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CHALLENGES TO INDIA'S PATENT REGIME- "TRADITIONAL KNOWLEDGE SHARING" ©

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ABSTRACT

Intellectual Property Rights (IP rights) are given with a purpose and are meant to assure rewards to innovators, and have been an important driving force behind the rapid industrial growth and development in the world. IP rights and development heavily related to each other. IP rights promote growth by converting knowledge into economy. The Indian Patents (Amendment) Act, 2005 introduced product patents in India, beginning a new patent regime. This is done in accordance with the TRIPS agreement. This patent regime has impact on all the fields of patent, but among all it is going to affect the patent relating to traditional knowledge the most. This paper tries to analyze the impact of the new patent regime on the traditional knowledge. It also gives a solution as to what should be done by the government regarding patent of traditional knowledge. What will be the effect of such a policy on the traditional knowledge holder, is also dealt in this paper. This is an analytic paper. This is an original paper and not a copy from any other source.

Key words: *Intellectual Property Right, Traditional Knowledge, Patent, TRIPS, WTO.*

INTRODUCTION

"Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author" and that "Everyone has the right to share in scientific advancement and its benefits"². These paradigmatic but conflicting words of the Universal Declaration of Human Right became the bedrock of the Trade Related Intellectual Property Right (TRIPS) for governing the Intellectual Property Right in world Diaspora.

To be at par with the developed nation and to fight the war in the battle field of patent, Indian Government has equipped itself with the shield of The Indian Patents (Amendment) Act, 2005 and

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² Article 27 of the 1948 Universal Declaration of Human Rights.

introduced product patents in India and thus marked the beginning of a new patent regime aimed at protecting the intellectual property rights of patent holders. The parent Act, The Patents Act, 1970 was amended in fulfillment of India's commitment to World Trade Organization (WTO) on matters relating to Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement)³. During the period 1995 to 2005, in a gap of ten years India carried out three amendments to its patent laws and thus transitioned the patent law from process patent regime to product patent regime and became at par with TRIPS Compliant.

The chronology of Amendments in Patent Law that carried out is as follows :-

The 1st amendment of The Patents Act, 1970 was carried out in 1999 whereby

“Mail-box” provisions were introduced to provide a means by which product patent applications could be filed with effective from 1st January 1995.

The 2nd amendment done in 2002 provided for incorporation of all substantive provisions except for providing patents to products. The important provisions incorporated include:

- (i) redefining patentable subject matter;
- (ii) extension of patent term to 20 years; and
- (iii) amending compulsory licensing system.

The 3rd amendment in 2005 provided for product patents which marked the beginning of new patents regime in India.

The reason for these amendments may be found on the Indian reaction to the two options about animal behavior in any situation given by Nobel Laureate, KONRAD LORENZ who is one of the founders of the modern science of animal behavior, either to drift passively with the current, or to break one's head against a brick wall⁴. India adopted the former option. But in adopting it, is India safe from breaking its head. This will be decided in the post 2005 era, when more challenges are to be faced.

PRODUCT PATENTS REGIME AND TRADITIONAL KNOWLEDGE

Intellectual Property Rights (IP rights) are given with a purpose and are meant to assure rewards

³ WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights* (entered into force on Apr. 15, 1994).

⁴ Lorenz, K., *Studies in Animal and Human Behavior*, Harvard University Press, Cambridge, Massachusetts, 1970.

to innovators, and have been an important driving force behind the rapid industrial growth, industrialization and development in the world. IP rights and development heavily related to each other. IP rights promote growth by leveraging ideas and knowledge into economic asset, these assets are capitals, capitals are a form of investments, and investments leads to growth. India's traditional communities possess considerable knowledge unknown to modern industry, much of which retains potential commercial and economic value in the modern world. IP rights primarily evolved to protect mechanical and chemical innovations for which identification of novelty, the inventive step and the innovator is relatively easy and straightforward. The current IP rights regimes fail to provide and face a challenge to provide any rewards to the public-domain foundations also known as Traditional Knowledge, on which the innovations may be based. This becomes a matter of much more importance and concern when the IP rights regime is extended to the biological domain and Traditional Knowledge. The Traditional Knowledge is deal in IPR in the following manner:-

(i) Defensive protection whereby IP rights are given to customary Traditional Knowledge holders under the World Intellectual Property right(WIPO)administered patent systems by means of:-

(a) International Patent Classification system; and

(b) The Patent Cooperation Treaty Minimum Documentation.

(ii) Positive protection for, providing positive rights and empowering Traditional Knowledge holders to protect and promote their Traditional Knowledge.

Traditional Knowledge is essentially culturally oriented or culturally based, and it is integral to the cultural identity of the social group in which it operates and is preserved.

The question of the patentability of the Traditional Knowledge comes in that kind of matter such as in the case of neem oil, a well-known pesticide in many parts of rural India. The main ingredient present in neem oil, which gives it pesticide property, is "*azadirachtin*", which is a active chemical and thus breaks down very quickly. W.R. Grace & Co., a multinational corporation, invented a chemical treatment and method for stabilizing the "*azadirachtin*", which increases its stability and self-life and thus making it possible for it to be transported and used worldwide. This innovation was protected through a US patent (No. 5124349)⁵. Another case is

⁵ Subbaram, N. R. and Thyagarajan, G., Committee on Science and Technology in Developing Countries (COSTED), Chennai, 1998.

that of the controversial cases of Turmeric in which, the US patent office granted a patent (No. 5401504), after initial reluctance, on use of Turmeric in the powder form for wound healing, on the grounds that such usage of Turmeric was not known in the US.

TRADITIONAL KNOWLEDGE AND THE CHALLENGE

The challenge posed to Traditional Knowledge, in this IP regime in India can be analyzed by asking some simple questions.

How can India bring the benefits of IP rights to its poor citizens living in their traditional lifestyles?

How can the Government of India help these communities and their members who are holding and possessors of traditional knowledge to attain the growth that IP rights and IP economy generate?

The point which makes these questions much more complicated is the meaning and concept of the term “innovation” in context to the Traditional Knowledge and if stretch the word’s definition may go beyond any boundary and set meaning. Historical patent law precepts have faced this problem and had never been able to address traditional knowledge in any meaningful way other than to just regard it as part of the world of “prior art.” The main challenge in this regard is to convert the huge mass of Traditional Knowledge into individual knowledge “items” which can then be used for leveraging and gaining through an IP right. But this challenge present before the Government of India, a bold experiment and revolutionary thinking in both legislative and administrative set up, which will have a far-reaching consequence in the IP sphere.

Traditional Knowledge holder, its possessor and its practitioners have two distinct but conflicting options to choose from.

On one hand protection of their Traditional Knowledge and, not sharing it with any one on the other hand sharing the knowledge and getting the compensation for its sharing.

Protection of traditional knowledge usually means retaining it as the sole property of its practitioners and their apprentices, ensuring that it continues to pass to future generations, and denying any one the rights to obtain patents built and based on it, and removing it from the commercial domain and preventing its commercial exploitation.

Compensation for Traditional Knowledge usually means promoting its commercial potential,

pushing it into the knowledge broad public awareness, encouraging the private sector to build on it, and permitting the patenting of improvements on it subject to some form of quasi-license that directs a fair share of commercial profits back to the communities who provided the foundational knowledge.

The two options will have two different impacts on the society. Protection of Traditional Knowledge will preserve traditional lifestyles but will be of little help to alleviate poverty or improve prospects for the integration of future generations of practitioners with the modern economy. Compensation schemes, on the other hand, risk sacrificing control of traditional knowledge in ways that could destabilize communities, but that could generate significant revenues for poverty abatement and educational improvement.

But again, the first option of retaining the Traditional Knowledge has got another challenge of its own. Preservation of commercially valuable secrets is notoriously difficult. Corporations sitting on heavy cash develop complex, and expensive, procedures and have successfully taped the Traditional knowledge for their own profit. With any secrets, the protection will evaporate as soon as someone capable of exploiting the commercial potential discovers them.

The second option is also not free from any challenge. In sharing of Knowledge and gaining compensation, the sole question which concern is that of compensation. How much the compensation is and to what extent it be given? And to whom it is to be given?

Keeping secret of Traditional Knowledge has got some inherent problem. Companies that learn traditional secrets patent them primarily because their status as “prior art” is undocumented. But when documentation is done, the traditional knowledge would no longer be secret—and someone would undoubtedly exploit it commercially. Again, the very basis of IPRs, and the characteristic unifying all branches of IP law, is the public’s willingness to trade competitive advantage for increased knowledge. Because secrecy of any sort runs counter to that public- private bargain, society rarely if ever grants IPRs to those who keep their knowledge secret. Thus, if India wishes to lead the world in addressing the IP inherent in traditional knowledge, it must begin by adopting the option of compensation explicitly and unequivocally.

Thus, the main challenge that remains of the two challenges is that of the costing and compensation of the IP right. Professor Anil Gupta, of National Innovation Foundation have jotted out this problem in this manner.

The key challenges before the traditional knowledge IP planners are:

- (a) How to provide incentives to local communities and individuals to share their knowledge innovation and practices without the fear of being exploited?
- (b) How to ensure that the intellectual property rights of the communities as well as individuals are protected through a low transaction cost system available globally in the form of registry like INSTAR (the International Network on Sustainable Technologies Applications and Registration)?
- (c) How to ensure that patent offices in the developed countries do not issue patents on traditional knowledge and/or knowledge obtained either illegally or unethically or both from developing country sources?

Protection of traditional knowledge may offer little benefit per se unless the protected traditional knowledge moves up the value chain and generates profits, which can then be shared with various stakeholders. The contribution of communities and individuals (not just the tribes, but also other local communities) needs to be understood not only in its functional attributes but also in analogical dimensions. We must recognize the need for developing new instruments, new ethics, and new frameworks for providing real life alternatives to knowledge rich and economically poor people.⁶

THE SUGGESTIONS TO FACE THE CHALLENGES

The challenges faced by the Traditional Knowledge holder regarding the compensation can be dealt with a two folds solution.

1. By creating the Traditional Knowledge cataloging.

The Government of India has already undertaken a affirmative, concrete and ambitious project, the Traditional Knowledge Digital Library (TKDL), a database of the Traditional Knowledge.

2. Management of the economic value created due to the sharing of the Traditional knowledge, the compensation.

Compensation for each item should be specific and be directed to a specific source such as a guild, community, or region, that hold the Traditional Knowledge rather than an individual. The

⁶ Anil K. Gupta, "Making IPR Regime Responsive to the Needs of Small, Scattered, and Disadvantaged Innovators and Traditional Knowledge Holders

administrator in charge of the catalog will have to publish reasonable and nondiscriminatory license terms for each item. The license fees thus collected must be used for specific, defined benefits accruing to the attributed holders of the rights and be directed at community at large like regional development, infrastructure, or education. Enforcement agency will have to seek stiff penalties from those who infringe on the Traditional Knowledge. In the World Forum Government negotiators will have to seek international accommodations from both developed countries likely to resist the introduction of traditional knowledge into the IP system and developing countries likely to insist that their citizens, in addition to the country to which it belongs, deserve compensation for the knowledge at issue.

CONCLUSION

The transition from water tight compartment to a free market economy, has a pressure of its own caused due to its potential, and time has come when we open the door and tap the potential so that greater mass of the community reaps the fruit, instead of suffering the loss and devastations caused due to the flood.

It is proved that India and the world be better served by maintaining the status quo on IP rights and sending increased aid into those communities from whom the Knowledge is derived. A proper analysis of IP rights for traditional knowledge must therefore justify the system as generating internal benefits in excess of its costs.

It is also set principle that possessors of traditional knowledge hold a moral right to their knowledge. Unfortunately, as visceral as this principle is that, it has no place in either patent law or a liberal market economy.

These moral rights in terms of Traditional Knowledge, if kept secret and not shared would become a noneconomic entity. Sacrificing growth and individual advancement in return of the secrecy of the Tradition Knowledge of the clan and the community has got no justification. Such a principle may have anthropological merit, but it is bad economics. It would be similar to use of IP rights to hinder growth rather than promote it. The recognition of such moral rights runs directly counter to the needs of economic development.

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