



Report on the 6th Session

of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

March 15 – 19, 2004

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To clarify options and to give the discussion a practical and applied focus, four main subjects and forms of protection are considered, namely:

- (i) protection of traditional literary and artistic productions against unauthorized reproduction, adaptation, distribution, performance and other such acts, as well as prevention of insulting, derogatory and / or culturally and spiritually offensive uses;
- (ii) protection of handicrafts, particularly their "style" (taking into account the emphasis many countries place on the protection of handicrafts);
- (iii) prevention of false and misleading claims to authenticity and origin / failure to acknowledge source; and
- (iv) defensive protection of traditional signs and symbols.

(a) Traditional literary and artistic productions:

Some countries may decide that the protection afforded to contemporary adaptations, derivations and performances of EoF / TCEs is adequate. In other cases, countries may consider, based on national policy objectives, that IP-type protection is warranted. These countries may need to address the following issues.

- (i) Criteria for protection;
- (ii) Communal / collective rights;
- (iii) Copyright of individuals;
- (iv) Nature of rights;
- (v) Rights granted;
- (vi) Exceptions and limitations;
- (vii) Procedures and formalities;
- (viii) Sanctions and remedies;
- (ix) Time period of protection;
- (x) Folklore shared within a country and 'regional folklore';
- (xi) Performance of traditional literary and artistic productions;
- (xii) Documentation;
- (xiii) Prevention of insulting, derogatory and culturally / spiritually offensive uses

(b) Protection against imitation

(c) Protecting authenticity and origin

(d) Defensive protection of traditional signs and symbols

The terms "traditional cultural expressions" / "expressions of folklore"

"Traditional cultural expressions " has been used as a neutral working term in Committee documents because in some countries, cultures and communities the term "folklore" is regarded as derogatory. Some participants in the Committee's Fifth Session expressed concern at the use of the term "traditional cultural expressions", and stated their preference for the term "expressions of folklore".

Accordingly, the terms "traditional cultural expressions" and "expressions of folklore" are both used together.

***Sui generis* systems**

Previous Committee documents have discussed the various *sui generis* systems which have already been established at national or regional levels for the protection of EoF / TCEs.

Customary and indigenous laws

Several Member States and many Indigenous peoples and cultural communities embodying customary legal systems have argued for greater recognition and use of customary laws and protocols in the formulation of approaches and systems for the protection of EoF / TCEs.

The subject matter of protection

Previous documents have discussed the nature of traditional cultural expressions / expressions of folklore, and pointed out that they may be tangible or intangible, or any combination of both.

"Contemporary" expressions of traditional cultures / folklore

Previous documents highlighted the distinction made by copyright and other IP laws between contemporary expressions, adaptations and interpretation of traditional cultures and folklore. Characteristics of expressions of traditional cultures/folklore

Expressions of traditional cultures/folklore reflect and identify a community's history, cultural and social identity, and its values. They often carry religious and spiritual meanings, and perform various spiritual, social and cultural functions. In general, they play a key role in identifying a culture or community and it embodying and communicating religious, spiritual, social and cultural meanings, beliefs and values.

While the cultural heritage of a community lies at the heart of its identify and links its past with its present and future, it is also 'living' - it is constantly recreated as traditional artists and practitioners bring fresh perspectives and experiences to their work.

It would appear that the essence of 'traditional' cultural expressions/folklore is that, whether one is speaking of the oldest, pre-existing and collective expressions of a traditional culture, or whether the most recent adaptations, performances and variations thereof, they are still regarded by a community as identifying and reflecting its traditions as being 'owned' by that community.

IP protection currently available for individuals in respect of recent adaptations and derivations from folklore, and performances of expressions of folklore, is an important factor to take into account when determining to what extent, as matter of legal and cultural policy, additional protection is necessary.

IP protection should be distinguished from the concepts of 'preservation' and 'safeguarding'. Copyright, for example, protects the products of creativity, in the form of original literary and artistic works, against certain uses such as reproduction. The holder of copyright in a work has the exclusive right to prevent or authorize others from undertaking any of those acts.

By contrast, preservation and safeguarding in the context of cultural heritage refer generally to the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance or viability.

According to general international principles, copyright protection is available for both oral and written works. Not all rights in copyright have exclusive effect, however. In some cases, rights may be limited so that certain use may be made of the protected work without the prior authorization of the copyright owner, provided a fair or reasonable royalty is paid. This is known as a 'compulsory license' or 'right to obtain equitable remuneration'. The author also enjoys certain 'moral rights'. Even works derived from materials in the public domain can be copyright protected, because a new interpretation of public domain materials can result in a new distinct expression which is sufficiently 'original'. However, the protection afforded to such derivative works vests only in the new material or aspects of the derivative work. Thus, aside from new material that belongs to the author, a derivative work may also comprise material that already belongs to another rightholder or material in the public domain.

The duration of copyright protection generally extends to 50 years after the death of the author. Many Indigenous peoples and traditional communities desire indefinite protection for at least some aspects of expressions of their traditional cultures, and in this respect the copyright system does not meet their needs.

Contemporary tradition-based creations protected by IP

As many have pointed out, tradition can be an important source of creativity and innovation for indigenous, local and other cultural communities and their individual members. The use of traditional cultural materials as a source of contemporary creativity can contribute towards the economic development of traditional communities and their members.

The recognition and promotion of IP protection for this contemporary creativity can in turn support such economic development.

The marketing of artisanal products also represents a way for communities to show and strengthen their cultural identity and contribute to cultural diversity.

Cultural heritage is also a source of inspiration and creativity for parties external to the traditional or customary context, such as the entertainment, fashion, publishing, design and other cultural industries.

Under current laws, they would have no obligations to the source community, such as obligations to acknowledge the origin of their inspiration, share benefits or respect the cultural and spiritual values and meanings associated with the underlying folklore that they adapted, unless their works were presented in a way that falsely or misleadingly suggested to the public that such a connection existed.

Cultural expressions in the 'public domain'

The term 'public domain' is used here in the sense in which the term is used in the copyright context and it refers to elements of IP that are ineligible for private ownership and the contents of which are available for use by any member of the public.

The 'public domain' in this context means something other than 'publicly available'. The 'public domain' is often characterized as a construct of the IP system, which does not take into account private domains or shared intellectual commons established by customary and indigenous laws.

OPTIONS FOR PROTECTING TRADITIONAL CULTURAL EXPRESSIONS

Current IP systems, adapted IP systems and stand-alone *sui generis* IP systems

IP-type property rights are not the only way to provide protection for TCEs. Approaches include:

- (i) Property rights:
 - (a) use of existing IP rights and possible modifications to them;
 - (b) stand-alone *sui generis* IP systems;
- (i) unfair competition;
- (ii) trade practices and marketing laws;
- (iii) use of contracts and licenses;
- (iv) registers, inventories and databases;
- (v) customary and indigenous laws and products;
- (vi) cultural heritage preservation laws and programs;
- (vii) common law and other remedies, such as rights of publicity, unjust enrichment, confidential information and blasphemy;
- (viii) criminal law.

Generally, existing *sui generis* systems are not conceived as a subset of copyright, and they do not require originality. Similarly, there is no explicit originality requirement in the Panama Law and in the Pacific Regional Framework. It is often suggested that oral traditional literary and artistic productions are not and cannot be protected because they are not fixed. One existing *sui generis* system has provided that protected TCEs must, amongst other things, be 'capable of commercial use'. Several *sui generis* systems provide that the protected subject matter must be based upon 'tradition' or be 'traditional'.

Collective rights have also been provided in stand-alone *sui generis* legislation:

- (i) Philippines Law provides rights for 'indigenous cultural communities / indigenous peoples';
- (ii) the Panama Law provides for the protection of the 'collective rights of the indigenous communities';
- (iii) the Pacific Regional Framework vests 'traditional cultural rights' in 'traditional owners';

However, most national laws which currently provide *sui generis* protection for TCEs vest rights in the State or a statutory body, or at least provide that the rights shall be managed and exercised by the State.

States have also noted that individuals develop and create EoF / TCEs and that rights they have under copyright and other IP rights should be recognized. The question arises, however, whether and how there should be regulation of derivative works created by individuals,

particularly those not connected with the traditions and cultural materials they adapted or were inspired by.

A possible approach, found in the Pacific Regional Framework, is not to deny copyright or other IP rights to derivative works made by non-traditional creators, but to place upon these external creators certain obligations towards the relevant community. There are various options possible in cases where the preference is for vesting rights other than in a community. In some cases two or more communities in one country may hold potentially overlapping rights in the same or very similar TCEs.

In the Panama Law, for example, it states that more than one community can apply for and be registered as the holders of rights in the same TCE. Under the Pacific Regional Framework, the 'cultural authority' is tasked with resolving disputes as to ownership of a particular TCE. Communities in different countries and even regions may lay claim to the same or similar folklore. Existing regional organizations and mechanisms may be important stakeholders in resolving the 'regional folklore' question.

PRACTICAL STEPS FOR SETTING OVERALL DIRECTIONS

Based upon the preceding materials, the following series of steps may help policymakers 'navigate' their way through these questions and illustrate the available options:

Step One: determine national policy objectives, including the needs of communities and groups that are the holders and custodians of folklore. Are they related to IP (or more concerned with other policy goals such as preservation of cultural heritage?). What subject matter is to be protected? Against which acts is protection sought? Is the protection aimed at positive or defensive protection, or a combination of the two?

Step Two: identify the policy considerations that may be relevant to framing overall directions (examples: promotion of cultural diversity; stimulation of cultural industries for economic development; preservation of cultural heritage; safeguarding of a vibrant and multicultural public domain: protection of cultural rights; protection of indigenous peoples' human rights, etc.).

Step Three: identify options available under conventional IP systems, including unfair competition, as well as options for adapted or modified elements of existing IP.

Step Four: analyze options available in non-IP systems relevant to meeting the desired goals, such as cultural heritage, consumer protection and marketing laws, and indigenous and customary laws.

Step Five: determine whether a stand-alone *sui generis* system is necessary, or whether uses that can be made of existing rights and modifications to them, meet the needs identified and strike the right balances. If so, how would a *sui generis* system relate to conventional IP systems, particularly in respect of overlapping subject matter?

Step Six: identify which practical and operational measures, institutions and programs may be needed to facilitate the effective use of implementation of the forms of protection already in place or to be established.

Step Seven: establish how national systems would interact with each other to provide regional and international protection, through bilateral, regional or international legal frameworks.

TRADITIONAL KNOWLEDGE, POLICY AND LEGAL OPTIONS

The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Committee") has explored policy questions related to the protection of traditional knowledge (TK).

The Committee has reviewed extensive documentation and analysis of the wide-ranging experience of legal protection of TK among WIPO Member States. Surveys and analysis have covered TK protection through conventional IP rights and through existing *sui generis* measures, including *sui generis* elements within conventional IP systems and stand-alone *sui generis* laws.

In providing the "structured, concrete analysis of specific option", there are two levels to consider: namely (a) the level of core principles and general policy objectives; (b) the level of elaborated legal provisions.

Traditional knowledge protection in a holistic context

The irreducibly holistic quality of TK is often stressed, and the substantive protection of TK necessarily involves consideration of the applicable principles and standards that are established at the international level - for instance, the Paris Convention for the Protection of Industrial Property.

Existing TK protection laws and policy discussions on the protection of TK have articulated and given effect to a number of general principles and objectives. In the Committee's discussions, IP-related principles and objectives have crystallized over two years through questionnaire response, policy statements, panel presentations, document submissions, notified national laws and documented practical experience.

A comprehensive and combined approach to TK protection, including the combined use of existing IP mechanisms, the repression of unfair competition, the grant of exclusive *sui generis* rights and/or the application of prior informed consent requirements linked to access regimes: appropriate protection of TK should be based on a combination of approaches, including any or all of these legal tools.

Repression of unfair competition, including appropriation and misuse of distinctive traditional characteristics.

A principle of recognition of rights of TK holders in their traditional innovations and know-how.

- A principle of prior informed consent (PIC)

- A principle of equity and benefit-sharing

- A principle of regulatory diversity, including sectoral distinctions

- A principle of adapting the form of protection to the nature of TK

- A principle of effective and appropriate remedies

- A principle of safeguarding customary uses

- A principle of consistency with access and benefit-sharing frameworks for associated genetic resources

Grant of exclusive rights over TK Use of Conventional IP Rights

Existing IP rights have been used to protect TK or TK-related subject matter in the following ways.

- Geographical indications or collective/certification marks; these forms of IP have been used to protect products made with traditional technologies, including products that are particularly associated with a particular region or community (for example, Vietnam is establishing geographical indications to protect traditional Vietnamese pickled food products, which are associated with a particular region);
- unfair competition and trade practices laws: such laws have been used to take action against false claims of indigenous authenticity or other claims that a product is produced by or associated with a particular traditional community;
- patent rights: the patent system has been used by practitioners of traditional medicine to protect their innovations (for example, in 2002 China granted 4479 patents for Traditional Chinese Medicine (TCM) in China), and systems have been developed to ensure that illegitimate patent rights are not granted over non-novel TK subject matter;
- Trade mark rights: distinctive signs, symbols and terms associated with TK have been protected as trade marks, and have been safeguarded against third parties' claims of trade mark rights (for example, the logo for Kyana Aboriginal Cultural Festival has been registered by the indigenous artist who created it);
- Copyright and related rights: while extending only to the form of expression of TK, and not its ideas or content, copyright and related rights have been used in protecting TK when it is recorded in a fixed form, or protecting against the illicit recording of TK, for instance when it may be passed on by the performance of a traditional chant, song or story (document WIPO/GRTKF/IC/6/3 deals with legal and policy options for the protection of traditional cultural expressions);
- The law of confidentiality and trade secrets: non-disclosed TK, including secret and sacred TK, has been protected as confidential or undisclosed information, and remedies have been awarded for breach of confidence in contravention of customary laws.

Issues in the use of *sui generis* exclusive rights:

- (i) difficulty meeting requirements such as novelty or originality, and inventive step or non-obviousness (this may be due at least in part to the fact that TK often dates back prior to the time periods associated with conventional IP systems, or are developed in a more diffuse, cumulative and collective manner, making invention or authorship difficult to establish at a fixed time);
- (ii) requirements in many IP laws for protected subject matter to be fixed in material form (given that TK is often preserved and transmitted by oral narrative and other non-material forms);
- (iii) the frequently informal nature of TK and customary laws and protocols that define ownership (or other relationships such as custody and guardianship) which form the basis of claims of affinity and community responsibility

- (IV) the concern that protection systems should correspond to a positive duty to preserve and maintain TK, and not merely provide the means to prevent or exclude others from making unauthorized use (the characteristic function of IP rights);
- (V) the perceived tension between individualistic notions of IP rights (the single author or inventor), as against the tendency for TK to be originated, held and managed in a collective environment (often making it difficult to identify the specific author, inventor or analogous creator that IP law is viewed as requiring); and
- (VI) limitations on the term of protection in IP systems (calls for better recognition of TK often highlight the inappropriate nature of relatively brief terms of protection in conventional IP systems, as need for protection as seen as enduring beyond individual life spans for TK subject matter).

TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND GENETIC RESOURCES: THE INTERNATIONAL DIMENSION

INTERNATIONAL ASPECTS OF THE COMMITTEE'S MANDATE

Considering the international aspects of intellectual property in general, the international dimension of the issues before the Committee may include:

- (a) coordination and clarification of linkages with the other elements of international law;
- (b) consideration of current international IP law and standards that apply to TK and TCE subject matter;
- (c) interpretation of existing standards and development of new international standards that apply to the treatment of TK, TCEs and genetic resources under national legal systems, and clarification of the range of legal options available under national law to give effect to these standards;
- (d) international mechanisms for enabling nationals of one country to enjoy IP rights in a foreign jurisdiction;
- (e) coordination and articulation of common policy positions and objectives, and guidelines for achieving them;
- (f) international mechanisms for enabling or facilitating notification or registration as the basis for recognizing an IP right under national law;
- (g) administrative coordination, facilitation and cooperation in the operation of systems of IP rights under national law, including international classification and documentation standards;
- (h) international coordination of mechanisms for the collective administration and management of IP rights;
- (i) settlement of international disputes; and
- (j) settlement of private disputes involving more than one jurisdiction, through international or quasi-international means.

PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES

PRACTICAL STEPS TAKEN TO DATE

The majority of the specific proposals for enhanced participation and involvement of NGOs, and especially indigenous and local communities, have already been implemented.

- (i) a number of Member States have adopted the practice of funding NGO representatives of indigenous and local communities;
- (ii) the funds provided by WIPO to support Member State participation from developing countries have been used in some cases by such countries to support the participation of leaders of indigenous or local communities;
- (iii) the WIPO Secretariat has cooperated closely with the United Nations Permanent Forum on Indigenous Issues over relevant issues, and WIPO hosted a meeting of the Inter-agency Support Group on Indigenous Issues on September 8, 2003;
- (iv) consultations and workshops at the national and regional level and other for a aimed at developing focused input for the Committee have included representatives of indigenous and local communities as speakers and participants;
- (v) as agreed by the Committee at its last session, the WIPO web side now has a page for submissions of accredited NOGs on the issues before the Committee; Document WIPO/GRTKF/IC/6/INF/2 will list the documents available on this site as at the time of the Committee's sixth session;
- (vi) specific briefings and consultations for NGO representatives, particularly representatives of indigenous and local communities, have been undertaken in the framework of Committee meetings;
- (vii) the Secretariat has continued its practice of consulting with interested representatives of indigenous and local communities on draft documents and other materials being developed for the Committee.

March 2004