

and preventing dilution is what eats away into the client's enforcement budgets."

Sen says a thorny issue relates to detecting infringement outside India's metros, particularly in remote areas of the country. And even if such activity is identified, enforcement against the perpetrators is sluggish. "It is easier to obtain an interim injunction against infringing activities in India than in countries like the UK, but actually enforcing the injunction, particularly in remote areas of the country, is not very effective," says Sen. "Court proceedings generally take a very long time and are frequently adjourned often making it very difficult to obtain final relief."

Lall shares the details of a case involving a foreign client who struggled to stop a competitor in India from filing applications to register similar marks. "Each of these marks, despite being blatantly similar to pre-existing marks on the register, would proceed to advertisement,

compelling our client to file oppositions," recalls Lall. "The Indian company would not even contest these oppositions and simply abandon the mark. But they would continue to file fresh applications. A few marks would slip through the cracks and proceed to registration and our client had to institute cancellation actions. All of this was a big cost issue."

Lall and his team addressed the problem by filing a civil suit against the Indian party to restrain them from filing similar applications. The court ordered the Indian party not to file fresh applications until the matter was decided.

Adams has combated similar problems. "I would suspect one of the biggest challenges most companies face is finding out what's actually happening," he says. "The biggest asset that we have is our broad distributor network and the number of partners we have in the field."

Practitioner's perspective

Time-honoured traditions under threat

Anushri Gupta of Remfry & Sagar explains why existing laws are inadequate to protect India's traditional knowledge

As one of the world's most bio-diverse countries, India is well endowed with traditional knowledge, particularly that relating to the properties of plant species. The medicinal effects of tulsi (holy basil), for example, have been passed down through generations for centuries.

In recent years, scientists and big businesses have also got in on the act, often using traditional knowledge as a starting point for the research and development of new products. As a result, traditional knowledge has made the transition from being an informally owned, freely shared practice to a formally owned, tradable commodity.

The transformation has had advantages and disadvantages. On the positive side, the formal ownership of traditional knowledge can help to protect it. Indeed, when traditional knowledge is not formally recognized, the lack of documentation and systems for dissemination put it at risk of being lost. Similarly, the indiscriminate and unregulated use of knowledge may result in the depletion of scarce resources, such as medicinal plants.

On the negative side, there is increased danger of misappropriation of traditional knowledge, which essentially robs communities of their time-honoured practices and expertise. The US patent for turmeric and the EU patent for neem (both now revoked) are cases in point.

Judicious protection

Traditional communities often lack the concept of private ownership, particularly where information and knowledge are concerned. In stark contrast to this, global pharmaceutical companies, many of which have

become intensely interested in traditional know-how, regard the exclusive ownership of knowledge as a fundamental part of their business.

As a result of this disparity, it is important that the government develops mechanisms of protection that strike a judicious balance between the rights of all parties. It may do this by assigning ownership rights to certain families or communities. If no particular family or community is able to establish ownership, or if the knowledge in question is the heritage of more than one community, the government may become the de facto owner of the knowledge.

Legislation and conventions

The most important international agreement covering traditional knowledge is the Convention on Biological Diversity (CBD), 1993. The CBD, to which India is a signatory, asserts the sovereign rights of nations over their national resources and their right to determine access to these resources and promote sustainable use.

More recently, with the aim of bringing the protection of traditional knowledge into the existing framework of international intellectual property laws, the Doha Declaration, 2001, widened the ongoing review of Article 27 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), to include an examination of the link between TRIPS and the CBD.

Several countries have subsequently argued that the disclosure of the origin of biological materials used in an invention should be a precondition for the grant of a patent. They also lobby for evidence of prior informed

No one's stripping down devices – but they're clearly letting us know if there's a retailer using a Nokia name or other parties selling Nokia apparel."

Although the Indian legal system is not very different from what exists in the UK or other common law countries, IP owners may encounter key differences in the way law is practised. Local knowledge is thus essential.

"At the enforcement level, the offenders are usually small parties but many in number," warns Lall. "It is never possible to take one infringer head on and nail him to the ground by claiming heavy damages and costs. Instead, strategies have to be aligned to file actions against multiple parties and settle quickly with restraining orders."

Bajpai argues that harsher punishment could also prove a valuable deterrent. "IP violation is not seen as a serious offence and bail is granted as a matter of routine,"

he says. "In addition, once IP infringement comes to light and court orders are enforced by the police, the property in which the trademark or copyright is illegally applied is released by the court easily."

Leaning towards litigation

Inevitably, many IP disputes wind up in India's courts, from India's most experienced IP forum – Delhi High Court – to tiny district courts dotted all over the country. And the judiciary should brace itself for more cases still, though Kumar says such disputes, particularly in relation to patents, are necessary to resolve ambiguities that persist.

Kumar predicts that there will be a lot of public interest litigation in order to grant compulsory licences. "Those interested will have to prove that the patent has not been

consent, through the approval of relevant national authorities, as well as proof of equitable benefit-sharing.

For its part, India has instituted the Biological Diversity Act, 2002, and the Biological Diversity Rules, 2004. Meanwhile, the Rules for Protection, Conservation and Effective Management of Traditional Knowledge Relating to Biological Diversity, 2009, are still being discussed.

In a parallel development, the Nagoya Protocol was adopted at the 2010 meeting of the CBD. This convention, of which India is a strong proponent, provides a mechanism for sharing the benefits of traditional knowledge.

Key initiatives

Many different models of "ethical bio-prospecting" existed even prior to the Nagoya Protocol. US-based Shaman Pharmaceuticals, for example, sought the knowledge of traditional healers (shamans) in the rainforest in exchange for cash payments, health-care, clean drinking water, roads and the transfer of technology to indigenous communities. Royalties were also paid to the communities and the host country's government. The Body Shop, meanwhile, has been buying Brazil nut oil processed by the Kayapo Indians since 1991 at fair prices, ensuring steady income for the tribe, as well as the preservation of rainforests.

Another important precedent has been set by the Indian government, with the development of the world's first Traditional Knowledge Digital Library (TKDL) as a model for prior art search. This Library – which can be accessed online at www.tkdlib.res.in – is a repository of more than 1,200 formulations of various systems of Indian medicine, such as Ayurveda, Unani and Siddha, as well as 1,500 yoga postures. It is available in English, German, French, Spanish and Japanese.

India has signed agreements with the European Patent Office, the German Patent and Trade Mark Office and the United States Patent and Trademark Office allowing them to access the TKDL. Several European patent applications have since been rejected on the basis of TKDL evidence. For example, the Livzon Pharmaceutical Group was forced to concede that Kalamegha (Andrographis) and Pudina (mint), used for the treatment of bird flu, were previously known forms of medicine in India.

Alternative protection

In some cases, traditional knowledge may be protected by applying for Geographical Indication (GI) status. GI status could protect traditional products that bear particular characteristics specific to a geographical location. Trademark laws may also be helpful. For instance, Australian Aboriginal artists obtained a certification trademark to promote the marketing of traditional products and deter the sale of products that falsely claim to be of Aboriginal origin. Aboriginal artists in Canada, on the other hand, have sought copyright protection for tradition-based creations including masks, totem poles and sound recordings. However, it must be clarified that these forms of protection only safeguard certain manifestations of knowledge, not the knowledge itself.



Moving forward

While existing IP laws can provide some protection, they are not a panacea for the threats facing traditional knowledge in India and other countries. Indeed, the complexities of protecting traditional knowledge while facilitating its fair use have confounded domestic and international lawmakers for more than two decades. Given such a scenario, presently the best strategy is to employ as many measures of protection as possible. As for the future, a special law on traditional knowledge is advocated. However, such a statute will have to conform with all global treaties to ensure effective implementation across international boundaries.

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