



INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

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The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the Committee”) has agreed on the development of a toolkit to provide practical assistance to TK holders and custodians of genetic resources who are faced with this challenge. The toolkit focuses on management of IP concerns during the documentation process, and also takes the documentation process as a starting point for a more beneficial management of TK as a community’s intellectual and cultural asset. This document reports on the development of the toolkit and the consultations held with stakeholders. A summary and introduction to the toolkit are annexed. Finalization of the toolkit will be based on continuous input from WIPO Member States, other participants in the Committee’s work and a wide range of other stakeholders, with an emphasis on field-testing the toolkit in cooperation with the communities concerned and with other TK-related initiatives.

Many communities are taking part in programs to record, write down or document their traditional knowledge (TK) and to record information about the plants they have traditionally used (often called ‘biological resources’). This may be to help preserve the TK and biological resources for future generations, or to help others to use it.

Before documenting:

- Consult widely with all in the community who have an interest in the TK and biological resources, and work out what is needed to make sure they have agreed in advance to the documentation process and are fully aware of the implications (‘prior informed consent’).
- Set your objectives for the documentation project and identify any concerns about IP.
- Assess your TK and all your IPR options, before disclosing your TK.
- After considering your options, set your IP strategy to implement your objectives.

During documentation:

- Do not disclose your TK to anyone beyond the traditional circle, unless you have taken a conscious decision to do so.
- Record your TK and associated genetic resources, but don't make the records or documents publicly available unless or until this fits in with your strategy.
- Identify those who provided the information and who claim ownership and record this information, including any conditions or limitations they impose on its use.
- Clarify and structure your relationship with your project partners through contractual agreements (e.g. confidentiality agreements and research agreements).

After documentation:

- Review possibilities of protecting your TK and genetic resources through IP and other rights - and work out what elements of your TK could be protected as IP;
- Only disclose your TK and genetic resources if this is part of your strategy;
- Decide whether you wish to use databases and registries to achieve your IP objectives;
- Use and enforce your IP rights in your TK and genetic resources, if any

When your TK or biological resources are being documented, it's vital to remember that:

- Documentation does not ensure legal protection for your TK and genetic resources. In fact, in some cases it can destroy your rights and options, if you proceed without an IP strategy;
- "Documentation" is not the same as putting TK and genetic resources in the public domain, and documented TK and genetic resources can still be kept confidential or restricted; and
- There is no single way to approach documentation of TK and biological resources. The range of IP interests involved is as diverse as the range of traditional communities concerned. Since there are many ways of defining and protecting IP interests, you should carefully consider all your options and consult widely before undertaking a documentation project.

What is TK documentation?

'Documentation' does not mean publishing TK, making it available to the general public, or placing it in the public domain. Some documentation projects are intended just to preserve traditional knowledge for the community itself, and to keep it secret. You can choose to document your TK and biological resources without placing them in the public domain.

Traditional cultural expressions and folklore

TK documentation can include not just the knowledge itself, but the traditional way it has been expressed – for example, songs and chants, dances and performances, images, oral narratives and stories.

What are traditional knowledge, genetic resources and biological resources?

Traditional knowledge

There is no clear-cut definition of ‘traditional knowledge’ – in fact, your perception of what is your traditional knowledge is likely to be just as important as any official definition.

‘Traditional knowledge’ refers to a very wide range of knowledge, and is not limited to any particular field – it could be knowledge about medical treatments, about agriculture, about caring for the environment. What sets it apart from other knowledge and makes it ‘traditional’ is the way it is associated with a particular local or indigenous community. Traditional knowledge is created, preserved, shared and protected within the traditional circle. The term “traditional” means ‘handed down from generation to generation,’ and in the case of “traditional knowledge” (TK), it usually refers to knowledge that has been accumulated by societies in the course of long experience in a particular location. It is often knowledge that is important to the very sense of identity of a community.

Biological resources

Many documentation projects gather information about specific plants, animals, insects or other living beings

The Convention on Biological Diversity (CBD) is an international treaty that creates rules for how biological resources should be conserved and accessed, and how the benefits from their use should be shared.

The CBD defines ‘genetic resources’ as ‘genetic material of actual or potential value.’ ‘Genetic material’ is any material of plant, animal, microbial or other origin containing functional units of heredity. Documentation of a genetic resource can also cover its parts or components, such as organs, cells, cell organelles, genes, etc.

Intellectual property (IP) rights and systems can provide valuable tools for safeguarding your interests. IP can help ensure that when your TK is documented, you have a say in how the TK is used and managed beyond your community. The toolkit includes practical examples of how various IP systems have been used:

- To create positive rights over TK for the benefit of traditional communities; and
- To prevent others from taking out IP rights over TK when this offends or damages the interests of the traditional community.
- Patents on inventions created within knowledge tradition, and measures to stop patents being granted on inventions that already form part of existing TK;
- Trademarks, collective and certification marks, and geographical indications that protect the reputation and special qualities of traditional products that make use of

TK, and stop others from making misleading or offensive use of references to traditional communities and cultures;

- Copyright and folklore protection that covers the way TK is expressed in words, music, dance and other artistic works, and various ways of protecting databases and the information held in databases;
- Use of trade secrets and the law of confidentiality to protect TK against unauthorized disclosure and use; and
- Specific, tailor-made (*'sui generis'*) laws (available in some countries only) that directly protect some forms of TK.

Before you consider using IP tools for your TK and genetic resources, you should remember that alongside or instead of these IP mechanisms, you can use a range of other mechanisms to preserve and protect your TK and biological resources.

They include:

- the application of customary law and protocols;
- cultural heritage legislation;
- contracts, licenses and other legal agreements that set conditions on how other people can use your TK or biological resources;
- security systems like passwords and codes that protect data that is in digital form and held in electronic databases, and
- non-IP *sui generis* forms of protection, where these have been implemented.

INTELLECTUAL PROPERTY PROTECTION OF TRADITIONAL KNOWLEDGE

Some forms of IP protection cover the content of knowledge (notably patents and trade secrets), others protect a specific form or expression (such as copyright, performers' rights and design rights), while others yet again protect distinctive signs, symbols or indications (such as trademarks, geographical indications and certification and collective marks). For instance, a longstanding doctrine holds that copyright protection extends to expressions, not ideas; patents, by contrast, protect against the use of the inventive concept disclosed in the patent document, and this protection is not limited to a particular mode of carrying out the invention. Trademark law does not protect knowledge as such, but can protect the distinctive reputation of products or services prepared using TK.

In the more detailed work of the Committee, however, a distinction has been drawn between protection of traditional knowledge *stricto sensu* (in the strict sense) and protection of expressions of TK (or TCEs and expressions of folklore), corresponding to the different general modes of IP protection.

NATIONAL EXPERIENCES IN THE USE OF CONVENTIONAL IP REGIMES TO PROTECT TRADITIONAL KNOWLEDGE

Experiences with positive protection of TK through traditional IP mechanisms.

A number of Committee Members, such as Sweden and Switzerland, has indicated that IP mechanisms are, in principle, available for the protection of TK, provided the general conditions under IP law are met. Other Committee Members have identified

the conventional IP mechanisms that can be (or have actually been) resorted to in order to protect TK. For example:

(a) *copyright and related rights*

Australia, Canada, Costa Rica, Indonesia, New Zealand, Qatar, Samoa, Uruguay and the European Community;

(b) *patent law*

Costa Rica, Kazakhstan, Hungary, Japan, Republic of Korea, Republic of Moldova, New Zealand, Romania, the Russian Federation, Uruguay, and Viet Nam;

(c) *plant variety protection*

Experiences with the use of traditional IP mechanisms for the defensive protection of TK.

(a) *defensive use of the patent system*

Colombia, New Zealand, the United States of America and the European Community noted that appropriate measures, such as the identification in patent applications of the origin of genetic resources and licensed TK used in the development of claimed inventions, could help prevent unwarranted claims by unauthorized third parties.

(b) *defensive use of trademark law*

New Zealand has informed that a new Trade Marks Bill, currently being considered by Parliament, will if enacted allow the Commissioner of Trade Marks to refuse to register a trade mark where its use or registration would be likely to offend a significant section of the community, including Maori.

NATIONAL EXPERIENCES IN THE USE OF *SUI GENERIS* IP REGIMES FOR THE PROTECTION OF TK

By February 28, 2003 four Committee Members had informed about the enactment of legislation establishing a *sui generis* IP regime for the protection of TK *stricto sensu*: Brazil, Panama, Portugal and Peru.

Additionally, the Philippines has provided information on a bill for the establishment of "Community Intellectual Rights Protection" that is pending before the Philippine Senate.

In order to obtain a clearer view of the trends in national practices, it is important, however, to continue gathering relevant data, in particular information concerning the practical and concrete experiences in the protection of TK through traditional mechanisms.

CONTRACTUAL PRACTICES AND CLAUSES RELATING TO INTELLECTUAL PROPERTY, ACCESS TO GENETIC RESOURCES AND BENEFIT-SHARING

Contracts or agreements have potential use in relation to a wide range of scenarios concerning access to and benefit-sharing from genetic resources and associated TK. For instance, under Article 15, paragraph 7, of the Convention on Biological Diversity, each Contracting Party shall “take legislative, administrative or policy measures, as appropriate... with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.”

Many contracts regarding access to genetic resources are established under general contract law within national legal frameworks. Some national laws also govern access to TK that is associated with genetic resources.

- (a) Brazilian Provisional Measure No. 2.186-16, of August 23, 2001;
- (b) Panamanian Law No. 20 of June 26, 2000, on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge; and Executive Degree No. 12 of March 20, 2001; and
- (c) Peruvian Law No. 27811 (“A Law introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources”), published on August 10, 2002.

Brazilian Provisional Measure No. 2.186-16, of August 23, 2001

Under the recently enacted Brazilian Provisional Measure No. 2.186-16, of August 23, 2001, whenever there is a prospect of subsequent commercial use, *in situ* access to samples of components of genetic heritage and associated TK may only be granted after a Contract for Use of the Genetic Heritage and Benefit-Sharing has been signed.

The Brazilian Provisional Measure contains considerable detail regarding the development and practical operation of such a contract.

- (a) Establish directives for drafting the Contract for Use of the Genetic Heritage and Benefit-Sharing; and
- (b) Approve Contracts for the Use of the Genetic Heritage and Benefit-Sharing as complying with the requirements of this Provisional Measure and the regulations under it.

Furthermore, the Chairman of the Management Council shall be competent to sign the Contract for the Use of the Genetic Heritage and Benefit-Sharing.

Essential clauses in the Contract are those that relate to:

- (a) Purpose, elements, quantification of samples and intended use;
- (b) Duration;
- (c) Method of fair and equitable sharing of benefits and, where applicable, access to and transfer of technology;
- (d) Rights and responsibilities of the parties;
- (e) Intellectual property rights;
- (f) Cancellation;
- (g) Penalties; and
- (h) Jurisdiction in Brazil.

INTELLECTUAL PROPERTY ASPECTS OF CONTRACTS CONCERNING BIOLOGICAL MATERIAL AND ASSOCIATED TRADITIONAL KNOWLEDGE

A consideration of the list of contracts, licenses and questionnaires currently included in the Contracts Database (see Annex), reveals the very broad range of model and actual agreements¹ so far included in the database.

- (a) *Providers and recipients of biological materials;*
- (b) *Biological material;*
- (c) *Licensed uses of the biological material and associated TK;*
- (d) *Time frames*
- (e) *Legal jurisdictions.*

CONCLUSION

The Contracts Database may help illustrate the different roles that IP can, and does, play in agreements for the access, research and use of genetic resources and associated TK. There is accordingly a continuing need for input from a broader base of experience.

The Contracts Database provides a solid empirical basis for this continued work on policy issues related to IP aspects of contracts and licenses concerning access to

genetic resources and benefit-sharing. This may assist the development of the proposed IP guidelines or best practice models.

PARTICIPATION OF INDIGENOUS AND LOCAL COMMUNITIES

The following measures were suggested by Member States and other participants during the session:

- (a) greater involvement of indigenous and local communities in national processes, such as in the development of national policies and of statements to be made by States at Committee sessions;
- (b) the participation of indigenous and local community representatives on expert panels;
- (c) the involvement of representatives of indigenous and local communities as co-chairs of working groups;
- (d) capacity-building at the national and local levels;
- (e) the participation of indigenous and local community experts in the analysis of papers and reports being produced for the Committee;
- (f) the inclusion of an indigenous staff member in the unit dealing with the subjects covered by the Committee;
- (g) development of a working relationship with the United Nations Working Group on Indigenous Populations; and
- (h) allowing indigenous and local communities to make available to Member States comments and papers on the issues under discussion, and for time to be allocated on the Committee's agenda for adequate responses to them documents by Member States.