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INTERNATIONAL INTELLECTUAL PROPERTY LAW: A STUDY ON 'GYRINOPS WALLA

Yasith Kumara Sannasgala Hirimburegama

Sri Lanka Law College and University of Colombo, Colombo, Sri Lanka

yasithrc@yahoo.com

Abstract

Pointing out the necessary loopholes and gaps in the local legal system to protect Intellectual Rights and challenges in the legal system. Intellectual Property Right is to protect intangible property of the owners. Sometimes Industrialized countries to manipulate the resources available in developing countries use this concept as a tool. Further, there are other challenges such of lack of technology to exploit resources for developing countries. A method must be introducing vis-à-vis the protection of Traditional Knowledge and at the same time it must pave a way to the benefit of the society by exploiting the knowledge.

Keywords

Intellectual Property Law, Developing Countries, Indigenous Rights, Gringos Walla, Sri Lanka, Patent Law

1. Introduction

This article critically discusses the universal legal framework of Intellectual Property law (IP), its application in developing countries, whether the international instruments are adequate

to protect national Intellectual Rights with a particular emphasis on ‘commercialization of Indigenous people’s rights and Intellectual Property’. This is analyzed in relation to a case study on ‘*Gringos Walla*’ and its related intellectual rights. This also explains the benefits and negatives of the International Intellectual property law for a developing country.

2. What is Intellectual Property Law?

IP law regulates the creation, use and exploitation of mental or creative labour. The general area of IP law includes copyrights, patents, designs, and trademarks. IP law protects creators, tangible or intangible property.

The patent system can be justified on the basis of that “it provides investors with an incentive to invest in research and development of new products”, or an encouragement to reveal valuable information to the public, if not remained a secret.

The territorial nature of intellectual property rights has been issues on the right of the holders whose labor, inventions and brand names are the subject of transnational trade. Previously it was protected by bilateral treaties, but in the current century it is protected by multilateral arrangements: the *Paris Convention for the Protection of Industrial Property of 1883* and the *Bern Convention for the Protection of Literary and Artistic Works of 1886*. The two treaties adopted as their central principle for protection the principle of ‘*national treatment*’.

The World Intellectual Property Organization (WIPO) governs most of these conventions, which is the central forum for the development of new intellectual property at international level. The *Trade-Related Aspects of Intellectual Property Rights (TRIPS)* agreement covers all the main areas of IP, which are copyright, trademarks, geographical indication, designs and patents. As a result, of TRIPS being part of the World Trade Organization (WTO) agreements, it is indirectly compulsory for a country to bring its laws into lines with TRIPS. As a result the developed countries began to use tactics such as threatening trade sanctions to control international IP.

3. The Traditional Knowledge of Common Indigenous ‘Walla Patta’.

Walla Patti, scientifically known as ‘*Gyrinops Walla*’, is a sub-canopy tree grown in wet zones forests in Sri Lanka (SL). Recently authorities learned illicit operations to smuggle Walla

Patta out of the country. Walla Patta was found to produce a resinous substance called “Agarwood”, which is used as a base for the world’s most expensive perfumes. Until recently no one in SL knew Walla Patta had this valuable property. Agarwood is produced from the bark of the tree when a fungus infects the tree. Once extracted, Agarwood is burnt as incense and used in the manufacture of non-alcoholic perfumes. Villagers mostly use Walla Patta for bark fiber ropes for limb casts and also as traditional Ayurveda medicine for serpent stings and toothaches. The issues regarding this tree are that the patent rights for Walla Patta Agarwood and the process of extracting Agarwood from Walla Patta should be patented before being used by an industrialized country. The smugglers may use this plant to invent pharmaceutical products for commercialization. Therefore, it is evident that this indigenous tree is highly valued. This tree is still not protected under *Section 42 of Fauna and Flora Protection Ordinance* in Sri Lanka, because Walla Patta has indigenous medicinal properties to allow sustainable use, but cannot be taken out of the country without permission.

Traditional Knowledge (TK) defined as “*the information that people in a given community, based on experience and adoption to a local culture and environment, have developed over time, and continue to develop*”, has reached a high economic value. The advancement of new technology has made TK a goldmine for scientists for inventions that can make developed countries richer. *Article 8(1) of the Convention on Biological Diversity (CBD)* has realized the importance of TK and protected it. Some communities depend on their TK for survival. In this case study the TK regarding the medical use of Walla Patta is transmitted orally; it is not static and is traditional.

An oral transmission of knowledge takes place from generations to generations and evolves continuously over time on the needs of the community. Most of these indigenous communities geographically located in developing countries; therefore, resources are kept within developing countries. As a result, industrialized countries tend to find resources from those countries.

A good example is smuggling Walla Patta from SL and making use of the traditional medical knowledge and Agarwood. The central issue in developing countries is that they lack the economy for commercialization of Research and Development (R&D). In contrary industrialized countries have technology and economy for R&D, but do not have resources.

Developing countries do not receive Foreign Direct Investment (FDI) if the patent protection system is not highly standardized. Even though patent law is the protected, developed countries may monopolize the invention that is taken from a TK and commercialize it for their benefit. Especially in the pharmaceutical industry, developed countries sell the medicine for higher prices. This is contrary to the **Millennium Development Goals** because selling back the medicine for a higher price would not reduce fighting disease epidemics to be achieved by the year 2015. It was discussed in Doha rounds that the TRIPS agreement should be interpreted in a manner that does not prevent members from taking steps to protect public health. *Article 31 of TRIPS* provides for the use of the patent without authorization in the case of ‘national emergency or other circumstances of extreme urgency’. Commentators state that Article 31 does not explicitly mention the word ‘*compulsory license*’, but the meaning can be drawn from the reading. Therefore, for some extent TRIPS is beneficial for developing countries.

It should be noted that “*today, diseases are polarized in terms of geography, and the serious, infectious epidemics exist largely in the developing world*”. A pharmaceutical company who has spent millions on the research of a new drug would not provide free medicine for developing countries. Under the compulsory license, pharmaceutical companies are obliged to act according to the law. As a result, most of the pharmaceutical companies in develop countries invest money in research on cosmetic products. The outcome of this would lead to a high risk of health issues which again developing countries would suffer.

“*...out of a total of about 1,400 new products developed by the pharmaceutical industry between 1975 and 1999, only 13 were for tropical diseases and just three were for Tuberculosis, both endemic in the developing world*”.

It can be argued that these local people, who have the Ayurvedic medical knowledge of Walla Patta, are not indigenous communities; therefore it cannot be protected as traditional knowledge. CBD ponder that TK is held by indigenous or local communities, suggesting that the “*holders of TK are not necessarily indigenous groups and could be community people of any sort, as long as they lead traditional lifestyle, despite the fact that indigenous groups are the ones that usually seek protection*”. Likewise local community in the west zone forests in SL has customs, beliefs, rituals and practices that are transmitted by generations to generations, even though they are not indigenous people.

“...traditional people are described as those who hold an unwritten corpus of longstanding customs, beliefs, rituals and practices that have been handed down from previous generations. They do not necessarily have a claim of prior territorial occupancy to the current habitat; that is, they could be recent immigrants”. It can be stated that TK is being created and used by traditional communities who are mainly villagers in rural areas of SL. Therefore, TK related to Ayurvedic medicine in Walla Patta can be protected under the *Article 8(1)CBD* as a TK, which is used by a local community in SL.

Most of the well-known stimulants and substances come from plants of the wet zone forests in SL. It is stated that rainforest is a “geotropically pharmacy”. With the new technology, modern societies are familiar with compounds coming from rainforests and make use of them for many purposes ranging from medicine to pesticides. Industrialized countries seek TK of the village people who are within that region because local communities have been dealing with plants for generations. The pharmaceutical, biotechnologists, and agricultural industries have shown interest in the wet zone forests in SL, especially in the Sinharaja rainforest.

Patent rights of Walla Patta Agarwood can be protected under Geographical Indications (GI). Walla Patta can only be seen in wet zone forests in SL. There are names that are used to describe foods and other agriculture products that originate from particular geographic areas.

The Paris Convention expressly includes agriculture within its legal regimes that regulate geographical designations in the form of Intellectual Property law. It should be noted that GI potentially protect all the IP products. It is interesting that since GI recognizes collective rights and the connection between ‘product’ and ‘place’, which are essential for many indigenous communities, the “*indigenous creations could be protected via a style of law modeled on geographical designation*”.

International instruments define three main key geographical indications. They are, *qualified geographical indication of origin*, *Article 22(1) of TRIPS* and *appellation of origin*. In SL, IP rights can be protected under GI as stated in *Section 161 of Intellectual Property Act, No. 36 of 2003 (IPA2003)*. Walla Patta Agarwood can be protected under *Section 161(1) (iii) of IPA2003* as it fulfills the requirement such as ‘*qualified geographical indication of origin*’, because an indication of source of the product is connected to a particular geographical location such as wet zone forests of SL. It is stated in the case of C-3/91 [1992] that:

“...an indication of source simply informs consumers that the product bearing the sign comes from a particular place, region, or country.”

TIPRS protect GI in a wider sense by giving definition to the terms of GI. *Article 22(1) of TRIPS* define GI as “ *indications, which identify a goods as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristics of the goods are essentially attributable to its geographical origin*”. The TRIPS is the most important international treaty, because of its broad membership. Article 23 of TRIPS requires to provide protection even the true origin of the goods is indicated, the GI is used in translation, or is accompanied by expression such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or the like. It is stated in Doha Declaration that higher level of protection should be given to a multinational system of notification and registration of GI for wine and spirit under *Article 23 of TRIPS* to all agricultural products.

An appellation of origin is the “geographic name of the country, religion, or locality, which serves to designate a product originating therein, the quality or characteristics of which are exclusively or essentially due to the geographical environment, including nature and human factor”. Locality can be seen by the name of the plant as ‘*Gringos walla*’, called after the plant’s local name that was first recorded in Galle in 1780 by J.G. Konig.

SL can enter into bilateral agreements as a way of protecting Walla Patta in other jurisdictions. Bilateral agreements are effective as it protects the goods directly between two countries, but it is not efficient because the agreement are only between two countries and cannot be protected in other countries. It can be noted that further protection for GI can be seen in the view of ‘false indications of source’ as stated in Madrid Agreement. Likewise, Walla Patta Agarwood fulfills all the requirements for GI as, stated in international instruments; therefore, IPR of Walla Patta Agarwood can be protected internationally.

Patent rights for Walla Patta Agarwood under GI can be counter argued by stating that it is a discovery rather than an invention. i.e., Agarwood substance is not an invention but is a scientific discovery. In contrary, it can be argued that the isolation requires a significant invention by man using a highly sophisticated technological process, and. Therefore, the outcome is an explanation of a technical problem. It can be further argued that isolated Agarwood is not different from chemical substance extracted from nature, which is patentable

subject matter.

Article 27.1 of the TRIPS agreement requires that patents should be available in all fields of technology, without discrimination, provided that they are new, involve an inventive step and are capable of industrial application. Likewise, it is stated in SL legislations that “an invention is patentable if it is new, involves an inventive step and is industrially applicable” and it should “not anticipated by prior art”. It can be counter-argued that *Article 27(3) (b) of TRIPS* states that “*Members may exclude from patentability: plant, animals and essential biological processes for the production of plants or animals*”. Agarwood is not a plant or an animal gene; it is an extract from Walla Patta tree that is located in SL. It is a biological material, which is isolated from its natural environment or produced using technical process. Therefore, Agarwood that is extracted from Walla Patta, and the process of extracting can be protected precisely by the implementation of International IP law.

Biotechnology is a field of technology growing importance. Genetic engineering methods are also used in the modification of microorganisms and plants for the production of new medicines and highly expensive substances such as Agarwood. Industrialised countries have been the main investors in biotechnology and the principle beneficiaries of its adoption. Developing countries, however, are in lack of technology and economy for the investments in biotechnology. Therefore, developed countries may patent the process of extracting Agarwood before SL patent the procedure of extracting Agarwood since, “*smugglers know how to extract Agarwood, but SL people do not know*”. This is mainly due to of lack of technology and lack of necessary equipment for research in SL.

It should be noted that granting patents for the Walla Patta Agarwood would contradict with the rights local communities have in Walla Patta which are in public domain. Indigenous peoples state that development has been imposed upon them in a way that would endanger the environment and violate their rights.

“The concept of development has meant the destruction of our lands. We reject the current definition of development as being useful to our peoples.”

Indigenous people are willing to share the knowledge they have acquired from generations to generations, but they do not like to commercialize the biological diversity they owned. After the patent of Walla Patta Agarwood, it will be monopolized and gain commercial

benefits. Industrialized countries argument is that patent protection increase local R&D, attract foreign investment, foster technology transfer, provide high technology employment and scientists and researchers would participate in sustainable *“developmental activates since they could gain economic benefits by either licensing their patented invention or by developing their manufacturing plants to develop and market patented products”*.

In my opinion, the next generations of indigenous/local communities would be victims of globalisation. As a result, TK that is verbally transferred from generations to generations may vanish. They would also feel the need of new technology such as iPods', iPods and new devices. Therefore, the conflicts between individual ownership and community ownership which are in the public domain should be balanced and get the best out of it. The TK should be properly constructed and save in TK libraries before native language becomes extinct. With new technology on TK, a sustainable development is deemed to be achieved.

For example, if a scientist innovated a process to extract Agarwood substance there would be exportable perfume industries coming up in SL. As a result job opportunities would come to the peoples and development would take place. This would occur only if the Agarwood substance is patentable. In contrary if it were patentable, local communities' rights would be infringed. That indirectly endangers the environment. Therefore, it is a question of fact that what is more important, development taking place or rights of indigenous communities? Therefore, a strong legal system should be introduced to balance the development and safeguard rights of indigenous communities.

The CBD was introduced to regulate the balance between patenting and Indigenous people's rights. Article 8(j) of CBD deals with the protection of TK and the implantation depends on the willingness of national governments. The national governments argue that Indigenous communities are a threat to the sovereignty of the country. Therefore, the protection of TK is in a weak position to the discretion of the state.

“...indigenous human rights claims are grounded on the idea that unitary notions of sovereignty are incomplete, and that indigenous people are also a source of power that exist alongside the nations state.”

It is a benefit for the developing country to have sovereign rights over their biological resources, but the current international law recognize that state sovereignty does not exclude

respect for indigenous peoples rights insured by international treaties. i.e., *The 2007 Indigenous Peoples Declaration Article 11(2) states that “States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their culture, intellectual, religious, and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs”*. The provisions of International instruments including *CBD* and *Nagoya Protocol* aiming to secure TK with respect to biodiversity and genetic resources attempt to provide equal protection for both providers and beneficiaries of TK through Prior Informed Consent (PIC) and Equitable Benefit Sharing.

Article 15 of CBD requires PIC of the party that provides the resources. It is beneficial for both patentee and the local community. If PIC is obtained, a contractual agreement with mutual terms and Equitable Benefit-sharing aspects may be discussed between local communities and patentee, regarding Walla Patta Agarwood.

4. Conclusion

Most efficient way to protect TK is by establishing a ‘*Sui Generis*’ system; both at national and international level. National law provides assurance that indigenous / local people can obtain prompt, effective and affordable judicial, administrative action that is easy to access, to punish, prevent, and obtain full restitution and compensation for the violation of their rights. It is noted that SL has a draft law on Protection of TK which is ‘*Legal Framework for the protection of Traditional Knowledge in Sri Lanka*’.

The protection of indigenous communities’ heritage should be adopted in consultation with communities concerned, and commercialization of any traditional plants and medicine of local communities must be managed by themselves who have inherited such knowledge. “...*further commercialization of Indigenous Medicinal plant and human genetic material must be declared until Indigenous communities have developed appropriate protection measures.*”

For further protection, a multilateral system of notification and registration of all geographical indication should be developed.

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