ASIAN PATENT ATTORNEYS' ASSOCIATION (APAA)
Bali, Indonesia

APAA EMERGING IP RIGHTS COMMITTEE (2016)
PHILIPPINES GROUP REPORT

Submitted by

Copyright Committee Members (Philippine Group)
ATTYS. ABELAINE ALCANTARA and MARIA TERESA M. TRINIDAD

Special Topic: "The Protection of Traditional Knowledge"

> *Is 'Traditional Knowledge presently protected as a form of IP right in your jurisdiction? Is there any other legal basis (e.g. equivalent legislation, policies or guidelines) in your jurisdiction that provides protection for 'Traditional Knowledge', including their benefits, limitation and possible areas for improvement? Should Traditional Knowledge be proper subject matter for IP protection, and what are the related pros and cons?*

Under the Philippine Intellectual Property Code (IP Code), the Intellectual Property Office is not vested with mandate to deal with matters related to 'Traditional Knowledge' or indigenous knowledge systems and practices.[1] The IP Code however (dwelling on non-patentable inventions) indicate that " **provisions under this subsection (Section 22.4 of the IP) shall not preclude Congress to consider the enactment of a law providing** *sui*

[1] SEC. 22. Non-Patentable Inventions. – The following shall be excluded from patent protection:
22.1. Discoveries, scientific theories and mathematical methods;
22.2. Schemes, rules and methods of performing mental acts, playing games or doing business, and programs for computers;
22.3. Methods for treatment of the human or animal body by surgery or therapy and diagnostic methods practiced on the human or animal body. This provision shall not apply to products and composition for use in any of these methods;
22.4. Plant varieties or animal breeds or essentially biological process for the production of plants or animals. This provision shall not apply to micro-organisms and non-biological and microbiological processes. Provisions under this subsection shall not preclude Congress to consider the enactment of a law providing sui generis protection of plant varieties and animal breeds and a system of community intellectual rights protection;
22.5. Aesthetic creations; and
22.6. Anything which is contrary to public order or morality. (Sec. 8, R.A. No. 165a) SEC.

generis **protection of plant varieties and animal breeds and a system of community intellectual rights protection**.

That even as these matters are non-patentable subject matter, it is for Philippine Congress to enact laws with *sui generis* protection of subject matters pertaining to plant varieties, animal breeds as well as a system of community intellectual rights protection.

Presently, Philippine Congress had so far enacted the following "sui generis" laws:

a) Republic Act 9168 otherwise the Plant Variety Protection Act, providing for an administrative procedure which an applicant complies with to secure a form of intellectual property right called the "plant breeder's right." This right is a recognition of the efforts of the mind, or work of intellectual creation, as applied on plant varieties transformed through breeding, whether done the traditional way or through the use of modern technology such as genetic engineering.

The "plant breeder's right" is a form of exclusive right that enables the owner of the right to stop anybody from exploiting or using the protected plant variety without obtaining permission or license. It is in compliance with the Trade Related Intellectual Property Rights Agreement (TRIPs) under the General Agreements on Tariff and Trade/World Trade Organization (GATT/WTO).

Under the law, a breeder is defined as: 1) "the person who bred, or discovered and developed a new plant variety;" or 2) "the person who is the employer of the aforementioned person or who has commissioned the work;" or 3) "the successors-in-interest of the foregoing persons as the case may be;" and 4) "the holder of the Certificate of Plant Variety Protection."

b) Republic Act 8371, otherwise the Indigenous Peoples Rights Act, on community intellectual rights protection.

Philippine laws that have references to 'Traditional Knowledge', are as follows:

1. Executive Order No. 247 (Repealed). Said executive order was enacted in 1995 and its Implementing Rules and Regulations in 1996 provide the regulation for prospecting biological and genetic resources, their by-product and derivatives for scientific and commercial purpose. The Department of Environment and National Resources (DENR) is mandated to a) regulate research, collection and use of biological and genetic resources s that such resources are conserved, used sustainably and benefit the national interest; b) promote development of local capacity in science and technology.

Bioprospecting are subject to research agreements with government, containing terms for the provision of information and samples, technology cooperation and benefit sharing. For the collection of biodiversity in areas where local and indigenous communities live, prior informed consent of communities is required. [2]

2. The Indigenous People's Rights Act of 1997 (Republic Act 8317). Said law protects the rights of indigenous people in their cultural and intellectual property in general, to include traditional knowledge. They shall have the right to special measures to control, develop through the creation of the National Council for Indigenous People (which is responsible for issuance of permits for access to indigenous people's lands) and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of properties of fauna and flora, oral traditions, literature, designs and visual performing arts.

   Access to biological and genetic resources and indigenous knowledge related to the conservation, utilization and enhancement of these resources, shall be allowed within ancestral lands and domains of the communities only with free and prior informed consent of such communities, obtained in accordance with customary laws and concerned communities.

   It limits the access of researches into their ancestral domain and designates as the source of information in any writings or research resulting from research. Communities are also to receive royalties from income derived from any of the researches and resulting publication. [3]

3. Traditional and Alternative Medicine Act of 1997. Said law created the Philippine Institute of Traditional and Alternative Health Care in the year 2000, and provided a development fund therefor. It provided a legal framework whereby indigenous societies would own their knowledge of traditional medicine. If such knowledge is used by outsiders, the indigenous communities can require the permitted users to acknowledge its source and can demand a share of nay financial return that may come from its authorized commercial use.

   Said law provides for a Traditional and Alternative Health Care, encourages scientific researches, promotes the use of traditional, alternative, preventive and curative health care modalities, and formulates standards and policies for the protection of indigenous and

[2] Executive Order No. 247, DENR DAO 96-20
[3] Secs. 34 &35, (Republic Act 8317)

natural health resources and technology from unwarranted exploitation, making such endeavors subject to approval by appropriate government agencies. [4]

4. Plant Variety Protection Act of 2002(Republic Act 9168) . The Plant Variety Protection Act of 2002 aims to protect and secure the exclusive rights of plant breeders with respect to their new plant variety, particularly when beneficial to people, through an effective intellectual property system.

5. Wildlife Resources Conservation and Protection of 2004 (Republic Act 9147), and the Guidelines for Bioprospecting Activities in the Philippines-Joint DENR-DAPCSD-NCIP AO No. 1 of year 2004. Said law was enacted to address limitation of EO 247, in regard to bioprospecting procedures and fees, benefit-sharing, royalty payments, as well as upfront payments agreed upon by providers and users. Foreign applicants must collaborate with Filipino scientists in Philippine Research Institutions before agreements can be entered into. The researcher must submit certification as proof of compliance, specifically on the roper procurement of PIC, delivery of benefit-sharing agreement and collection quota. Outputs of research or the IPs accruing from the activities must not be applied for intellectual property rights without approval of concerned agencies. The researcher must submit results and future plans to the concerned government agencies. Contracts not in accordance the bioprospecting undertaking shall be fined and sanctioned (e.g. a researcher who enters into commercialization agreements without informing the community) [5]

Pending Bills in Congress

1. **Senate Bill 534**. Mandating the National Statistics Office (NSO), in coordination with the National Commission on Indigenous Peoples (NCIP) to ensure the inclusion of Ethnic Origin in its national survey and national census starting the year 2011 thereafter.

2. **Senate Bill 669**. The Indigenous Peoples Rights' Act (RA 9371) does not provide for specific provisions for the protection of their cultural properties, both intangible and tangible. It is with the passage of this bill that this void is sought to be filled. With the help of the National Commission for Culture and the Arts, National Museum, National Commission on Indigenous Peoples and local government units, the bill creates a comprehensive cultural' archive which shall organize and make an inventory of all cultural properties of the different ethnic-linguistic groups of the Philippines. This inventory of cultural properties shall then be submitted to the National Museum

[4] Republic Act 8371
[5] Republic Act 9147

which shall ensure the registration of the ownership to the proper ethno-linguistic group for protection of their intellectual property. This bill mandates the payment of royalties for the use of the cultural 'property of indigenous groups.

3. **Senate Bill No. 101** - Community Intellectual Rights Protection Act of 2004. Said law recognizes traditional knowledge, that indigenous peoples and local communities have original rights over plant and animal genetic resources, traditional medicines, agricultural methods and local technologies they have discovered and developed, and as such will be the general owners. Said law also provides registration as a form of IP protection. A systematic inventory of plant and genetic resources and knowledge from these communities, especially those without written tradition or culture, shall be done and eventually serve as the basis for proprietary ownership. The law recognizes community ownership of traditional knowledge. All benefits derived from the knowledge and innovations shall be equitably shared.

   "Community intellectual properties" include genetic resources, whether for agricultural or medicinal purposes, and their products and uses, cultural products including pottery, weaving patterns, poetry, music, folklore, and all other products and processes developed communally. [6]

Should Traditional Knowledge be proper subject matter for IP protection, and what are the related pros and cons?

1. No. Intellectual property protection rests on the concept of individual innovation and opposed to the concept of Traditional Knowledge which is collective and discovered through a community process.

"Intellectual property protection" presupposes an individual innovation which is a distinct concept from "community intellectual property right" where Traditional Knowledge is built. "Community intellectual right is the notion that this right is collective and that this right is a different concept from what is usually understood as intellectual property right."[7]

[6] Senate Bill No. 35, 30 June 2004

[7] CURRENT INNOVATION CONCERNS, Elpidio V. Peria, 16 March 2015

"Community intellectual rights arise from the community themselves, it is not something granted by the State, like intellectual property rights; second, community intellectual rights are not time-bound, while intellectual property rights, by their nature, are time-limited, depending on what kind of intellectual property they are, they will have differing time-frames (20 years for patents and plant variety protection certificates, though sometimes it is 25 years for trees and vines, lifetime of author plus 50 years for copyright, 10 years renewable for trademarks), but the ultimate essence of these intellectual property rights is that they expire, for they pass on to what is called the public domain, not your usual concept on land rights which are lands owned by the state, but one whereby any material therein is susceptible of being used or appropriated by anyone for us in further creating any creative work, this public domain we are dealing with here is a copyright law concept.[8]

2. Intellectual property rights expire and revert to public domain.

Traditional Knowledge of indigenous peoples are their collective intellectual property and are an inherent part of their cultural patrimony. "That indigenous peoples have the right to own, control, develop and protect the past, present and future manifestations of their cultures. [9] "The indigenous peoples themselves should have a say on how guidelines on the protection of their traditional knowledge, how it should be written and eventually evolve, including also the emerging practice of indigenous peoples who may have established their customary laws and even customary law declarations as regards these matters and some may have also taken this up under their so-called Ancestral Domain Sustainable Development Protection Plan, these should also be taken into account when dealing with the matter of protection of Traditional Knowledge.[10]

[8] Ibid
[9] Ibid
[10] ibid