

A study on Geographical Indication as a Tool of Protection of Traditional Knowledge

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Abstract - Indigenous people who are living at the foothill of biodiversity have developed, preserved their own knowledge, innovation and practices embodying traditional lifestyles. This knowledge has been used for centuries by indigenous and local communities under local laws, customs and traditions. This knowledge is essentially culturally oriented or culturally based and it is integral to the cultural identities of the social group in which it operates and preserved. Recently western science has become more interested in traditional knowledge and realised that traditional knowledge may help to find useful solutions to current problems in combination with modern scientific and technological knowledge. Despite the growing recognition of traditional knowledge as a valuable source of knowledge, it has generally been regarded under western intellectual property laws as information in the public domain, freely available for use by anybody. Moreover in some cases, diverse forms of traditional knowledge have been appropriated under intellectual property rights by researchers and commercial enterprises without any compensation to the knowledge creators or possessors. In this background this article aims at examining the extent of Geographical Indication in protection of traditional knowledge.

Index Terms - Knowledge, Protection, Communities, Geographical Indication, Handicraft, Goodwill.

INTRODUCTION

Indigenous and local communities cherish traditional knowledge as a part of their very cultural identities maintaining the distinct knowledge systems that gives rise to traditional knowledge. It can be vital for their future well being and sustainable developments and for their intellectual and cultural identities. For many communities, traditional knowledge forms part of a holistic world view and is inseparable from their very ways of life and their cultural values, spiritual beliefs and customary legal systems. Traditional knowledge is a practical commonsense based on

teaching and experience passed on from generation to generation. It has been passed orally from generation to generation and we cannot find any textual reference relating to traditional knowledge. It is also holistic and cannot be compartmentalised and separated from the people who possess it. It is rooted in the spiritual healthy culture and language of the people. Most indigenous people have traditional songs, stories, dreams, methods and practices as means of transmitting specific human elements of traditional knowledge

In the absence of any particular law for protection of traditional knowledge courts should not underestimate importance of intellectual property rights in the protection of traditional knowledge. However, there is a continuing controversy over the impacts of intellectual property systems on the traditional knowledge of indigenous and local communities. 'Many indigenous peoples' representatives and commentators complain that existing intellectual property systems are inadequate to protect indigenous intellectual and cultural property rights.' Other critics argue that the existing systems encourage the erosion of indigenous traditional knowledge. In their view, existing systems, which are oriented around the concept of private ownership and individual invention, are inherently at odds with indigenous cultures, which emphasize collective creation and ownership of knowledge.

Indeed, "there is concern that intellectual property systems encourage the appropriation of traditional knowledge for commercial use without the fair sharing of benefits, or that they violate indigenous cultural precepts by encouraging the commodification of such knowledge. On the other hand, advocates for conventional intellectual property systems argue that IPRs, as currently defined, create effective incentives for innovative use of biodiversity, which in turn creates profits on which

innovators can draw in negotiating benefit-sharing arrangements with the holders of traditional knowledge and biodiversity. However, though there are deferent opinions about protection of traditional knowledge under existing intellectual property practically geographical indication, some extent, be used for protection of traditional knowledge. Let us discuss in detail to what extent geographical indication could be used for protection of traditional knowledge.

PROTECTION OF TRADITIONAL KNOWLEDGE UNDER GEOGRAPHICAL INDICATION

Geographical indication is a form of intellectual property rights that do not protect novel elements but rather an accumulated goodwill built up over the years. This goodwill is the outcome of a recognised or perceived link between a product and a geographical area. The purpose of geographical indications is to identify products but not to provide protection to the product as such. Further, geographical indications are also typically insofar as they are a collective right that only grant producers in a given area the right to use the indication for products of a specific geographical area and that is unlimited as long as the specific conditions for the grant of the geographical indication remain in place. Geographical indications can take the form of words, phrases, symbols and iconic emblems.

Under the TRIPS Agreement, indications do not necessarily have to be the names of a geographical place on earth and can therefore include names that relate to a specific geographical area such as Basmati in the case of rice. However, goods that are protected must originate in the region, to which they are associated, which implies that license for the production of a protected good outside its region of origin cannot be protected. This geographical indication regime could be used to protect traditional knowledge. At the first sight the use of geographical indications for the protection of traditional knowledge seems to be particularly suitable. Geographical indications are not intended to reward innovation, but rather to reward members of an established group or community adhering to traditional practices belonging to the culture of that community or group. They are designed to reward the goodwill and reputation created or built up by a

group of producers over many years or even centuries. Geographical indications can create economic rewards for producers who use traditional methods in the region where the product has been traditionally produced.

Geographical indications may be used to enhance the commercial value of natural, traditional and craft products of all kinds if their particular characteristics may be attributed to their geographical origin.

A number of products that come from various regions are the result of traditional processes and knowledge implemented by one or more communities in a given region. The special characteristics of those products are appreciated by the public, and may be symbolized by the indication of source used to identify the products. Better exploitation and promotion of geographical indications would make it possible to afford better protection for the economic interests of the communities with traditional knowledge. India (and Pakistan) experienced the need and importance of protection of geographical indications in the Basmati Rice case. The problem arose when the US patent office has issued in 1997 patents for three new strains of rice. These strains could be sold under the name “Basmati”, referring to a particular form of rice - long-grained, aromatic, and associated with the plains of Punjab. In 1998 the US Rice Federation submitted that the term “Basmati” was generic and referred to a specific type of aromatic rice. In response, U.S and Indian civil society organizations collectively filed a petition seeking to prevent US-grown rice from being advertised with the word “Basmati”. The US Department of Agriculture and the US Federal Trade Commission rejected the petition in May 2001. Neither considered that the labelling of rice as “American-grown Basmati” was misleading, and deemed “Basmati” to be a generic term. After the protest of India and Pakistan against the use the name “Basmati”, the US patent office disallowed the patent holder from using the generic name “Basmati”. The rice can now be sold only as “Texmati” or any other name that clearly informs the consumer that the rice is not from the Punjab region. Even the well-known traditionally developed, preserved and improved components of biodiversity such as neem and turmeric have been protected under the geographical indication. Indigenous knowledge relating to these biological resources is protected under the regime of geographical indication.

The relationship between the traditional knowledge and geographical indication has also been acknowledged by various courts in the world. Number of developing countries realised that there is potential under the geographical indications regime for protecting some traditional knowledge. In practice geographical indications have the potential to be an important instrument for the protection of products derived from plant genetic resources and traditional knowledge, as this protection requires that the quality, reputation, or other characteristic of a product to be essentially attributable to its geographical origin. This allows the protection not merely of the uniqueness of the product but also the uniqueness of its origin and traditional knowledge at that place. From the perspective of traditional knowledge, geographical indications are of specific interest for several reasons.

1. They differ from other type of intellectual property rights insofar as they are clearly collective in scope. Geographical indications do not grant a single holder the right to benefit from the protection but rather limit the protection to a specific area. They provide a collective right to use the indication. In other words, they offer an interminate number of people within the region of protection. Protection through geographical indications may therefore provide for products manufactured within a specific area while not restricting the number of rights holders within the area.
2. Geographical indications do not impose any tests of novelty like the patent system. In fact, they can be used specifically to protect traditional products as long as the particular characteristics of these products can be attributed to a specific geographical origin.
3. Protection through geographical indications does not relate to one specific method of production of a given product. This allows not only different production methods to be covered under a given indication but also for production methods to change overtime within the scope of the protection offered. In other words, geographical indications intrinsically recognise one of the essential characteristics associated with traditional knowledge, which is its evolution over time.

4. Geographical indications do not imply monopoly control over the knowledge that is embedded in the protected indication. In fact, this knowledge remains in the public domain. This presents side, from the point of view of the existing intellectual property rights system, the absence of protection of the knowledge is counterbalanced by recognition in perpetuity as long as the link between the geographical place and the good is maintained. On the negative side, the lack of protection implies that traditional knowledge can be misappropriated. This is similar to the broader concern over bio-piracy in the contexts of patents.
5. The impossibility of transferring geographical indications outside their region of protection constitutes a major advantage in the context of traditional knowledge.
6. Geographical indications present an advantage over other forms of intellectual property rights for traditional knowledge holders insofar as protection may extend not only to indications that are currently in existence, but also to indications likely to be used in the future. In other words, an indication is in use but also in cases where it may be used by traditional knowledge holders for commercial aims in the future.

A more optimistic assessment of the potential from geographical indications shares a common element insofar as they both protect accumulated knowledge typical to a specific locality. While traditional knowledge expresses the local traditions of knowledge, a geographical indication stands for specific geographical origin of a typical product or production method. Geographical indications and traditional knowledge relate a product... or a piece of information respectively to a geographically confined people or a particular region or locality. Similarly, in its Review of existing Intellectual Property Protection of Traditional Knowledge the IGC Secretariat observed that: Geographical Indications as defined by Article 22.1 of the TRIPS Agreement and appellations of origin, as defined 2 of the Lisbon Agreement. Rely not only on their geographical connotation but also, essentially, on human and /or natural factors (which may have generated a given quality, reputation or other characteristics of the good). In practice, human and/or natural factors are

the result of traditional, standard techniques which local communities have developed and incorporated into production. Goods designated and differentiated by geographical indications, be they wines, spirits, cheese, handicrafts, watches, silverware and others are as much expressions of local cultural and community identification as other elements of traditional knowledge can be. Handicrafts appeal to the aesthetic of the observer and yet may be put to good use. They need not necessarily serve a physical purpose; but a clear demarcation, where use and aesthetics depart, does not exist. In fact, the hallmark of good craftsmanship is when the object serves a functional purpose and yet appeals to subtler forms of intellection. Most forms of fine art, unlike traditional handicrafts, have evolved out of the need to fulfil sublime aspirations, which may be traced either to the submission to the supreme soul or a pursuit in a higher plane of intellectual activity.

Traditional handicrafts on the other hand, have evolved out of basic human necessity and not from the abrupt astral need. Traditional handicrafts could be protected under geographical indication as community rights of the indigenous people. One example of indigenous peoples' use of identification of origin as a tool to protect cultural forms and their use comes from the south-western region of the United States.

There, artisans of several Native American tribes earn as much as \$800 million annually from commercial sales of arts and crafts. For instance, the distinctive styles of Pueblo pottery, silver jewellery, and other items such as drums are well known. Styles and designs are considered a cultural heritage; in Zuni, a design may be the property of a certain family and no person outside that family has the right to use it. These indigenous communities were concerned that non-indigenous producers were using inauthentic methods to produce similar products that they passed off as indigenous traditional goods. In response, the state of New Mexico enacted the Indian Arts and Crafts Protection Law. The law places a duty on retailers of native arts and crafts to investigate whether goods are produced by indigenous persons by hand using natural materials. Only if a good passes this test can it be labelled as "an authentic, Indian, hand-made piece." Controversy continues because the law does not address whether goods are produced by traditional methods. Although this

example is unrelated to biodiversity, it offers significant lessons for indigenous control of traditional knowledge. Through such mechanisms, there may be opportunities to gain benefits from products of biological resources produced through traditional methods or based on traditional knowledge."

PROTECTION BY A COMBINATION OF EXISTING INTELLECTUAL PROPERTY RIGHTS

Various authors suggest a comprehensive protection for traditional knowledge by evolving new theories within the existing intellectual property regime. Sreevidhya Raghavan has explained in her article in detail views of various experts in the field. Professor Long suggests the use of moral rights to acknowledge the source of a work and to protect the integrity of traditional knowledge. This is similar to Professor Gopalakrishnan's statement "The owner of a new product based on traditional knowledge while claiming intellectual property protection must have the obligation to disclose to the community from where the knowledge was taken and also give evidence as to the prior informed consent."

Professor Downes favours the use of moral rights and suggests that this concept should be a model to enable recognition of the works of traditional people. However, the question of whether a specified alleged reproduction of work is a violation of moral rights is likely to become subject to the court's predilections and preconceived notions. However, for the short-term, a combination of moral rights and copyrights, coupled with trademarks and geographical indicators can provide overlapping rights. For example, folklore can have a geographic indicator indicating the region of origin. It may also have a trademark as a mark of the tribe, group, or sometimes as a mark owned by the artist. The song, lyrics and tunes can also be protected under moral rights. Attempts to remix a song and other forms of tampering can be brought as violations under moral rights theories or under trade secret law. In addition, one or more of the following can be applied to ensure added protection:

1. Deterrent punitive measures such as sharing a percentage of the profits could be incorporated. These would be mandatory obligations on the infringers to adequately compensate the indigenous community.

2. Unauthorized information holders could be banned from commercializing on patents acquired from traditional knowledge without acknowledging the source. The CBD and other Conventions can be amended to incorporate such a sanction. This method could deter the multinational corporations from seeking to obtain cheap information from the indigenous people.
3. Indigenous people could be made joint owners of the intellectual property rights created from their knowledge. The Shaman Pharmaceuticals case can be used as a model for agreements between corporations and indigenous people. However, the measures should also include the mandatory sharing of patents as joint inventors.
4. In the case of a legal dispute, the burden of proof should be on the user of the knowledge to show that valid consent was obtained from the community. These obligations must be built into TRIPS to make it effective and operative. Patent statutes should incorporate an affirmative defence provision. For example, a person accused of infringing a patent could argue that the product or process in question was derived from traditional knowledge of a specified indigenous people and that he will include them as joint inventors. Alternately, a third party should be allowed to invalidate a patent on the ground that the product or process in question was invented through the use of traditional knowledge without permission. This will strengthen the bargaining power of the developing countries while negotiating with multinationals who need their traditional knowledge.

CONCLUSION

Indigenous knowledge, both at the national and international level, is increasingly being exploited, inappropriated, and commercialised by non indigenous people. Despite high commercial value of traditional knowledge indigenous people often derive little or no benefit from the market consumption of their traditional knowledge. The main problem of enforcing rights for contemporary indigenous groups stems from the dichotomy between the values systems of western and indigenous culture. The values of indigenous culture do not fit within the

western concept of the egocentric individual that is the current focus of the legal regime today. However in the absence of suitable laws, geographical indication could be used for protection of traditional knowledge.

REFERENCE

- [1] According to indigenous people misappropriation of traditional knowledge means disrespecting their culture, belief and spiritual values.
- [2] Intellectual property and Traditional Knowledge, Booklet No 2, series of booklets dealing with intellectual property genetic resources, traditional knowledge and traditional cultural expression/ folklore WIPO.
- [3] <http://www.nativescience.org>.
- [4] See United Nations Environment Programme, Convention on Biological Diversity, Conference of the Parties, The Impact of Intellectual Property Rights Systems on the Conservation and Sustainable Use of Biological Diversity and on the Equitable Sharing of Benefits From Its Use: A Preliminary Study: Note by Executive Secretary, M 32-33, UN Doc. No. UNEP/CBD/COP/3/22 (1996)
- [5] David R. Downes* How Intellectual Property Could Be a Tool to Protect Traditional Knowledge, HeinOnline -- 25 Colum. J. Envtl. L. 253 2000 .
- [6] After Convention on Biological Diversity 1992 the concept of sharing the benefits arising out of the unitization of biological resources and related traditional knowledge came into being. Before there was no such concept existed. Indigenous were being exploited without any benefits. For more information about the sharing of the benefit see the previous chapter.
- [7] Supra Note 10.
- [8] See Bernard O' Conner, Protecting Traditional Knowledge: An Overview of a Developing Area of Intellectual Property Law, Journal of World Intellectual Property, Vol 6, Issue 5, September 2003.
- [9] Philippe Cullet, Intellectual Property Protection and Sustainable Development, LexisNexis, Butterworths, New Delhi, 2005, p 330
- [10] Peter-Tobias Stoll, Jan Busche, Katrin Arend, WTO--trade-related Aspects of Intellectual

Property Rights, Martinus Nijhoff Publishers, Germany, 2006, p 393.

- [11] Ibid
- [12] A.C. Fernando, Business Environment, Dorling Kindsley (India) Pvt. Ltd, Noida, 2011, p 630.
- [13] Summary of the presentation “Geographical Indications and Traditional Knowledge” O’CONNORAND Company European Lawyers http://www.ecap-project.org/archive/fileadmin/ecapII/pdf/en/activities/national/thailand/2003_0723_25/summary_of_II_presentation_2.pdf.
- [14] Ibid
- [15] for more information relating to Basmati Rice Case, See generally Sreenivasulu N.S, Law Relating to Intellectual Property, Penguin patridge, Bloomington, USA, 2013, p. 425.
- [16] Ibid
- [17] The relationship between the GI and TK has been recognised by the European Court of Justice in a number of its decisions. In a case C-47/90 Delhaize v Promalvin, which concerned inter alia the production of Rioja wine, the court accepted that the particular qualities and characteristics of the wine resulted from a combination of natural and human factors that are linked to its geographical area of origin and that vigilance must be exercised and efforts made in order for them to be maintained. It accepted that the rules governing the Rioja ‘denomination de origin calificada’ were designated to uphold those qualities and characteristics. The court accepted that the bottling of wine in the Rioja region employing a series of complex oenological operations concerning the filtering, clarifying, cooling and other technologies of the region was an important operation, which , if not carried out in accordance with strict requirements, could seriously impair the quality of the product. For more information see Christoph Antons (ed..) Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region, Wolters kluwer, New York, 2009, p 93.
- [18] Philippe Cullet, Intellectual Property Protection and Sustainable Development, LexisNexis, Butterworths, New Delhi, 2005, p 330.
- [19] S. Biber- Klemm, T Cottier (Ed..) Rights tp Plant Genetic Resources and Traditional Knowledge: Basic issues and Perspectives The Swiss Agency for Development and Cooperation, 2006, p 252.
- [20] Ibid.
- [21] See M. Panizzon and T Cottier, Traditional Knowledge and Geographical Indications: Foundations, Interests and Negotiating Positions in Developing Countries in the Doha Round: WTO Decision- Making Procedures and WTO Negotiations on Trade in Agricultural Goods and Services, see Christoph Antons (ed..) Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region, Wolters Kluwer, New York, 2009, p. 93.
- [22] WIPO, ICIPGRTKF, Third Session, Geneva 13-21 Jun. 2002 WIPO/GRTKF/IC/3/7, 6 May 2002.
- [23] Ibid.
- [24] J Sai Deepak, Protection of Traditional Handicrafts under Indian Intellectual Property Laws, Journal of Intellectual Property Rights, Vol 13, May 2008, pp 197-207.
- [25] David R. Downes, How Intellectual Property Could Be a Tool to Protect Traditional Knowledge, Hein Online 25 Colum. J. Envtl. L. 253 2000.
- [26] This right is recognized under the Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention was established September 9, 1886 and entered into force on December 5, 1887. See 331 U.N.T.S. 217.
- [27] Dr. N. S. Gopalakrishnan, Protection of Traditional Knowledge — The Challenges (Paper presented at the WIPO Conference held at Peking University, Beijing, June 15, 1999).