

UNIT-II

PROTECTION OF TRADITIONAL KNOWLEDGE

1. Protection of traditional knowledge

Need to protect traditional knowledge have increased with changing time, especially in order to stop unauthorized and commercial misuse of such knowledge. It is important to protect the indigenous people from such loss and also help them to preserve such ancient practices. Protection to TK shall also promote its wider and efficient use.

Protection of Traditional Knowledge

The most difficult aspect of traditional knowledge is in its protection. There has been a lot of debate to protect traditional knowledge under IP regime but that in itself faces a lot of challenges such as; a) under which IP under which traditional knowledge can be protected, b) since every IP protection is provided for a limited period of time then how will traditional knowledge have a continuous protection. Protection of traditional knowledge is rooted in the problem of Bio-piracy. Bio-piracy occurs when there is commercial utilization of traditional knowledge without proper authorization of the indigenous or local people associated with such knowledge.

How to Protect Traditional Knowledge

There are methods through which TK can be protected: a) Positive Protection, and b) Defensive Mechanism. Positive protection means protecting TK by way of enacting laws, rules and regulations, access and benefit sharing provisions, royalties etc. Defensive Mechanism means steps taken to prevent acquisition of intellectual property rights over traditional knowledge.

India, for example, followed by the well-known case of USPTO, wherein patent was granted on healing properties of turmeric and with much difficulty CSIR proved the prior existing knowledge of such properties of turmeric with help of numerous ancient scriptures and documents, has adopted a Defensive mechanism to protect its traditional knowledge by way of setting up a Traditional Knowledge Digital Library (TKDL) in 2001, in collaboration between Ministry of Ayush and CSIR.

But is TKDL adequate? The digital library, although comprising of voluminous documents and work of Indian traditional knowledge, has its own shortcomings such as; translation problems, disclosure of traditional knowledge as prior art is un-advantageous since it leads to public disclosure of entire traditional knowledge which simultaneously results to fishing expeditions, further one of the major aspect of traditional knowledge is that it is mostly passed by generations in oral manner, therefore, a lot of TK has no documentary record and TKDL maintains no record of oral traditional knowledge.

Adequacy of IP protection to Traditional Knowledge in India

Unlike other categories of intellectual property rights, India has no substantive act or law to protect traditional knowledge but other IP acts contain provisions with respect to traditional knowledge such as the Patents Act, 1970, Section 25 and Section 64 gives one of the grounds for revocation of a patent application on the basis of traditional knowledge. Under the Copyright Act, 1957, has not specific mention of protecting traditional cultural, literary or artistic work or folklore but Section 31A provides for protection of unpublished Indian work, nonetheless Copyright protection in for a limited time period and also demands certain criteria to be fulfilled, therefore under this IP as well protection of traditional knowledge doesn't have much scope.

Past few years it has been seen that India has actively participated in TK conventions and has made efforts to protect its TK at international level. Access to Indian TK is available at USPTO and EPO and CSIR is day by day improving the efficiency of TK database.

Important International TK related conventions

The CBD and the 2010 Nagoya Protocol introduces the recognition and protection of TK at international level. Article 8(j) of the CBD, requires parties are required to respect and maintain knowledge held by indigenous communities, and promote broader application of TK based on fair and equitable benefit-

sharing. Article 16 recognizes TK as a 'key technology' for effective practices of conservation and sustainable use of biodiversity, with procedural requirements established in Article 15 for access to genetic resources, including those based on prior informed consent and mutually agreed terms. The Nagoya Protocol broadens the CBD provisions relating to access and benefit-sharing.

Call for Sui Generis Protection and its Awareness

There has been an increasing demand of Sui Generis system of Protection for traditional knowledge since IP protection has its own downside and loopholes. Sui Generis is a Latin word meaning 'of its own kind'. Sui generis instrument shall provide legal framework of protection of TK, enforcement of right of indigenous communities, prevent misuse and control of TK, provisions of ABS (access and benefit sharing) system etc.

In addition to TKDL system, India can work towards a more active approach, foremost to create awareness and understanding among people who are till date completely unaware or have very limited knowledge on Intellectual Property Rights as well as the term 'traditional knowledge'.

2. The need for protecting traditional knowledge

The World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC), which met for the first time in 2001, is in discussions about draft provisions for the enhanced protection of traditional knowledge and traditional cultural expressions against misappropriation and misuse. WIPO's work in these areas involves close cooperation with other international organizations and NGOs, as well as the organization of a wide range of capacity building activities. Capacity-building resources include practical guidelines for indigenous and local communities on developing intellectual property protocols, and information technology tools for managing intellectual property issues when digitizing intangible cultural heritage. In 2000, the WIPO General Assembly established forum for the discussion of intellectual property issues in relation to access to genetic resources and benefit sharing, the protection of traditional knowledge and expressions of folklore. The work program has produced an impressive number of discussion papers, surveys of national laws and data obtained by means of surveys, consultations and fact-finding missions. The technical dimensions of the issues have received a thorough exploration in a number of papers prepared by the Secretariat. The work program also has produced a number of practical outcomes as: A toolkit for the management of intellectual property in the context of documenting traditional knowledge and genetic resources; a practical guide for the protection of traditional cultural expressions and a database of contractual provisions relating to intellectual property and access to genetic resources.

Discussions of WIPO to date have considered the following issues:

- Human rights treaties and other existing or emerging instruments that is applicable to traditional knowledge and genetic resources.
- Elements of customary law that are vested in traditional knowledge protection and transmission.
- Analysis of indigenous participation, including the levels and roles in decision-making, including measures to ensure compliance with free, prior and informed consent.
- Options and opportunities in the proposed certificate of origin, source or legal provenance from genetic resources.
- Role of customary law in the protection of traditional knowledge and development of regimes on access to genetic resources and benefit sharing.

In applying these principles at the domestic and national level, it is envisaged that an international access and benefit-sharing regime would be supported by national legislation that addresses a sui-generis protection of indigenous traditional knowledge, innovation and practices, ensuring compliance.