

SPEECH OF HON'BLE MR. JUSTICE VIJENDER JAIN, CHIEF JUSTICE, PUNJAB AND HARYANA HIGH COURT, CHANDIGARH IN A SEMINAR OF ASIA PACIFIC JURIST ASSOCIATION (APJA) ON "SAFEGUARDING THE TRADITIONAL KNOWLEDGE IN INDIA" ON 28.04.2008 IN DELHI.

Traditional Knowledge (TK) is essentially culturally oriented or culturally based, and it is integral to the cultural identity of the social group in which it operates and is preserved. "Traditional knowledge" is an open-ended way to refer to 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. The definition of traditional knowledge used by the World Intellectual Property Office (WIPO) includes indigenous knowledge relating to categories such as agricultural knowledge, medicinal knowledge, biodiversity-related knowledge, and expressions of folklore in the form of music, dance, song, handicraft, designs, stories and artwork.

Process leading to the creation of TK may not be formally documented in the way that much scientific and technological information is recorded. The apparent non-

systematic manner of creation of traditional knowledge, does not diminish its cultural value, or its value from the point of view of technical benefit.

In recent years concern has been expressed in relation to the recognition of traditional knowledge as prior art. Patents have been granted for traditional knowledge-related inventions which did not fulfill the requirements of novelty and inventive step when compared with the relevant prior art. This prior art consisted of traditional knowledge that could not be identified by the patent-granting authority during the examination of the patent application. The term “prior art” generally refers to the entire body of knowledge which is available to the public before the filing date of an application for certain industrial property titles, principally patents, utility models and industrial designs. The identification of prior art constitutes a cornerstone for the substantive examination of applications for these titles, since requirements such as novelty and inventive step are established by comparing the claimed subject matter with the relevant prior art.

For example, pharmaceutical patents were granted which had to be revoked, once the patented invention was

compared with the teaching of traditional medicine which constituted relevant prior art. A well-known example is US on Use of Turmeric in Wound Healing, issued March 28, 1995.

Turmeric (*Curcuma longa*) is a plant of the ginger family yielding saffron-colored rhizomes used as a spice for flavoring Indian cooking. Its unique properties also make it an effective ingredient in medicines, cosmetics and as a color dye. As a medicine, it is traditionally used to heal wounds and rashes.

In March 1995, two expatriate Indians at the University of Mississippi Medical Centre, Jackson, (Suman K Das and Hari Har P. Cohly) were granted a US patent for turmeric to be used to heal wounds.

The European Patent Office (EPO) revoked in its entirety Patent number 436257, which had been granted to the United States of America and the multinational corporation W.R. Grace for a fungicide derived from seeds of the Neem tree.

The broad development underlying this issue is that, as the reach of the intellectual property system in the global information society extends to new stakeholders, such as indigenous and local communities, their knowledge base, including in particular their traditional knowledge, constitutes an increasingly relevant body of prior art, the effective identification of which is of increasing importance for the functioning of the intellectual property system. Traditional knowledge documentation data constitutes an important form of non-patent literature with specific characteristics. Some of those characteristics may necessitate specialized measures for traditional knowledge data to be adequately integrated and recognized as relevant non-patent literature.

The development of new technology and the new use of traditional knowledge based products today is the major threat to the survival of many of these communities. The modern cultural industries as well as the manufacturing industries now commercially exploit the traditional knowledge based products using new technology without the permission and sharing of profits with the communities. It is possible today to bring out new products or find out new use of existing products based on traditional knowledge utilizing

the technological developments in the field of biotechnology. This is proved beyond doubt particularly in the field of medicines, agriculture etc. The development of new products or new use of existing products enable the industries to get protection for these products through the formal intellectual property laws.

Traditional knowledge is generally associated with biological resources and is invariably an intangible component of such a biological resource. Traditional knowledge has the potential of being translated into commercial benefits by providing *leads/ clues* for development of useful practices and processes for the benefits of mankind. The valuable *leads/clues* provided by TK save time, money and investment of modern biotech and other industries into any research and product development. Logically, therefore, a share of such benefits should accrue to the creators and/or holders of such traditional knowledge. Some countries have specific legislation protecting this kind of knowledge while some other countries feel their existing IPR regime protect such knowledge. A regional policy has to be developed for the protection of indigenous knowledge related to biodiversity which includes agriculture, medicinal,

ecological related knowledge; and also for the protection of other traditional knowledge relating to folklore.

“Jeevani” is a restorative, immuno-enhancing, anti-stress and anti-fatigue agent, based on the herbal medicinal plant *arogyapaacha*, used by the Kani tribals in their traditional medicine. Within the Kani tribe the customary rights to transfer and practice certain traditional medicinal knowledge are held by tribal healers, known as *Plathis*. The knowledge was divulged by three Kani tribal members to the Indian scientists who isolated 12 active compounds from *arogyapaacha*, developed the drug “Jevaani”, and filed two patent applications on the drug (and another patent based on the same plant but for different use). The technology was then licensed to the Arya Vaidya Pharmacy, Ltd., an Indian pharmaceutical manufacturer pursuing the commercialization of Ayurvedic herbal formulations. A Trust Fund was established to share the benefits arising from the commercialization of the TK-based drug “Jevaani”. The operations of the Fund with the involvement of all relevant stakeholders, as well as the sustainable harvesting of the *arogyapaacha* plant, have posed certain problems which offer lessons on the role of intellectual property rights in benefit-

sharing over medicinal plant genetic resources and traditional medicinal knowledge.

The current IPR system cannot protect traditional knowledge for three reasons. First, the current system seeks to privatize ownership and is designed to be held by individuals or corporations, whereas traditional knowledge has collective ownership. Second, this protection is time-bound, whereas traditional knowledge is held in perpetuity from generation to generation. Third, it adopts a restricted interpretation of invention which should satisfy the criteria of novelty and be capable of industrial application, whereas traditional innovation is incremental, informal and occurs over time. A *sui generis*, or alternative law, is therefore necessary to protect traditional knowledge.

The Convention on Biological Diversity is the first international agreement acknowledging the role and contribution of indigenous and local communities in the conservation and sustainable use of biodiversity.

The Convention imposes general obligations relevant to the conservation, sustainable use, sharing of

information on, and equitable sharing of benefits derived from biodiversity.

Each party has an obligation (subject to their particular national circumstances) to develop national legislation as far as possible and as appropriate in order to:

- *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.

Thus it is clear that there is a general agreement within the international community that there is a need to recognize the traditional knowledge. The concern is to recognize it, take measures to ensure that communities are involved in the preservation and development of it and proper

benefits return to them in case of commercial exploitation by others. But the method of achieving it is left to individual nations. But there are no uniform norms regarding the protection of different types of traditional knowledge owned by local communities. The reasons being that the international community never had an occasion to look at the protection of traditional knowledge in its entirety.

Recently amended patent law of India contains provisions for mandatory disclosure of source and geographical origin of the biological material used in the invention while applying for patents in India. Provisions have also been incorporated to include non-disclosure or wrongful disclosure of the same as grounds for opposition and for revocation of the patents, if granted.

Documentation of traditional knowledge is also acknowledged as a means of giving due recognition to the traditional knowledge holders. This particular aspect of documenting formulations in the Ayurvedic system of medicine in India in the shape of Traditional Knowledge Digital Library (TKDL) is already on. The scope of the TKDL work relates to the transcription of 35,000 formulations used in Ayurvedic system of medicines. These

details are being converted into Patent Application Format and will include description, method on the preparation, claim and the usage of the bibliography. The retrieval will be based on the Traditional Knowledge Resource Classification (TKRC) and International Patent Classification (IPC). The original Sanskrit text is translated and presented in French, German, English, Japanese, Spanish and Hindi through unit code technology that is language independent.

But I feel that a *sui generis* system separate from the existing IPR system should be designed to protect the traditional knowledge of the local and indigenous communities of India.
