

TRADITIONAL KNOWLEDGE AND SUI-GENERIS LAW

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Introduction:

Traditional knowledge is a source of knowledge, which is unprotected by Intellectual Property Rights and often freely available within the public domain.¹

At present World Intellectual Property Organization (WIPO) is unable to satisfactorily protect traditional knowledge from patenting.

The World Intellectual Property Organization (WIPO) failed to recognize the rights of traditional knowledge holders adequately.

As regards protection of knowledge, innovations and practices associated with biological resources, these do not seem to meet the conditions required for grant of patents or other intellectual property rights (eg. copyrights, trademarks etc) under prevalent intellectual property regime, i.e., novelty, inventiveness and industrial applicability.²

Conventional forms of IPR's are inadequate to protect traditional knowledge, because they are based on protection of individual property rights where as traditional knowledge is collective in nature.

Further traditional knowledge is developed over several generations over a period of time and is therefore not novel or inventive.

So national level mechanisms and legal provisions are needed to prevent bio-piracy. For rewarding traditional knowledge holders through informed consent mechanisms national level mechanisms and legal provisions are needed.

International recognition is needed for effective implementation of national level mechanisms and legal provisions. For the enforcement of national level mechanisms and legal provisions in other countries international recognition is needed.

In this regard there is a need for development of an international mechanism for protecting traditional knowledge. Such an international mechanism could include: local

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¹ Henrik Ardhede – "Traditional Knowledge and the patent system – Irre cancelable differences or a simple case of mistaken identity" wtp://www.jur.lu.se/...../Examensar be ten.nsf/0/6999D4E189B4410BC125726D00752B6B/\$File/exa m.pdy?

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² Desh Deepak Verma "Protection of Traditional Knowledge: The Indian Perspective" – International Seminar on Systems of Protection of Traditional Knowledge, held during April 3-5, 2002 New Delhi.

Wtp://www.unctad.org/trade-env/test1/meetings/delhi/India/MOEF-I ppt.

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protection to the rights of traditional knowledge holders through national level sui-generis regimes including customary laws as well as others.

Sui-generis is used to describe some thing that is unique or different.

What makes an IP system sui-generis?

Sui-generis system is the modification of some of the features of intellectual property system so as to properly accommodate the special characteristics of its subject matter (traditional Knowledge) and the specific policy needs which led to the establishment of a different system.

In an effort to extend protection to traditional knowledge, various countries have adopted existing intellectual property system to the needs of traditional knowledge holders through sui-generis measures.

What exactly is a sui-generis system?

Sui-generis literally means “of its own kind” and consists of a set of nationally recognized laws and ways of extending plant variety protection (PVP) other than through patents.

A Sui-generis system might consist of some standard forms of intellectual property protections combined with other forms of protections, or not at all for protecting traditional knowledge and genetic resources.

A Sui-generis system could be defined and implemented differently from one country to another.

In addition, a Sui-generis system might be defined to create legal rights that recognize any

associated traditional knowledge, relating to genetic resources and promote access and benefit sharing. The govt. may choose to extend protections to genetic resources and / or knowledge to a community in the form of patents, trade secrets, copy rights, farmers and breeder’s rights or another creative form not currently established in the intellectual property regime.

In addition a Sui-generis system may adopt measures of protection specific to traditional knowledge in order to nullify in appropriate patents.

If a country has passed a Sui-generis law, it is necessary for local communities to establish a working relationship with the intellectual property office.

These intellectual property offices may privately maintain inventions or registries of locally held knowledge, and can assist in its protection. This intellectual property office can deny a patent application if the knowledge that it is based on is already held in the registry.

Under a Sui-generis system and according to Convention on Biological Diversity, any person interested in gaining access to a community’s biological resources or knowledge for scientific commercial or industrial purposes would need to obtain the prior informed consent of the indigenous people’s who possess the knowledge in question, unless the knowledge is already in the public domain.

This would allow the community to decide on access to traditional knowledge and use of

traditional Knowledge with the option to share traditional knowledge or not to share traditional knowledge.

If consent is granted, the person or person's wishing to access traditional knowledge, lands held by indigenous communities or a conservation area, its biological resources and knowledge associated with them, would need to present evidence of this consent to the intellectual property office or proper authority.

Convention on Biological Diversity (CBD) 1992 and Sui-generis Law:

Article 8(j) of CBD is not against making of Sui-generis laws. Art8 (j) of the CBD allows convention countries to make sui-generis laws at national level.

Art 8(j) "Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices,"³

TRIP's 1994 and the Sui-generis laws:

The WTO's 1994 Agreement on Trade Related Aspects of Intellectual Property (TRIP's) requires member countries to provide patent protection for inventions in all fields of technology, but also allows some exceptions from the patenting requirement, specifically plants, animals and processes for their production. However TRIP's does require member countries to grant protection for plant varieties either through patents or by an effective Sui-generis system or by any combination there of.

Art. 27.1 of the TRIP's agreement requires that the members to grant patents for inventions in all fields of technology, provided they are new, involve an inventive step and are capable of industrial application.⁴

Art 27.3 of the TRIP's allows members to exclude from patentability inventions related to diagnostic, therapeutic and surgical methods for treatment of humans or animals. It also allows exclusion of plants and animals other than micro organisms, and essentially biological processes for production of plants or animals other than non-biological and microbiological processes. However, members are required to provide for protection of plant varieties either by patents or by

³ Stephen A Hansen and Justin W. van fleet "Traditional Knowledge and Intellectual Property" A handbook on Issues and options for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity".

Wtp://www.shr.aas.org/tek/handbook/handbook.pdf.visited on 08.03.2009.

⁴ Parbhudha Ganguli "Intellectual Property Rights Unleashing the Knowledge Economy" Tata Megrew Hill Publishing Company Ltd. New delhi. 2001.P-121.

an effective sui-generis system or by any combination there of.⁵

Essential elements of Sui-generis Laws

1. Sui-generis laws include elements of benefit sharing.
2. Sui-generis laws include provisions of prior informed consent (PIC).
3. Sui-generis laws include elements of disclosure of the country of origin of genetic resources/biological resources.
4. Sui-generis system includes elements of co-ownership of the patents where applicable.
5. Sui-generis system includes disclosure of traditional knowledge.
6. Sui-generis system includes provisions for contractual agreements.
7. Sui-generis system may include provisions of customary law.
8. Sui-generis law including the provisions of, rights of farmers and breeders
9. A Sui-generis law may be a combination of intellectual property law and any one or more of the above provisions.

Benefits of Sui-generis Laws.

1. Sui-generis system better protects the rights and interests of traditional knowledge holders.

2. This system improves the livelihoods of traditional knowledge holders and communities.
3. This system benefits national economics.
4. This system conserves the environment.
5. This system prevents bio-piracy
6. This system provides legal protection to traditional knowledge.

Difference between intellectual property right's patent System and Sui-Generis System:

⁵ Ibid

Sl. No.	Intellectual Property Patent System	Sui-generis System
1	For protection under this system an invention has to be novel, Non-obvious and must have industrial application	For protection under this system an invention/knowledge need not be novel, it need not be non-obvious and it need not have industrial applicability.
2.	Under this system property rights of individuals are recognized.	Under this system property rights over community are recognized.
3.	Monopoly is given for a definite period	Monopoly is given for an indefinite period
4.	After the completion of monopoly period the knowledge becomes with in the public domain, and any body can use that knowledge for commercial purpose without paying any amount to the inventor	Under this system monopoly is given for an indefinite period. So licensee has to pay money until he uses that knowledge or as per agreement between them for benefit sharing.
5.	Under this system licensee has to pay maximum for a period of 20 years.	Licensee has to pay for on indefinite period or he has to hare benefits for an indefinite period.

Relation of Intellectual properties Rights and Sui-generis law

At the international level intellectual property rights are created and implemented by World Intellectual Property Organization. Even though intellectual property laws are made at national level they are governed by WIPO.

But normally Sui-generis laws are made and implemented at the national level. Sui-generis laws are not governed by WIPO.

Normally Sui-generis laws are not entirely different from intellectual property laws. A Sui-generis law may be a combination of intellectual

property law, customary law, benefit sharing provisions and contractual agreements.

i.e. A Sui-generis law may be a combination of IP law and any one or more of the above provisions.

National level Sui-generis system can be effectively enforced through inter alia systems such as positive comity of protection systems of traditional knowledge which include co-ordination and co-operation amongst national authorities of various countries in undertaking measures for protection of traditional knowledge.⁶

Development of an appropriate form of protection for the knowledge of local communities is of great interest to countries, which are rich in bio-diversity and traditional knowledge, such as India. There is therefore a need for various bio-diversity rich developing countries to work together in various inter governmental forums towards developing an international instrument for the recognition of diverse national Sui-generis system.⁷

Several countries have adopted Sui-generis laws for protecting traditional knowledge from patenting. These include South Africa, Peru, Panama, Costa-Rica, Portugal, India and Thailand.

A number of countries have decided to develop national legislation to protect traditional

knowledge. In addition inter governmental and non-governmental organizations have produced model legislation for interested countries to adopt.

In June 2000 Panama has passed a Sui-generis law by name "Panama's special system for registering the collective rights of indigenous people's for the protection and defense of their cultural identity and traditional knowledge and setting out other provisions".⁸

According to World Intellectual Property Organization (WIPO) the Sui-generis system of Panama actually constitutes the first comprehensive system of protection of traditional knowledge ever adopted in the world.⁹

The object of this law is to protect the collective intellectual property rights and the traditional knowledge of the indigenous peoples over their creations. Such creations include "invention, models, patterns and designs, innovations contained in images, figures, symbols, diagrams and petroglyphs".¹⁰

Also included are the cultural elements of their history, music art and traditional artistic expression capable of commercial use".¹¹

⁶ Department of commerce Govt of India "Protecting Traditional Knowledge – the International Dimension" International Seminar on systems of protection of Traditional Knowledge Organized by the Department of Commerce Govt. of India in co-operation with UNCTAD from 3-5 April, 2002. New Dhelhi P-6.

⁷ Ibid at P-7

⁸ Graham Dut field "Protecting Traditional Knowledge and Folklore" a review of progress in diplomacy and policy formulation . UNCTAD/eTCTSD capacity building project on Intellectual Property rights and sustainable development October 2002, P-36.

⁹ World Intellectual Property Organization (2003) "Intergovernmental Committee on Intellectual Property and Generic Resources, Traditional Knowledge and Folklore third session. Geneva, June 13-21, 2002. Review of existing intellectual Property protection of traditional Knowledge prepared by the secretariat" (WIPO/GRTKF/IC/3/7)

¹⁰ Supra Note 9

¹¹ Ibid P-31

Indian Parliament has passed Sui-generis laws such as, “The Indian Biological Diversity Act 2002” and “Plant Variety Protection and Farmer’s Rights Act 2001”.

Policy objectives of “The Indian Biological Diversity Act 2002 are-“ to provide for conservation of biological diversity., sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources and knowledge”¹²

Objectives of “Plant Variety Protection and Farmers Rights Act 2001” are to provide for strong, proactive farmers rights, registration of farmers varieties, Provisions for benefit sharing through a national gene fund and the requirement for prior informed consent for use in breeding”.¹³

Conclusion:

As Sui-generis law may be a combination of intellectual Property law, customary law, equitable benefit sharing provisions, provisions for the rights of farmers and breeders, provisions of prior

informed consent, provisions of contractual agreements and provisions of disclosure of origin of biological/genetic resources it is the best system of law for the protection of traditional knowledge. Sui-generis law better protects the rights and interests of traditional knowledge holders. Sui-generis law intends for the wider application of the knowledge, innovations and practices of indigenous and local communities with the involvement of holders of such knowledge, innovations and practices. At present international recognition is needed for the effective implementation of Sui-generis laws at national level.

¹² World Intellectual Property Organization (2003) “Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Fifth session, Geneva , July 7.15.2003 Comparative summary of existing national Sui-generis measures and laws for the protection of traditional Knowledge. Prepared by the secretariat”. (WIPO/GRTKF/IC/5/INF/4).

¹³ Dr. Suman Sahai “Protection of Indigenous Knowledge and possible methods of sharing benefits with local communities. ICTSD. Background paper prepared for the multi-state holder Dialogue on Trade, Intellectual Property and Biological and Genetic resources in Asia. BRAC centre for Development management, Rajendrapur Bangladesh from 19-21. April 2002. P-17 <http://www.ictsd.org/dialogue/2002-04-19/Sahai.daf.visited> on 25.01.09

