TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY RIGHTS

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Abstract

This paper is devoted to the analysis of possible options to ensure the protection of traditional knowledge through existing laws and legal systems in the field of intellectual property. For this purpose, the common problems that indigenous peoples and local communities face, when trying to ensure the protection of their traditional knowledge with the help of intellectual property law tools, are addressed. Separately, the possibility of using copyright, patents, industrial designs, trademarks, geographical indications, legislation on trade secrets and unfair competition are analyzed in detail. Examples are given for the implementation of traditional knowledge protection through intellectual property rights at the national level in selected countries, such as Peru, Mexico, Venezuela, Vietnam, and Ethiopia. Considerable attention is paid to the interpretation of the provisions of existing international legal acts in the field of intellectual property, in particular, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), as well as the Bern Convention for the Protection of Literary and Artistic Works. It is concluded that traditional intellectual property regimes do not provide adequate protection for traditional knowledge since contractual intellectual property rights are based on the concepts of an individual property.

Keywords: traditional knowledge, intellectual property rights, patent, copyright, TRIPS

INTRODUCTION

Arguments about the protection of traditional knowledge at the international level usually boil down to the question of whether adequate and appropriate protection will be ensured through a system of intellectual property rights, or the development of an alternative *sui generis* system. The protection of intellectual property in its various forms is the protection of commercially valuable information. According to Thomas Kottie and Marion Panizzon, it would be inconsistent to consider intellectual property rights as the main tool for protecting the information, while completely denying traditional knowledge of such protection, despite their potential economic value [1]. Professor Hannes Ulrich believes that traditional knowledge is first of all “knowledge”;

accordingly, the possibilities for their protection should be primarily sought in accordance with the principles and rules of intellectual property [2]. Such a position can mainly be due to the Western approach, in accordance with which everyone has personal non-property rights in relation to the product of their labour or creativity [3]. In turn, developing countries claim that their traditional knowledge serves as the basis for Western studies, which result in expensive inventions that benefit developed countries [4]. The relationship between intellectual property rights and traditional knowledge needs clarification. The current relationships and the current state of affairs do not satisfy the needs of the holders of traditional knowledge and cause rejection, especially in those developing countries that do not have the means to effectively judicially challenge the patents granted. At the heart of the problem is that traditional knowledge is often perceived as an object in the public domain, and therefore are accessible and usable by any company interested in this information [5].

METHODS

The main methods used in the study are concrete historical, comparative legal, and also the system method.

RESULTS AND DISCUSSION

Various authors have put forward several arguments for and against the protection of traditional knowledge within the framework of the established regime of intellectual property rights. There are three main points of view regarding the use of intellectual property rights to protect traditional knowledge, traditional cultural expressions and genetic resources. The first point of view supports the use of the system of intellectual property rights in general to protect these objects. According to the second point of view, it is argued that certain types of intellectual property rights may be suitable for this purpose. The third view is that intellectual property rights instruments are not suitable for the protection of traditional knowledge, traditional cultural expressions and genetic resources. Traditional knowledge as such is not in itself a product that meets the necessary requirements for protection as an object of intellectual property rights [6]. As a result, the protection of objects owned and possessed as property by indigenous peoples and local communities face many difficulties under the current regime of intellectual property rights.

Protecting traditional knowledge with existing intellectual property regimes

Although the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) does not directly mention traditional knowledge as a subject of protection within its field of activity, it does not explicitly prohibit the protection of traditional knowledge as a form of intellectual property right.Consequently, it is possible to interpret the Agreement in such a way when traditional knowledge, practices and innovations that meet the protection criteria within the existing categories of intellectual property rights are not excluded from the scope of the TRIPS agreement. To determine the possibility of recognizing traditional knowledge as intellectual property in accordance with the existing regime of such property rights, it is necessary to check

them for compliance with generally accepted preconditions or conditions that define the right to protect intellectual property rights.

Difficulties in applying copyright

Copyright protects the works of art listed in art. 2 (1) of the Bern Convention. The purpose of copyright protection is to protect the works of authors from copying and other actions. However, the expression itself is protected, and not the ideas underlying it. The first difficulty with respect to the protection of traditional cultural expressions arises due to the fact that copyright law requires that the work was original. As a rule, authors of folklore works are inspired by pre-existing traditions which are consistently passed down from generation to generation for a long time, which means that the copyright requirement of originality will not be fulfilled [7]. The second difficulty lies in the fact that the copyright system gives copyright to the owner or author of the work. Most traditional cultural expressions are associated with the identity of indigenous communities, are passed on from generation to generation and are in the collective ownership of the community.These works are usually the result of collective efforts, and often no one person can be identified as the only author of a design, song, dance or another traditional culture expression [8].

The third restriction is that copyright protection is limited. Protection is associated with the longevity of the author or the date of fixation of the work or publication. The concern of developing countries, indigenous peoples and custodians of traditional cultural expressions is that works protected during the term specified in the copyright systems may be in the wrong hands after copyright expires [9].

Security options within the patent system

The patentability of any invention is subject to triple verification: (a) novelty, (b) inventive step and (c) industrial applicability. These are common requirements for patents. The TRIPS Agreement establishes that patents must be available for any inventions, be they products or processes, in all areas of technology, provided they are new, contain an inventive step and are industrially applicable. It is argued that some traditional knowledge, such as technological processes associated with weaving, metalworking or designing musical instruments, as well as the use of herbal medicines, can be patented. To obtain a patent, everyone must fulfil three requirements. Many traditional methods are suitable for technological use, but they are unlikely to meet statutory criteria relating to novelty since they are already available to the public. Although traditional drugs have many opportunities for use, they usually do not meet the requirement of novelty and non-obviousness. Anything that is already in the public domain is not considered new since it is the "prior art" [10]. Since much traditional knowledge has been widely available for a long time, they fall into the public domain. As well as copyright, patents give protection for a certain period; therefore, the period of protection here is also limited.

Security options with industrial designs

An industrial design is a decorative or aesthetic aspect of a functional or useful product. The Industrial Design Law protects the appearance of independently created

functional elements. The term of protection of industrial designs is ten years, but it may be extended. To ensure protection, the sample must be presented as new or original. Some traditional designs would not satisfy the requirement of novelty, because they have been in the public domain since time immemorial. Indigenous peoples and traditional communities seek to protect their traditional designs from exploitation by non-indigenous persons for an indefinite period, and the limited period of protection provided by industrial design rights is considered unsatisfactory.

Security options in accordance with trademark law

It is argued that aspects of traditional cultural expressions such as fashion design, complex marks on agricultural implements and wood carvings can be protected as trademarks. A trademark is any visible mark that allows the goods and services of one manufacturer to distinguish from the goods and services of another manufacturer. Terry Dzhank notes that in Australia some indigenous peoples have registered various words and marks as trademarks [11]. An example of protecting genetic resources and associated traditional knowledge with a trademark is traditional coffee in Ethiopia - Heritage Coffee [12]. There are other examples. The Seri people in Mexico registered the Arte Seri trademark at the Mexican National Institute of Industrial Property in order to protect a wide range of products: baskets, necklaces, woodcarving and stone, dolls [13]. This trademark belongs to five classes of products, each of which corresponds to traditional cultural expressions: necklaces, sculptures of stones, carving on iron and ivory wood, carving on clay and rag dolls [13]. The positive aspects of the trademark registration are protection against unfair enrichment and misappropriation of traditional cultural expressions. In addition, a trademark provides fair competition and avoiding confusion among consumers, provided that the mark is used and protected on an ongoing basis. However, developing countries, indigenous and traditional peoples are concerned that the trademark system does not meet their needs because of the requirement to use trademarks during a trade.

Unfair competition and difficulties associated with its use

Unfair competition laws prohibit the sale of fake copies of works, as well as fraudulent practices in marketing and sales. To protect traditional cultural expressions, unfair competition legislation can be used to prevent the sale of counterfeit copies. However, it is argued that it is impossible to protect folklore under unfair competition laws because of the narrow scope of prohibited acts. Unfair competition laws are about misleading in relation to commercial goods or services, and they may be useless to protect certain types of traditional cultural expressions that do not meet this criterion, such as rituals and dancing.

Security Restrictions under Trade Secret Laws

Trade secret legislation may be the best form of protection for traditional knowledge among existing intellectual property regimes. A trade secret can protect any object: a model, a device, a compilation, a method, a technique, or a process which gives a competitive advantage. Article 39 of the TRIPS Agreement establishes the requirement to protect classified (undisclosed) information, or trade secrets, from unlawfully

obtaining, disclosing or using in a manner contrary to honest commercial practice, in the process of ensuring effective protection against unfair competition. To recognize a violation of this requirement, three elements are necessary. First, the information must be secret and commercially valuable, secondly, there must be an obligation to maintain the confidentiality of the information, and, thirdly, unauthorized use of the information must occur. There are proposals to use legislation on trade secrets to protect traditional knowledge of spiritual importance and known only to properly initiated clan members, as well as to protect sacred developments. The first step towards protection as a trade secret of indigenous knowledge is the awareness of their values by the owners. A small tribe in Peru uses this methodology to protect its property from the American company *Shaman Pharmaceuticals Inc.* (hereinafter *referred to as Shaman*) [14]. *Shaman* is a company located in San Francisco. Its attention is drawn to obtaining biologically active compounds from tropical plants with a history of medical use. The company's research team collects information on the use of herbal medicine for the treatment of various diseases. As part of their program, *Shaman* called in aid to a separate tribe in Peru.The local community demanded an agreement with the company in order to get short-term and long-term benefits. The terms of the agreement relating to the mutual exchange between the company and the tribe consists in three stages. Short-term engagement meets the immediate needs of the community, such as public health, forest conservation, and health care. A medium-term mutual exchange consists of benefits that are not immediately obvious. These include the provision of equipment, books and other resources. Long-term reciprocity implies the return of part of the profits to indigenous communities after the sale of a commercial product [14]. Protection in the form of trade secrets is cheaper, faster and easier to implement than obtaining a patent. A trade secret is not limited in time, unlike other forms of intellectual property. The legal requirements for proving the existence of a trade secret are more flexible than for obtaining other forms of intellectual property, such as a patent. Information that is not amenable to patent or copyright protection may be protected by trade secrets [15].

Geographical indications (appellations of origin) and their use

Geographical indications may be used to designate a tribe, artist, or combination thereof. They have sufficient flexibility that allows them to be used for all types of folk art, including traditional medicines. Geographical indications do not require an author and an element of innovation. Like trademarks, they are designed to protect manufacturers or makers of goods. Geographical indications also better reflect the communal meaning, since it is based on its location and mode of production. It doesn't matter whether the manufacturer is an organized corporation or an individual. Typically, manufacturers based in the relevant region can work together to establish, maintain and enforce guidelines for the protection of geographical indications [16]. Among the countries that use the geographical indication mechanism to protect traditional knowledge are Venezuela and Vietnam: liquor Cocuy the Pecaya made from agave in Venezuela, and Phu Quoc, fish soy sauce and Shan Tuyet Moc Chau, a kind of tea in Vietnam [17]. However, the protected object of a geographical indication is an indication of the product, and not the product itself. For this reason, traditional knowledge cannot be protected by geographical indications as such. The protection by means of geographical indications can only be applied to signs indicating this knowledge [18].

SUMMARY

As can be seen from the above, traditional intellectual property regimes (copyright, patents, geographical indications, trade secrets, trademarks, and others) do not adequately protect traditional knowledge. Intellectual property rights are based on the concepts of an individual property. In addition, other aspects of traditional intellectual property systems hamper the protection of folklore. These are concepts of novelty, questions of authorship, and other requirements for protection. A serious problem is the limited duration of protection in the right of intellectual property. Inconsistencies in the contractual law have led to the condemnation of the prevailing intellectual property system by developing countries and many indigenous groups who view this system as colonial, racist, and as a form of usurpation. Developing countries and indigenous communities have already begun a political struggle to change the existing intellectual property regime [19].

CONCLUSION

It is obvious that today the issue of the protection of traditional knowledge is as acute as possible.The lack of special protection means forces the owners of traditional knowledge to search for options and take the already existing mechanisms, such as intellectual property law. This allows the protection of certain types of traditional knowledge, but it is not a universal solution. The restrictions in intellectual property do not allow it to be used as the only instrument; this will be possible only when making changes and adaptations for the protection of traditional knowledge in terms of at least copyright and patent law, which, unfortunately, seems unlikely.

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