Efficacy of Intellectual Property Rights to Alleviate the Issues of Bio- Piracy

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Abstract

Bio-piracy is the commercial exploitation of the naturally occurring biological resources. In this article only bio-piracy with respect to traditional knowledge is taken into consideration. The laws available at international level and national level are also mentioned. There are lot of problems faced by the indigenous community because of bio piracy. There is a need for a proper law and enforcement to protect the rights on indigenous people in India. All the problems of the community with respect to environment, intellectual property rights, human rights and territorial rights should be considered. Their prosperity will add to the nation's wealth.

There are various innovative practices introduced to bring bio-piracy under control: Defensive Protection, Sui generis system, Prior informed consent etc.
KEYWORDS: Bio-piracy, traditional knowledge, Defensive Protection, Sui generis system, Prior informed consent

Introduction:

As said in Bhagwat Gita:14.4

"sarva-yonisu kaunteya
sambhavanti murtayo yah
tasam mahad yonir brahma
aham bija-pradah pita"

Meaning, "It should be understood that all species of life, O son of Kuntī, are made possible by birth in this material nature, and that, I am the seed giving father." The different forms of these living entities are only their external dresses. Every living being is actually a spirit soul, a part and parcel of God."

There are many species of life. The aquatics, the trees, the plants, the birds, the bees, the insects... then the human beings. And out of the human beings also, there are so many uncivilized. Civilized human beings are very few.

Bio-piracy is the commercial exploitation of the naturally occurring biological resources. Generally it is done by a developed nation or a multinational company or organisation without compensating the people or nations from where the resources originated. This term explains the stealing of the material resources. The quote above explains that everything on this earth, belongs to the earth and the people who also belong to the earth behave in a uncivilized manner. It is considered as a phenomenon that is not new but that has flourished under colonialism, capitalism and more recently globalisation.[1]

[1] IKECHI MGBEOJI, GLOBAL BIOPIRACY: PATENTS,PLANTS AND INDIGENOUS KNOWLEDGE, 12,Ubc Press 2006.

Due to globalisation we are facing many challenges like degeneration of the biodiversity and increasing cases of bio-piracy. It is considered as new form of colonialism where the genetic resources are misappropriated by the powerful community. Bio-prospecting is another term to bio-piracy, where it involves searching and collecting genetic resources for producing new materials that has commercial value.

Bio- piracy

The word bio-piracy was coined by Canadian activist Pat Mooney through the North American advocacy group, Action Group on Erosion, Technology and Concentration (ETC Group) — formerly known as Rural Advancement Foundation International — to refer to the uncompensated commercial use of biological resources or associated TK from developing countries, as well as the patenting by corporations of claimed inventions based on such resources or knowledge.[2]

RAFI coined the term "bio-piracy" in 1991, during the Uruguay round of GATT negotiations, when Northern industries were accusing the South of rampant trademark "piracy"." The historical context of the term is explained as; the western intellectual property owners have often accused the third world states of pirating and unlawfully appropriating the intellectual property rights of industrialized entities, especially patents and copyrights. With the increase of biotechnological inventions and the patenting by Western states and entities, the third world states contend that industrialized states, business entities and research institutions are pirating their biological resources of the indigenous people, obtained without their lawful informed consent .[3] Bio-piracy is done in number of ways like, the folk music can be copyrighted, and the traditional medicines can be patented by depicting its false novelty. It affects the environment, the moral rights and the interests of the community or place on whom the misappropriation is committed.
Who are the victims of bio-piracy or can we call it as victimless crime. We cannot call it as victimless crime, because it belongs to common ownership and since it falls within the domain of public property, the numbers of victims are many. The community at large suffers. Can the public claim the ownership? This was answered in the Hoodia Case, where the South African Council for Scientific and Industrial Research, a government institution investigated the plant and patented certain compounds possessing appetite suppressant activity. The CSIR had high hopes that it will form the basis of a successful anti- obesity treatment. This plant was already used by the indigenous community, Khomani as an appetite suppressant. After a long battle this community is getting the benefits. Similarly the neem tree and turmeric has been a subject of patents, where as it was known to India as traditional knowledge. Patents give monopolistic and exclusionary rights where as indigenous group ask for group recognition. Moreover the novelty requirement in patents does not apply to the indigenous knowledge. There are many examples like, the case of, Jeevani medicine, problems of Yanadi tribes etc

AT INTERNATIONAL LEVEL: The objectives of the CBD are the conservation of biodiversity, sustainable use of its components and the equitable sharing of the

[2]Bioprospecting: legitimate research or biopiracy?, Graham Dutfield, http://www.biology.mcmaster.ca/course_info/4b03/bioprospecting%20and.pdf
[3] IKECHI MGBEOJI, GLOBAL BIOPIRACY: PATENTS,PLANTS AND INDIGENOUS KNOWLEDGE, 12,Ubc Press 2006.

benefits derived from access to and use of genetic resources. The CBD reaffirmed that countries have the sovereign right to determine how and under what conditions their genetic resources may be accessed and used and calls for the equitable sharing of benefits arising out of the utilisation of genetic resources. It also established that access and use of genetic resources between the provider and user of such resources should be based on prior and informed consent (PIC) and mutually-agreed terms. Furthermore, the CBD requires members to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities and encourage the equitable sharing of benefits arising from the utilisation of such knowledge, innovations and practices. The CBD also seeks to facilitate access to technologies developed through the use of genetic resources, an important objective for developing countries that may be interested in developing their own biotechnology-based industries.[4]

Article 27.3(b) of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement allows governments to exclude some inventions from patenting, i.e. plants, animals and "essentially" biological processes (but micro-organism, and non-biological and microbiological processes have to be eligible for patents). However, plant varieties have to be eligible for protection either through patent protection or a system created specifically for the purpose ("sui generis"), or a combination of the two.

The United Nations Conference on Trade and Development (UNCTAD), in an Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, noted that documenting of traditional knowledge is essential and ordered collections of databases can help to conserve and protect such knowledge and could demonstrate the existence of prior art.

Work on traditional knowledge is taking place in various inter-governmental bodies like CBD, WIPO, FAO, WTO and UNCTAD. For protection of traditional knowledge national biodiversity conservation regimes are coming up in conformity with the objectives of the Convention on Biological Diversity (CBD). We expect that the efforts of these regimes would provide legal protection to biological resources and associated traditional knowledge at the national level.

AT NATIONAL LEVEL : India has actually introduced in Patents (Amendment) Act 2002, two new grounds for revocation, that patents may be revoked on the ground, that the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention , and "that the inventions so far as claimed in any claim of the complete specification was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere." In addition a significant new item is added to the list of things that are not inventions within the meaning of the act. "An invention which, in effect, is traditional knowledge or which is an aggregation or duplication of non properties of traditionally known component or components." [5]

[4] The campaign against "biopiracy": introducing a disclosure of origin requirement, *Viviana Munoz Tellez*

[5] GRAHAM DUTFIELD,INTELLECTUAL PROPERTY,BIOGENETIC RESOURCES AND TRADTIONAL KNOWLEDGE,2004,Earthscan Publishers,U.K.

The Biological Diversity Act 2002, prescribes special provisions for the protection of TK. Among them, Chapter II regulates access to biological diversity. The Act under S.3 prohibits "certain persons" from obtaining any biological resources occurring in India or knowledge associated there for research or for commercial utilisation or for bio-safety and bio-utilization. The Act prevents any person from transferring the results of any research for monitory consideration or otherwise to such certain persons without prior approval of the National Biodiversity Authority (NBA) (art.3, 4).Article 6 is the important provision relating to the IPR in the Act. The article prevents applying for the IPR protection "in or outside" India for any invention based on any research or information on biological resources obtained from India without prior approval of NBA.[6]

There are various innovative practices introduced to bring bio-piracy under control:

Defensive Protection

Defensive disclosure refers to information or documentation intentionally made available to the public as prior art in order to render any subsequent claims of invention or discovery ineligible for a patent. A defensive disclosure needs to be easily located by patent examiners during the application process. If it is found and it invalidates a patent application, there is generally relatively little upfront costs involved to invalidate an application.

An example is the Data base:

For preventing bio-piracy there is a need for developing digital databases of prior art related to herbs which is already under public domain. The Government of India has already undertaken a affirmative, concrete and ambitious project, the Traditional Knowledge Digital Library (TKDL), a easily navigable computerized database of the Traditional Knowledge. Such digital database would enable Patent Office's all over the world to search and examine any prevalent use/prior art, and thereby prevent grant of such patents and bio-piracy. Thus proper documentation of associated traditional knowledge could help in checking bio-piracy. Documentation of traditional knowledge (TK) is one means of giving recognition to knowledge holders. But mere documentation may not enable sharing of benefits arising out of the use of such knowledge, unless it is backed by some kind of mechanism for protecting the knowledge. Documentation of traditional knowledge may only serve a defensive purpose, namely that of preventing the patenting of this knowledge in the form in which it exists.

Prior Informed Consent

Prior informed consent is the approval in advance for the use of one's genetic resources and any associated TK. "Prior" indicates that the approval must come before access is allowed or others use the knowledge. "Informed" means
that information is provided on how the resource and/or knowledge will be used. "Consent" means permission to use the resource or knowledge. Sufficient information should be provided to a community, either by the intellectual property office, or other party, regarding the aims, risks or implications of using the knowledge, including its potential commercial value. Consent must be manifested in an explicit way, for example in writing, by a clear verbal agreement, or some other means.

[6] BIOPIRACY AND PROTECTION OF TRADITIONAL MEDICINE IN INDIA, S.Swarna Latha, Westlaw publication,2009.

Sui generis System

To introduce a law of its own kind, and this is already introduced by the TRIPS. But it does not define what sui generis is. A *sui generis* system might consist of some standard forms of intellectual property protections combined with other forms of protections or none at all, for genetic resources. For example, a country could provide patent protections for inventions, plant variety certificates (PCV) for plant varieties or just certain varieties, or to exclude plants from any form of intellectual property protection at all (although this could conflict with the compliance of TRIPs).[7]

Access and Benefit sharing

It means to enter an area and collect all the data or resources. Through benefit sharing you acknowledge the ownership and provide equitable and fair compensation.[8] Articles 1 and 8(j) of the CBD encourage the equitable sharing of benefits arising from TK for conservation and sustainable use of biological diversity. They need to enter into mutual contract where in turn the parties would share any advancements, benefits (including financial), or products that they made use of through the resources developed from the local community.

Conclusion:

As John Finnis rightly says, "one basic form of good is knowledge itself, which is reached not by intuition, but through experience and reflection."[9]These knowledge that is misappropriated by the powerful people should be curtailed. At international level and at national level lot of efforts are done to deal with it but have we curbed this problem completely is still to be answered. The active participation of stake holders of TK in the activities of both prospecting and commercialization is needed. The stakeholders such as indigenous community, government departments, industry, intellectual property experts, members of civil society need to cooperate in order to define mechanisms for protecting indigenous knowledge from bio-piracy.

References:

1. IKECHI MGBEOJI, GLOBAL BIOPIRACY: PATENTS,PLANTS AND INDIGENOUS KNOWLEDGE, 12,Ubc Press 2006.

2. GRAHAM DUTFIELD,INTELLECTUAL PROPERTY,BIOGENETIC RESOURCES AND TRADTIONAL KNOWLEDGE,2004,Earthscan Publishers,U.K.

3. BIOPIRACY AND PROTECTION OF TRADITIONAL MEDICINE IN INDIA, S.Swarna Latha, Westlaw publication,2009.

[7] Traditional Knowledge and Intellectual Property, A Handbook on issues and options for TK holders, Stephen. A. Hansen and Justin.W.Vanfleet

[8] Art 1 and 8(j) of CBD

[9] R.W.M.DIAS, Jurisprudence,5 e.d; Aditya Books Private Ltd,pg 489.

4. TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY, A Handbook on issues and options for TK holders, Stephen. A. Hansen and Justin.W.Vanfleet

5. R.W.M.DIAS, JURISPRUDENCE,5 e.d; Aditya Books Private Ltd

6. Bioprospecting: legitimate research or biopiracy?, Graham Dutfield, http://www.biology.mcmaster.ca/course_info/4b03/bioprospecting%20and.pdf