Geographical indications and traditional knowledge

Traditional knowledge usually lacks novelty, making it hard to obtain patent protection. So how can its misappropriation, abuse and misuse be prevented?

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Why would anyone want to protect traditional knowledge? Such knowledge has been developed and used by people in order to live a socially useful and productive life, and has been around for generations. While some such knowledge has origins so ancient that it is written off as folklore, other forms of traditional knowledge are used to produce commercially viable goods that are highly valuable.

One example of underrated traditional knowledge that came into sharp focus two decades ago is the common spice turmeric, which is used widely in Indian cooking and as an emergency remedy for burns, cuts and open wounds. In March 1995 the US Patent and Trademark Office granted Patent USPN 5401504 for turmeric to the University Of Mississippi Medical Centre. The patent claimed: "A method of promoting healing of a wound in a patient, which consists essentially of administering a wound-healing agent consisting of an effective amount of turmeric powder to said patient." The question that arises immediately is how any patent office can grant a patent for an 'invention' that lacks novelty – the first basic criterion of patentability. While the furore at the time stemmed from biopiracy, the main issue today is how to prevent the misappropriation, abuse and misuse of traditional knowledge.

Rights owned by a community

Under the Agreement on Trade-Related Aspects of IP Rights, seven IP rights are listed, of which only one mandates ownership by a community and traditional use as a prerequisite for protection – the protection of goods under a geographical indication or an appellation of origin. There are arguments in favour of including collective marks under trademark law, but the registration of collective marks does not have the prerequisite of collective marks. On the other hand, it is imperative that the goods registered as a geographical indication have a traditional use over time which makes them evocative of the region or community.

Since the enactment of the Geographical Indications of Goods (Registration And Protection) Act 1999 on September 15 2003, according to the official database a total of 426 applications for geographical indications have been filed in India. Of these, 192 geographical indications have been registered, four have been withdrawn and two abandoned. The registration is granted for 'goods', which are defined in Section 2(1)(f) as being "any agricultural, natural, or manufactured goods or any goods of handicraft or of industry and includes food stuff".

The registered goods are categorised under "Agricultural", "Handicraft", "Foodstuff" and "Manufactured". The legal obligations relate to the goods. The act does not address the protection and use of traditional knowledge associated with the goods. Further, the definition of a 'geographical indication' does not mention traditional knowledge, and the act does not define 'traditional knowledge'. Rather, the mandate of the act is to protect the "agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other

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characteristic of such goods is essentially attributable to its geographical origin and, where such goods are manufactured goods, one of the activities of either the production processing or preparation of the goods, concerned takes place in such territory, region or locality, as the case may be" (Section 2(1)(e)).

A study of geographical indication applications reveals that the traditional knowledge associated with the goods is often mentioned; indeed, in some cases, the actual process has been declared a trade secret. This was so regarding the registered geographical indication Aranmulla Kannadi, a mirror made of metal in Aranmula, Kerala. The president of the Vishwabrahma Aranmulakannadi Nirman Society, the applicant, stated in the affidavit accompanying the application for a geographical indication that the "hidden secret of its making is only known to my family".

Even with the mention of traditional knowledge, the pertinent question is whether a geographical indication can protect traditional knowledge. To 'protect' means to protect the right from unauthorised third-party use, where such unauthorised use would be an actionable offence. While the act protects the goods, it offers no protection against the misuse, misappropriation or abuse of the associated traditional knowledge. Rather, the act is limited to penalising offenders who falsify a geographical indication on goods.

The questions raised in the late 1990s in a dispute over Basmati rice, which encompassed issues relating to patent, trademark and geographical indications, are still being considered in various branches of government. The protection of traditional knowledge is now even more important in light of the surge in using it as a starting point for research in various fields, including pharmaceuticals, nutraceuticals and personal care. Indeed, traditional knowledge is now a fashionable concept, used by everyone from small and medium-sized enterprises to multinational life sciences companies searching for 'natural' solutions to medical problems.

Other initiatives to protect traditional knowledge

The Department of Industrial Policy and Promotion (DIPP), the office under the Ministry of Commerce for the administration of IP rights matters, is exploring ways to protect traditional knowledge. Although there has been discussion of affording IP rights-style protection to traditional knowledge, as yet there are no proposals as to how to do so. Discussions are ongoing, but it is evident that the act affords no protection against the misappropriation of traditional knowledge.

Traditional knowledge does not exist in a vacuum to be rolled out for use in a particular geographical indication. Rather, for the people who are privy to it, traditional knowledge forms part of everyday life, becoming part of the process of earning a livelihood; they practise traditional knowledge without being consciously aware of it. One example of living the traditional life using traditional knowledge is the Kashmir pashmina. While the relevant geographical indication application mentions

the various steps in the process of weaving the elegant Kashmir pashmina from the fleece of the *Capra hiracus* goat, it fails to mention the lifestyle of the weavers and traders, which seamlessly absorbs traditional knowledge into daily practice: the time spent by the women weaving between breakfast and lunch, the living arrangements in the homes in the Himalayan valley, with the weaving looms set up under the rafters to provide warmth to the weavers, and the singing of Persian folk songs in a rhythm that enables the weavers to pick up colour skeins on the cue taken from the song in order to complete the design.

In fact, the geographical indication application captures none of the rich tapestry of the weavers' and traders' lives. There is no protection against misuse of the Persian folk songs or the knowledge of the dyes used in colouring the wool. Indeed, there is no compensation for the disruption of their lifestyle due to misappropriation, misuse or abuse of the associated traditional knowledge.

The Ministry of Environment and Forests is also making an effort to ensure protection by way of proposed rules regarding access to traditional knowledge for biological materials under the Biological Diversity Act 2002. The act is a manifestation of India's commitment under the Convention of Biological Diversity to prevent biopiracy, protect biodiversity and promote the sustainable use of bio-resources. However, the Protection, Conservation and Effective Management of Traditional Knowledge Relating to Biological Diversity Rules 2009 are limited to the protection of traditional knowledge relating to biological diversity. Traditional knowledge accessed for any other purpose is beyond the mandate of the act, and therefore is not covered under the proposed rules.

One of the big challenges was to define 'traditional knowledge' – the very thing that must be protected, conserved and managed under the rules. The fact that traditional knowledge is an intangible asset that permeates every aspect of a lifestyle makes it difficult to define legally in a manner that would lend itself to protection, management and licensing, as well as ensuring its conservation, particularly when it is an evolving system.

The World Intellectual Property Organisation attempts to define 'traditional knowledge' as: "*tradition-based* literary, artistic or scientific works, performances, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information, and all other 'tradition-based' innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields". 'Tradition-based' refers to knowledge systems creations, innovations and cultural expressions which "have generally been transmitted from generation to generation, are generally regarded as pertaining to a particular people or its territory, and are constantly evolving in response to a changing environment".

India, on the other hand, has attempted to provide a more inclusive definition under the proposed rules – a task which was made easier because 'traditional knowledge' is limited to the traditional knowledge relating to the accessed bio-resource, and thus does not include pottery, painting, poetry, folklore, dance and music, and all other products or processes discovered through a community process, including by a member of the community individually but for the common use of the community.

The proposed rules define 'traditional knowledge' as: "the collective knowledge of a traditional community, including of a group of families, on a particular subject or a skill and passed down from generation to generation, either orally or in written form, relating to properties, uses and characteristics of plant and animal genetic resources; agricultural and healthcare practices, food preservation and processing techniques and devices developed from traditional materials; cultural expressions, products and practices such as weaving patterns, colors, dyes."

Returning to the question of whether a geographical indication helps to protect traditional knowledge, the answer is no. Rather, the solution lies in identifying the problem correctly. There is an ancient Hindu saying that when a problem cannot be approached directly because it is too nebulous, it is important to ask questions surrounding the problem in order to remove the extraneous unimportant issues and reach

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the core issues that need resolution.

The following issues have yet to be resolved:

- the definition of ‘traditional knowledge’ – how it should be defined, which traditional communities have developed and use that traditional knowledge and its cultural expressions, and whether the available definitions are adequate to protect and license such knowledge;
- the rights and duties of the traditional practitioner and of the accessor;
- the definition of the concepts of misuse, abuse and misappropriation of traditional knowledge, such that these are cognisable as an offence and accordingly penalised and enforced; and
- the authority to adjudicate such offence and levy suitable penalties.

Comment

It is evident that traditional knowledge cannot be protected effectively under geographical indications. Indeed, traditional knowledge cannot be protected properly under any of the IP rights; rather, it requires a *sui generis* system of its own that will protect, conserve and help to manage and license it. There is no hope of a suitable solution within the IP rights framework. Indeed, incorrect implementation or the enactment of ‘bad’ law could endanger the entire system – that is, the traditional knowledge and the traditional communities that use such knowledge to co-exist with nature.

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