

TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY

The current international system for protecting intellectual property was fashioned during the age of industrialization in the West and developed subsequently in line with the perceived needs of technologically advanced societies. However, in recent years, indigenous peoples, local communities, and governments, mainly in developing countries, have demanded equivalent protection for traditional knowledge systems. In 2000, WIPO members established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), and in 2009 they agreed to develop an international legal instrument (or instruments) that would give traditional knowledge, genetic resources and traditional cultural expressions (folklore) effective protection. Such an instrument could range from a recommendation to WIPO members to a formal treaty that would bind countries choosing to ratify it.

Traditional knowledge is not so-called because of its antiquity. It is a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. As such, it is not easily protected by the current intellectual property system, which typically grants protection for a limited period to inventions and original works by named individuals or companies. Its living nature also means that “traditional” knowledge is not easy to define.

Recognizing traditional forms of creativity and innovation as protectable intellectual property would be an historic shift in international law, enabling indigenous and local communities as well as governments to have a say over the use of their traditional knowledge by others. This would make it possible, for example, to protect traditional remedies and indigenous art and music against misappropriation, and enable communities to control and benefit collectively from their commercial exploitation.

Although the negotiations underway in WIPO have been initiated and propelled mainly by developing countries, the discussions are not neatly divided along “North-South” lines. Communities and governments do not necessarily share the same views, and some developed country governments, especially those with indigenous populations, are also active.

Two types of intellectual property protection are being sought:

- **Defensive protection** aims to stop people outside the community from acquiring intellectual property rights over traditional knowledge. India, for example, has compiled a **searchable database of traditional medicine** that can be used as evidence of prior art by patent examiners when assessing patent applications. This followed a well-known case in which the US Patent and Trademark Office granted a patent (later revoked) for the use of turmeric to treat wounds, a property well-known to traditional communities in India and documented in ancient Sanskrit texts. Defensive strategies might also be used to protect sacred cultural manifestations, such as sacred symbols or words from being registered as trademarks.

- **Positive protection** is the granting of rights that empower communities to promote their traditional knowledge, control its uses and benefit from its commercial exploitation. Some uses of traditional knowledge can be protected through the existing intellectual property system, and a number of countries have also developed specific legislation. However, any specific protection afforded under national law may not hold for other countries, one reason why many indigenous and local communities as well as governments are pressing for an international legal instrument.

WIPO's work on traditional knowledge addresses three distinct yet related areas: traditional knowledge in the strict sense (technical know-how, practices, skills, and innovations related to, say, biodiversity, agriculture or health); traditional cultural expressions/expressions of folklore (cultural manifestations such as music, art, designs, symbols and performances); and genetic resources (genetic material of actual or potential value found in plants, animals and micro-organisms).

Although for many communities traditional knowledge, genetic resources and traditional cultural expressions form part of a single integrated heritage, from an intellectual property standpoint they raise different issues and may require different sets of solutions. In all three areas, in addition to work on an international legal instrument, WIPO is responding to requests from communities and governments for practical assistance and technical advice to enable communities to make more effective use of existing intellectual property systems and participate more effectively in the IGC's negotiations. WIPO's work includes assistance to develop and strengthen national and regional systems for the protection of traditional knowledge (policies, laws, information systems and practical tools) and the **Creative Heritage Project** which provides hands-on training for managing intellectual property rights and interests when documenting cultural heritage.

TRADITIONAL KNOWLEDGE

When community members innovate within the traditional knowledge framework, they may use the patent system to protect their innovations. However, traditional knowledge as such - knowledge that has ancient roots and is often informal and oral - is not protected by conventional intellectual property systems. This has prompted some countries to develop their own *sui generis* (specific, special) systems for protecting traditional knowledge.

There are also many initiatives underway to document traditional knowledge. In most cases the motive is to preserve or disseminate it, or to use it, for example, in environmental management, rather than for the purpose of legal protection. There are nevertheless concerns that if documentation makes traditional knowledge more widely available to the general public, especially if it can be accessed on the Internet, this could lead to misappropriation and use in ways that were not anticipated or intended by traditional knowledge holders.

At the same time, documentation can help protect traditional knowledge, for example, by providing a confidential or secret record of traditional knowledge reserved for the relevant community only. Some formal documentation and registries of traditional knowledge support *sui generis* protection systems, while traditional knowledge databases - such as India's database on traditional medicine - play a role in defensive protection within the existing IP system. These examples demonstrate the importance of ensuring that documentation of traditional knowledge is linked to an intellectual property strategy and does not take place in a policy or legal vacuum.

In the WIPO talks, many argue that use of traditional knowledge ought to be subject to free, prior and informed consent, especially for sacred and secret materials. However, others fear that granting exclusive control over traditional cultures could stifle innovation, diminish the public domain and be difficult to implement in practice.

GENETIC RESOURCES

Genetic resources themselves are not intellectual property (they are not creations of the human mind) and thus cannot be directly protected as intellectual property. However, inventions based on or developed using genetic resources (associated with traditional knowledge or not) may be patentable or protected by plant breeders' rights. In considering intellectual property aspects of use of genetic resources, WIPO's work complements the international legal and policy framework defined by the **Convention on Biological Diversity (CBD)**, and its **Nagoya Protocol**, and the **International Treaty on Genetic Resources for Food and Agriculture** of the **United Nations Food and Agriculture Organization**. Issues under discussion at WIPO include:

- **Defensive protection of genetic resources:** This strand of the work aims at preventing patents being granted over genetic resources (and associated traditional knowledge) which do not fulfil the existing requirements of novelty and inventiveness. In this context, to help patent examiners find relevant prior art, proposals have been made that genetic resources and traditional knowledge databases could help patent examiners avoid erroneous patents and WIPO has improved its own **search tools** and patent classification systems. The other, more controversial, strand concerns the possible disqualification of patent applications that do not comply with CBD obligations on prior informed consent, mutually agreed terms, fair and equitable benefit-sharing, and disclosure of origin. "Biopiracy" is a term sometimes used loosely to describe biodiversity-related patents that do not meet patentability criteria or that do not comply with the CBD's obligations – but this term has no precise or agreed meaning.
- **Disclosure requirements:** A number of countries have enacted domestic legislation putting into effect the CBD obligations that access to a country's genetic resources should depend on securing that country's prior informed consent and agreeing to fair and equitable benefit-sharing. WIPO members are considering whether, and to what extent, the intellectual property system should be used to support and implement these obligations. Many, but not all, WIPO members want to make it mandatory for patent applications to show the source or origin of genetic resources, as well as evidence of prior informed consent and a benefit sharing agreement. Parallel discussions are also taking place in the World Trade Organization's **Council on Trade Related Aspects of Intellectual Property (TRIPS)**.

WIPO also deals with the intellectual property aspects of mutually agreed terms for fair and equitable benefit-sharing. It has developed, and regularly updates, an **online database** of relevant contractual practices, and has prepared **draft guidelines** on intellectual property clauses in access and benefit-sharing agreements.

TRADITIONAL CULTURAL EXPRESSIONS

Traditional cultural expressions (folklore) are seen as integral to the cultural and social identities of indigenous and local communities, embodying know-how and skills, and transmitting core values and beliefs. Protecting folklore contributes to economic development, encourages cultural diversity and helps preserve cultural heritage.

Traditional cultural expressions can sometimes be protected by existing systems, such as copyright and related rights, geographical indications, appellations of origin, trademarks and certification marks. For example, contemporary adaptations of folklore are copyrightable, while performances of traditional songs and music may come under the **WIPO Performances and Phonograms Treaty**. Trademarks can be used to identify authentic indigenous arts, as the Maori Arts Board in New Zealand, Te Waka Toi, has done. Some countries also have special legislation for the protection of folklore. Panama has established a registration system for traditional cultural expressions, while the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture gives "traditional owners" the right to authorize or prevent use of protected folklore and receive a share of the benefits from any commercial exploitation.

DEVELOPING AN INTERNATIONAL LEGAL INSTRUMENT

Because the existing international intellectual property system does not fully protect traditional knowledge and traditional cultural expressions, many communities and governments have called for an international legal instrument providing *sui generis* protection.

An international legal instrument would define what is meant by traditional knowledge and traditional cultural expressions, who the rights holders would be, how competing claims by communities would be resolved, and what rights and exceptions ought to apply. Working out the details is complex and there are divergent views on the best ways forward, including whether intellectual property-type rights are appropriate for protecting traditional forms of innovation and creativity.

To take just one example, communities may wish to control all uses of their traditional cultural expressions, including works inspired by them, even if they are not direct copies. Copyright law, on the other hand, permits building on the work of others, provided there is sufficient originality. The text of the legal instrument will have to define where the line is to be drawn between legitimate borrowing and unauthorized appropriation.

On genetic resources, countries agree that intellectual property protection and the conservation of biodiversity should be mutually supportive, but differ on how this should be achieved and whether any changes to current intellectual property rules are necessary.

Representatives of indigenous and local communities are assisted by the **WIPO Voluntary Fund** to attend the WIPO talks, and their active participation will continue to be crucial for a successful outcome. WIPO members have agreed to expedite their work so as to decide in late 2012 whether to convene a diplomatic conference for final adoption of one or more international instruments. ■

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