with respect to traditional knowledge specifically by emphasizing on conducting activities for promotion of traditional knowledge with participation of holders of such knowledge.

Defensive Protection indication: Developing TKDL

- The Policy also considers provisions to expand the ambit of Traditional Knowledge Digital Library (TKDL) for its utilization in further R&D and expansion of the ambit of TKDL to include other fields besides Ayurveda, Yoga, Unani and Siddha for which it is currently restricted to. In addition to expansion of TKDL domain it also explores options for public research institutions to be allowed access to TKDL for and makes room for exploring the options of providing access to TKDL for further further R&D, R&D by private sector by placing necessary safeguards to prevent misappropriation.
- IPR policy should provide for documentation of oral traditional knowledge and considers providing support and incentives for traditional knowledge holders for furthering the knowledge systems.

^[7] The highlights of the some of the provisions and policy regards to indigenous community/ Traditional culture expression owner/Traditional knowledge owner in India (national level)

Factors to be considered while drafting (shaping) the Sui-Generis law (tentative solution)

- **Constitution of India**
- It is necessary to refer the Constitution of India, which includes and have drafted the rights of Indigenous

³ [http://www.National IPR Policy.com](http://www.National_IPR_Policy.com) – Traditional Knowledge Related Objectives www.bananaip.com > ip-news-center > traditional-knowledge...

⁴ [http:// www.bananaip.com/ip-news-center/traditional-knowledge-ipr-policy-2016](http://www.bananaip.com/ip-news-center/traditional-knowledge-ipr-policy-2016)

⁵ [http://PR - Department for Promotion of Industry and Internal Tradedipp.gov.in > sites > files > National_IPR_Policy_English](http://PR-Department-for-Promotion-of-Industry-and-Internal-Tradedipp.gov.in/sites/files/National_IPR_Policy_English)

⁶ [http:// www.bananaip.com/ip-news-center/traditional-knowledge-ipr-policy-2016](http://www.bananaip.com/ip-news-center/traditional-knowledge-ipr-policy-2016)

⁷ www. SCOPING PAPER No. 3, February 2019 Protection of Traditional Cultural Expressions in India- FITM Forum on Indian

people while drafting 'Sui-Generis law'. From the constitution of India : Article 21 of the Constitution of India provides for the Fundamental Right to life and personal liberty. A liberal interpretation of the article can provide protection to TCE owners.

- The Constitution of India in Article 29 (1)19 identifies protection of cultural rights of minorities as a Fundamental Right. It indicates and explains that , only the communities falling within the ambit of minorities protected under the section can safeguard their rights, thus leaving out of the scope the protection of smaller communities relatively more vulnerable to the threat of 6 exploitation than the prominent communities.
- Even Article 51A (f)20 puts the onus of preservation, respecting and safeguarding the rich heritage of the Indian culture on every citizen of India as their fundamental duty.

The TCEs and folklore constitute heritage as well as culture

Another important factor to be consider is IP legislation while drafting 'Sui-generis'

IP Legislations

- The contemporary TCEs can be protected by the existing Copyright Act. But the preexisting TCE works, which is a form part of the public domain. As per the copyright law, are open for use by anyone, giving rise to a conflict of interest between the rightful owners and the users. The main gap is , TCEs is placed uncomfortably into the copyright protection scheme because of various factors such as their nature and centuries old ownership by the community. 'Originality' and 'individuality' are two principles of copyright laws which do not conform to TCE works.
- Various sections of the Copyright Act such as Section 31A,21 on compulsory licence provides for copyright of unpublished or published work and of unknown authors; Section 38 recognizes performer's rights; Section 5722 provides for author's special rights also called moral rights as per which the author has a right to claim authorship, restrain or claim damages in case of distortion, mutation, modification or any such act which is prejudicial to his/her honour or reputation, and can be interpreted to extend safeg uards to the interests of TCE owner.
- To comply with Article 2223 of Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS), India enacted the Geographical Indications of Goods (Registration and Protection) Act in 1999. Unlike other IPRs, the GI is a community right; as a result traditional communities often rely on Gis to afeeguard certain of their rights associated with their goods which have some quality or reputation or other characteristics linked to the geographical area in which they are produced. Products like Chanderi saree, Pochampalli ikat or Madhubani painting represent cultural expressions of the communities who are engaged in their manufacturing.
- A major initiative of the government in protecting TCEs has been the establishment of the Indira Gandhi National Centre for Arts (IGNCA). This Centre, underthe UNESCO Programme on Cultural Industries and copyright Policies and Partnership.

- The UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, adopted by the WIPO and UNESCO in 1982 were an attempt to provide MemberStates with a 'model law' that they could adopt to safeguard the TCEs and folklore. The provisions include definition of subject matter, role and duty of the competent authority, exceptions, etc. An attempt was made to transform these model provisions into a binding international treaty.
- The WIPO Performances and Phonograms Treaty (WPPT), 1996 deals with the rights of performers and producers of phonograms. Article 2 of the treaty provides for protection of performances of "expressions of folklore".

Conclusion

^[8] According to the analysis, there is no commonly acceptable definition as it differs from country to country, region to region or from one international instrument to another. The conflict is over the narrowness or broadness of the definition for TCEs. The problem arises because the stakeholders, the indigenous communities often do not agree with them.

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