



**CBD and TRIPS:
Empowering Knowledge Rich, Economically Poor People
Through IPR Reforms**

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Abstract

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The discussion in the recent COP 8 (Conference of Parties) meeting ending on March 31, 2006, the subject of Prior Informed Consent and protection of intellectual property rights of knowledge holders remained very contentious. I discuss various kinds of incentives that need to be provided for protecting the IPRs of local communities and individual knowledge holders, innovators without undermining the goal of people to people learning. The policy reforms are suggested in primarily five areas viz., registry of innovation and traditional knowledge, Prior Informed Consent, disclosure requirement, licensing and other issues relating to collecting societies (collective rights of innovators), etc. It is hoped that the deliberation of the next meeting of the Article 8J working group prior to COP 9 would draw upon these lessons and incorporate the same in the discussion.

CBD and TRIPS: Empowering Knowledge Rich, Economically Poor People Through IPR Reforms¹

Anil K Gupta²

The case for international policy reform gets strengthened when a country modifies domestic policies accordingly. Therefore, Indian policy and practice of providing support to the grassroots innovators and traditional knowledge holders can be looked at in the context of the reforms required internationally. CBD provides for Prior Informed Consent (PIC) of the country while seeking access to biodiversity and involvement and approval of communities and individuals contributing knowledge, innovation and practices while generating benefits and sharing them fairly. TRIPS provides for the intellectual property protection, negotiation of an international registry for wines and spirits, discussion under article 27.3b on patentable subject matter. Doha declaration also obliges compatibility between TRIPS and CBD and suggests measures to protect traditional knowledge and folklore.

My suggestions are based on the activities of Honey Bee Network over last sixteen years pursued by various voluntary organizations who have contributed towards a database on innovations and traditional knowledge. The experience of Society for Research and Initiatives for Sustainable Technologies and Institutions (SRISTI), GIAN (Grassroots Innovations Augmentation Network) and NIF (National Innovation Foundation) and National Micro Venture Innovation Fund managed by NIF has been drawn upon while advocating changes in the policies at national and international level.

The intellectual property rights provide only one set of incentives among many that are possible and necessary for encouraging creativity and innovation at grassroots besides conservation of biodiversity. Material and non-material incentives for individual and groups have to be combined in a proper portfolio matching the specific knowledge and resource context. However, in this note, I restrict to the reforms required in IPR framework. It is also important to stress that knowledge can be produced by individuals or groups and can be governed by private (proprietary), community and public domains. Likewise, the resources around which knowledge is developed can also be governed by private, community or public property rights. The local communities do not have knowledge distributed in a symmetrical manner. In fact, no knowledge system can grow, if there was no asymmetry in its exploitation. It is the asymmetry which produces expertise and provides incentives for specialization. The incentives for individual experts cannot be at par with that of the communities. However, if communities don't conserve the resources, the individuals will not be able to access, experiment, innovate, develop solutions and specialize. Therefore, there has to be a proper recognition of the rights of communities as well as individuals. Policy framework must recognize that the nature of innovations in traditional knowledge brought about by individuals can become community wide or public domain knowledge. But, it is also possible that certain individuals for very legitimate purposes may decide to keep knowledge as trade secret. The intellectual property rights framework is relevant to the extent that it may encourage knowledge otherwise kept as trade secret brought in the public domain for improvement and further innovation. It is also relevant to generate incentives for innovators to imagine a future in which they could improve their livelihood and prospects for the children primarily because of the innovations and knowledge that they produce. Indian

¹ Based on the earlier paper presented at the National Seminar on TRIPS- CBD and Subsidy Issues at the WTO on 25th August 2005, New Delhi

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aspiration for becoming a knowledge intensive society will be fulfilled when public domain will expand and proprietary knowledge will be balanced with open source pool of innovations and traditional knowledge. The knowledge producers should not be expected to subsidize the cost of learning by rest of the society. If communities and individuals have no rights, then there is no case for bio piracy or for that matter, any compensation to be given to the knowledge producers. The amendment in the Indian Patent Act implying that an invention in which any claim can be anticipated by knowledge, oral or otherwise available with any local or indigenous community in India or elsewhere can be a ground for revoking the patent. One could stretch the logic and argue that all the oral traditional knowledge is now considered a prior art. Once traditional knowledge of India becomes prior art, there is no argument for anyone to have any hesitation in using this knowledge or feeling obliged to compensate the knowledge provider. This provision must be modified to suggest that knowledge which is *reasonably accessible* can be a ground for revocation of the patent. It is obvious that no inventor can gain access to the mind of all the knowledge holders in thousands of villages. In any case, the law is made not only to deny wrongful practice but also to encourage right practice or behaviour. There is nothing in the Indian Patent Act which provides incentives to the communities and/or individuals seeking protection for their knowledge and innovation with as low transaction cost as possible.

Policy reforms:

A. Registry of Innovations and Traditional Knowledge

1. To reduce transaction costs of the inventors, innovators and traditional knowledge holders, the National Register of Grassroots Innovations and Traditional Knowledge being developed by NIF may be accorded the legal protection such that disclosure to NIF can entitle knowledge holders a minimum protection, if the knowledge is not already public domain.
2. The registry can share the synoptic information after protection is provided with the potential investors and entrepreneurs around the world in consonance with PIC provided by knowledge holders. The transaction costs of entrepreneurs will go down and value addition in local knowledge may generate wealth which can be shared with the stakeholders in fair and just manner.
3. The registry will also make it possible for people to people learning to be facilitated through local language interfaces thereby hastening the knowledge churning process in the society.
4. SRISTI has pleaded for international registry tentatively called INSTAR (International Network for Sustainable Technological Application and Registration) since 1993 to achieve the similar purpose at international level. The provision in TRIPS for international negotiations for international registry for wines and spirits was inserted because France would not have signed the treaty otherwise. This provision cannot be restricted only for wines and spirits. India should plead for international registry on the pattern of National Registry developed by NIF. Having mobilized more than 50000 innovations and traditional knowledge (not all are unique, in fact a large number are put in People Knowledge Database [PKD] because these are valid but common claims), from over 350 districts in last five years with the help of Honey Bee Network, NIF has demonstrated the potential Indian society has for solving problems through its own genius.
5. The registry should provide a grace period for disclosure so that protection can be achieved not only for knowledge produced within one year of its earlier disclosure but perhaps during last five to ten years. This may create problems because of the public domain nature of such knowledge. However, this will provide some solace to the communities who disclosed their knowledge in good faith to the outsiders not

realizing that their generosity will become a reason for their poverty and continued exploitation.

6. Any knowledge existing within a spatially bound community, not reasonably accessible to outsider and not catalogued in a publicly accessible catalogue should be considered a patentable subject matter, with the approval, involvement and consent such communities and/or knowledge experts. Restricted registry such as NIF registry will not make a registered knowledge, a public domain knowledge.

B. Prior Informed Consent

7. Honey Bee Network has experimented PIC extensively for more than a decade. NIF has modified the PIC framework and now developed a two stage process. In the stage one, the consent is sought for sharing, adding value or blending the knowledge with other innovations/TK practices, etc. In stage two, if something useful is considered possible with or without value addition, then benefit sharing agreement is signed with shares allocated for communities, nature conservation, innovation fund, R&D agency, institutional overheads, innovators association, etc. NIF follows PIC for transactions within India as well. The law whether under Biodiversity Act or Patent Act or Plant Variety and Farmers' Rights Act (PVFRA) does not require PIC for national use. Indian case for insistence on PIC at international level will not carry much weight unless access to TK and associated resources is required to be obtained only through PIC within the country.
8. It should be possible for communities to seek protection for their TK through their elected or customary leaders. NIF has recognized community innovations/TK and we believe it is possible to do so. In fact, the requirement for data and other specifications can be so modified that in every application on behalf of community whether for plant variety protection or GI or patent, a national fund should bear the cost for the same without expecting the community to bear these costs unless the community is very prosperous.
9. The abstracts of the patents issued in India or accepted applications should be made available in national language/s so that communities could track the unauthorized use of their traditional knowledge.
10. A small tax could be charged on every licensing agreement so as to facilitate public access to local language databases on TK to which these communities have in fact made the most contributions. This will empower the communities to be better informed and also enabled to innovate more.
11. The standards will have to be set up to consider whether the consent taken is informed or not. The background note developed by NIF and available at its website (www.nifindia.org/pic.htm) provides one reference point.
12. Every researcher must be obliged not only to acknowledge the knowledge provider by name and address (protecting their copyright) but also to share the findings in local language, in an easily understandable manner with the knowledge providers.
13. Guide of every Ph.D or M.Sc., student or any other investigation requiring collection of data from the people to certify that PIC has been taken, knowledge has been credited by name to the providers and findings have been shared with the providers. The recent guidelines developed by University Grants Commission are fairly elaborate about how to protect the intellectual property rights produced by the university scientists but have no mention about how the university scientists would protect third party intellectual property rights particularly that of creative people in

informal sector. MHRD must issue guidelines in the matter and ensure that no Ph.D or M.Sc degree can be granted without such a certificate. If it is established that certificate was willfully issued without verifying the facts, it could be a ground for withdrawal of the degree. The students should also be educated about their legal and ethical obligations in dealing with the knowledge of other creative people conserving resources or providing solutions otherwise.

C. Disclosure requirement

14. SRISTI and Honey Bee Network have pleaded for about fifteen years that every patent applicant around the world must be required by the international law to declare that knowledge and/or resources used to develop claims for invention have been obtained 'lawfully' and 'rightfully'. If a country does not have a law requiring PIC, then it will be legal to take some resource and/or knowledge for any commercial purpose. However, it will not be a morally and ethically right practice. The patent system will lose its credibility if it does not require such disclosures to be made. EU directive encourages such disclosures but does not make lack of disclosure as a ground for refusing patents. India can strengthen its case by institutionalizing such requirements within Indian Patent Office. The disclosure about place of origin serves very little purpose. In fact, there are patents in which even the location of the place from which a particular microbial culture has been obtained to develop an antibiotic by a large drug company has been disclosed. It provides no ground for any subsequent action except if obtaining such material required prior permission. Even in such a case, patent law would not warrant any action.

D. Licensing

15. Whenever a patent is obtained on a gene or any other biological material derived from third world, access of biodiversity providing country to the value added technology should be ensured without any payment. For other countries, such technologies could be commercialized with benefit sharing arrangements.
16. It should be possible for communities to monitor the licensing contracts based on the knowledge produced, conserved or shared by them.

E. Other Issues

17. The biodiversity, whether domesticated or wild, if characterized for unique or distinctive properties, should be considered eligible for protection under Plant Variety and Farmers' Rights Act (as provided in the Chinese Plant Variety Law).
18. The PVFRA should make arrangements for generation and collection of data required for filing varietal claims by farmers and/or the communities. No farmer would be able to meet the requirements of PVFRA on one's own. I had made this submission while giving evidence before the Parliamentary Committee set up to discuss the PVFRA bill. However, this provision has not yet been made.
19. The protection of collective rights of performers and other individuals have to be promoted through collecting societies. MHRD/Ministry of Commerce should support action research in forming such societies for various writers, performers, designers, etc.
20. The concept of collecting societies may also be developed for TK protection through national registry.

21. There is a need for innovation patent system with ten years protection, lower inventive threshold, five to seven claims and provision of product and new use patent within three to six months. This will help small innovators a great deal.
22. The distinctive signs should be protected with particular reference to Sacred Marks. Unless this is done at national level, it cannot be pleaded for at international level.
23. The access to TKDL should be provided to NIF and other legitimate users in the country. It is a pity that while international patent offices might get access to such a useful and valuable database but NIF cannot get access to this database. The problem is that NIF has to do all the prior art search in many cases which TKDL has already done. There is no doubt that TKDL is extremely valuable knowledge source in which because of the characterization and annotation, the codified classical knowledge has not only become accessible but also valuable for drug development and other such purposes. One can develop a framework for commercial access to full TKDL vis-à-vis synoptic part of TKDL.
24. There should be incentives for patent applicants to disclose extensive prior art. Patent office can give fast track/reduce costs or provide other incentives to such applicants who do so.
25. The first to invent system may be preferred in the case of traditional knowledge protection over first to file. It is obvious that local communities and traditional healers cannot compete the large corporations and formal sector researchers in rushing to the patent office first.
26. There is a need for national IP information system in local languages so that communities are empowered to learn from other communities as attempted by the Honey Bee Network so far. WIPO should also allocate more resources for developing PIC system and international IP information system in local languages.
27. The protection of TK or grassroots innovations will offer little benefit unless value chain is built. The product development fund needs to be created to support value addition at a large scale so that possibilities of getting benefits from the knowledge can be tried.

Summing up:

During Shodh Yatras in last eight years, after walking more than 2600 kms., we did not come across many young healers or herbalists. It is obvious that available incentives and the community structures have failed to motivate young people to carry the torch of knowledge forward for the next generation. The erosion of knowledge and resources has never been so high as in the current generation. The portfolio of incentives, material or non-material aimed at individuals or collective can indeed reverse the knowledge erosion. Intellectual property rights constitute an important element of this portfolio.