

Question Q232

National Group: Switzerland

Title: **The relevance of traditional knowledge to intellectual property law**

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Questions

I. Analysis of current law and case law

The Groups are invited to answer the following questions under their national laws:

1) Is TK defined in your national law?

No explicit definition of the term "Traditional Knowledge" can be found in Swiss legislation, even though the term itself appears in Article 49a Patent Law.

2) If yes to question 1, what is the source of the definition?

n.a.

3) If yes to question 1, how is TK defined?

n.a.

4) If TK is not defined in your national law, is there any 'working definition' described in any draft law or regulation, policy document or other discussion material?

In the comments ("Botschaft") to the Patent Law revision 2005, there is a remark that there is no internationally accepted definition of TK, but that TK can be described as knowledge, innovation and customs of indigenous and local communities in developing and industrialised countries, which have been created, improved and adapted to changing requirements and environmental conditions by these communities over generations, and handed down to subsequent generations, often in oral form.

Since the Patent Ordinance Article 45a (see below, question 6a) makes reference to the Convention on Biological Diversity of 5 June 1992, it has to be assumed that TK has to be interpreted in the sense of this Convention ratified by Switzerland.

5) Does your national law provide for any protection (whether positive or defensive) for TK?

Swiss law does not provide for direct positive protection of TK, be it Swiss TK or TK originating in other (developing) countries. However, one could consider indirect positive protection of TK by a trademark (e.g. guarantee mark), indication of origin / geographical indication, patent, design or copyright.

A kind of defensive protection is provided by the requirement of indicating the source of TK of indigenous and local communities connected with genetic resources, if an invention to be patented is directly based on such TK.

6) If yes to question 5, is the protection found in:

a) existing IP laws or regulations;

Positive TK protection:

Guarantee mark, Article 21¹, Law on the Protection of Trademarks and Indications of Origin:

The guarantee mark is a sign, which is used, under control of the mark owner, by several enterprises and which serves to guarantee the properties, geographical origin, method of production or other characteristics common to goods or services of such enterprises.

Indication of origin, Article 47¹, Law on the Protection of Trademarks and Indications of Origin:

Indications of origin are direct or indirect references to the geographical origin of goods or services, including references to their nature or properties, which are related to their origin.

Ordinance on the Protection of Designations of Origin and Geographical Indications for Agricultural Products and Processed Agricultural Products:

Art. 1 Principle

Designations of origin and geographical indications for agricultural products and processed agricultural products that have been entered into the Swiss Federal Register are protected.

Art. 2 Designation of origin

¹ *The name of a region, a place, or, in exceptional cases, a country used to describe an agricultural product or processed agricultural product:*

- a. originating in that particular region, place or country;*
- b. the quality or characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and*
- c. the production, processing and refining of which take place in the defined geographical area may be registered as a designation of origin.*

² *Traditional names for agricultural products or processed agricultural products that meet the conditions set out in paragraph 1 may be registered as designations of origin.*

Art. 3 Geographical indication

¹ *The name of a region, a place, or, in exceptional cases, a country used to describe an agricultural product or processed agricultural product:*

- a. originating in that particular region, place or country;*

- b. which possesses a specific quality, reputation or other characteristics which can be attributed to that geographical origin; and*
 - c. the production, processing or refining of which take place in the defined geographical area may be registered as a geographical indication.*
- ² *Traditional names for agricultural products or processed agricultural products that meet the conditions set out in paragraph 1 may be registered as geographical indications.*

Patent Law, Article 1

¹ *Patents are granted for new inventions which can be used in industry*

² *Whatever results from the state of the art (Art. 7²) in an obvious manner is not a patentable invention*

Design Law, Article 1:

This Law protects designs of goods or parts of goods, characterised in particular by the arrangement of lines, surfaces, contours or colours or by the materials used.

Patent and design protection requires novelty, and inventive step or originality, respectively. Novelty may be difficult to ascertain for TK.

Copyright protection may be considered for TK in the sense of traditional cultural expressions (TCE).

Law on Copyright and Neighbouring rights:

Art. 2 Definition of works

¹ *Works are, independent of their merit or purpose, creations of the mind in literature and art, which have an individual character.*

² *Such works are, in particular:*

- a. literary, scientific or other works of language;*
- b. works of music and other acoustic works;*
- c. works of fine art, especially paintings, sculptures and graphic works;*
- d. works with scientific or technical content, such as drawings, plans, maps or modelled presentations;*
- e. works of architecture;*
- f. works of applied art;*
- g. photographic works, films and other visual or audiovisual works;*
- h. choreographic works and pantomimes.*

Defensive TK protection:

It may be considered that registration of TK (or TCE) as a guarantee mark, indication of origin / geographical indication, patent or design may be prevented by deeming such registration to be contrary to morality (Art. 2(d) Trademark Law; Art. 2¹ Patent Law, Art. 4(e) Design Law). The illicit element may be in that the TK / TCE shall not be commercialised at all according to the will of its creators/custodians or that it shall not be commercialised by someone who has no connection with the creators/custodians. With regard to designs one may also consider that if someone unrelated to the creators/custodians tries to register as a design a form coming from traditional sources in developing countries (and which is not known in Switzerland) such design may be deemed not to be new anymore and thus may not be registered – this despite the usual approach that a design is not new anymore only if possibly known to the relevant circle of people in Switzerland.

A patent cannot be granted for TK which has been part of the public domain anywhere in the world. The “defensive protection” extends to an invention obvious in view of TK considered to be state of the art:

Patent Law Art. 7² corresponding to European Patent Convention Article 54(2):
The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the priority date or the date of filing.

For TK collected in suitable data bases, Examiners and Courts may easily determine whether particular TK is part of the state of the art and hence cannot be the subject matter of a patent, and whether an invention is obvious in view of such TK. As a consequence defensive protection is easily available for TK accessible to the public at large.

Further defensive protection is provided in that Patent Law requires the indication of source of TK. This should minimise misappropriation of such TK used as a starting point for inventions:

Patent law, Article 49a:

¹ *The patent application shall contain indications about the source:*

a. of genetic resources [...];

b. of traditional knowledge of indigenous and local communities connected with genetic resources, to which the inventor or the applicant had access, if the invention is directly based on such knowledge.

² *If the source is neither known to the inventor nor the applicant, this fact must be declared by the applicant in writing.*

Patent law, Article 81a:

¹ *Whoever intentionally provides false information according to Article 49a will be sentenced to a fine up to SFR 100'000.*

² *The judge may order publication of the judgement.*

Patent law, Article 138:

The applicant shall [a. ...;] b. provide indications about the source (Art. 49a); [c. ...; d. ...;] to the Institute within 30 months after the application or the priority date.

Patent Ordinance, Article 45a:

¹ *The source of genetic resources or traditional knowledge in the sense of Article 49a of the Law has to be stated in the description of the invention.*

² *Considered in particular as source according to paragraph 1 are:*

a. the country providing genetic resources in the sense of Articles 2 and 15 of the Convention on Biological Diversity of 5 June 1992;

b. the multilateral system in the sense of Article 10² of the International Treaty on Plant Genetic Resources for Food and Agriculture of 3 November 2001;

c. indigenous and local communities in the sense of Article 8j of the Convention on Biological Diversity of 5 June 1992;

d. the country of origin of genetic resources in the sense of Article 2 of the Convention on Biological Diversity of 5 June 1992;

e. ex-situ sources such as, for example, botanical gardens or gene banks;

f. scientific literature.

b) adaptation of IP laws or regulations through sui generis measures for TK protection;
or

There are no *sui generis* measures for TK protection in existing IP laws and regulations.

c) wholly sui generis laws or regulations relating to TK protection?

There is no *sui generis* law for TK protection.

7) If yes, to any part of question 6, please provide details of the law(s) or regulation(s), including where such detail exists:

a) criteria for eligibility for protection;

Guarantee mark: May serve to secure the properties, geographical origin, method of production or other common traits of goods or services of TK. If any of these aspects are fulfilled, a guarantee mark may be considered as a vehicle of protection.

Indication of origin / geographical indication: May serve to secure appearance and workmanship or properties of goods and services of TK, which are connected with the origin. If such aspects are fulfilled, indications of origin (geographical indication) may be considered as a vehicle of protection.

Patent: Patent protection requires that the TK had not been accessible and cannot be considered part of the state of the art (novelty requirement). Furthermore such TK must be based on an inventive step, i.e. non-obvious for a skilled person in the art, to be patentable.

Design: Design protection is restricted to a particular appearance of goods, and requires novelty and originality. Novelty may be difficult to ascertain for TK, see discussion under 6a).

Copyright: Protection is provided for creations of the mind in literature and art, which have an individual character.

b) beneficiaries of protection;

- owner of registration (patent and design)
- any person that fulfils the requirements of the corresponding guarantee mark or indication of origin
- author/creator (copyright)

c) scope of protection;

as defined for the guarantee mark, indication of origin, patent, design and/or copyright, respectively, without special reference for TK being the basis of such protection

d) sanctions, remedies and exercise of rights;

interdiction of infringement, termination of infringement (permanent injunction), financial compensation such as damages, accounting of profits or reasonable licence fee

e) administration of rights;

Guarantee marks, patents and designs must be registered. Designations of origin and geographical indications for agricultural products and processed agricultural products need not, but may be registered.

f) exceptions to and limitations on rights;

see a) and c)

Right of parallel use (continuing exploitation), private use (Patent Law, article 35, Design Law, article 13)

g) term of protection;

Trademarks (e.g. guarantee mark): 10 years, renewable indefinitely
Indication of origin / geographical indication: indefinitely
Patent: 20 years
Designs: 5 years, four times renewable for 5 years (i.e. a total of 25 years)
Copyright: 70 years after death of the (individual) creator

h) formalities to which protection is subject;

Trademark (e.g. guarantee mark), patent and design must be registered.

i) transitional measures;

n.a.

j) consistency with other laws;

n.a.

k) national treatment and foreign interests; and

Paris Convention and corresponding international IP agreements

l) trans-boundary cooperation.

Indication of origin / geographical indication: Agreements between states

Note: the items in this non-exhaustive list are taken from the IGC draft articles relating to the protection of TK dated 20 May 2011: WIPO/GRTKF/IC/19/5. Groups may benefit from referring to this document in answering question 7, but should also add any additional criteria, which exists in their national law.

8) Are the protections described in response to questions 6 and 7:

a) referable to TK alone; or

no

b) related to or linked to the concepts of protection of:

(i) genetic resources; or

(ii) TCEs?

Positive protection by guarantee mark, indication of origin, patent, design or copyright: No.

Defensive protection according to Patent Law Art. 49a, 81a and 138: Only TK linked to genetic resources.

9) If yes to question 8(b), please provide details of any linkages.

n.a.

10) Please identify any shortcomings in any protection of TK in your country by reference to the matters in questions 6 to 9 above.

none

11) Please identify any significant case law in connection with protection of TK in your country.

none

II. Proposals for harmonisation

The Groups are invited to put forward proposals for the adoption of harmonised rules in relation to the role of TK in relation to IP law.

11) Is a harmonised definition of TK desirable?

Yes.

Such harmonisation at least grants a universal understanding of the object of protection of *sui generis* laws. It has to be taken into account that TK does not only arise amongst "indigenous peoples" but also among local communities in industrialised countries.

12) If yes to question 12, please propose a definition of TK, or the concepts that should be included in any proposed harmonised definition of TK.

Knowledge, innovation and customs of indigenous and local communities in developing and industrialised countries, which have been created, improved and adapted to changing requirements and environmental conditions by these communities over generations, and handed down to subsequent generations, often in oral form.

13) Is it desirable to have only one form of protection for TK, either positive or defensive, or both forms? Please state reasons.

Existing positive and defensive protection is comprehensive.
No need for *sui generis* positive protection.

15) Should TK be protected by:

a) existing IP laws or regulations;

yes

b) adaptation of IP laws or regulations through *sui generis* measures for TK protection;
or

no

c) wholly *sui generis* laws or regulations relating to TK protection? In your answer, please identify which and state reasons.

no

16) If yes to any part of question 15, is a harmonised approach to protection desirable? In your answer, please state reasons.

Harmonised approach to simplify global trade

17) If yes to question 16, how should that approach be implemented

a) at an international level; and

b) at a national or regional level?

both

18) Having regard to WIPO/GRTKF/IC/19/5, please provide any proposals you have as to a harmonised approach concerning:

We do not see the need for a *sui generis* protection for TK. If, however, such a *sui generis* protection is taken into account we favour the following solution:

a) criteria for eligibility for protection;

(a) unique product of or distinctively associated with an indigenous people or local community; and

(b) collectively generated, preserved and transmitted from generation to generation in a traditional context; and

(c) integral to the cultural identity of such indigenous people or local community; and

(d) not known outside that community;

b) beneficiaries of protection;

Indigenous peoples and local communities who generate, preserve and transmit TK. The instalment of Collecting Societies as a platform for State authorities, exploiters of TK and beneficiaries seems to be reasonable.

c) scope of protection;

Right to exploit the TK, to authorize the access and use, to have a fair and equitable share of benefit arising out of the use, to prevent any unauthorized disclosure, use, or other exploitation.

d) sanctions, remedies and exercise of rights;

Appropriate legal, policy and/or administrative measures, including measures to prevent willful or negligent harm to the economic and/or moral interests of the beneficiaries, sufficient to constitute a deterrent.

e) administration of rights;

Establishment of a national or regional authority in consultation with the holders of TK. Such an authority could act as a Collecting Society.

f) exceptions to and limitations on rights;

Measures for the protection of traditional knowledge shall not restrict the generation, creation, customary use, transmission, exchange and development of traditional knowledge within and among communities in the traditional and customary context by the beneficiaries. Protection of traditional knowledge shall neither hinder nor encumber the independent discovery or the independent invention of the same knowledge.

g) term of protection;

Protection of traditional knowledge shall last as long as the traditional knowledge fulfills the criteria of eligibility for protection

h) formalities to which protection is subject;

In the interests of transparency, legal certainty and the conservation of traditional knowledge, relevant national authorities shall maintain registers or other records of traditional knowledge.

- i) transitional measures;

The provisions shall apply to all traditional knowledge which, at the moment of the provisions coming into force, fulfills the criteria set out.

- j) consistency with other laws;

Protection under this instrument shall leave intact and shall in no way affect the rights or the protection provided for in (other) international legal instruments.

- k) national treatment and foreign interests; and

Foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection.

- l) trans-boundary cooperation.

In instances where TK is located in territories of different states, those states shall cooperate by taking measures that are supportive of and do not run counter to the objectives of TK protection.

- m) any specific measures for facilitating protection of TK, eg, systems for recording TK, specific mechanisms for benefit-sharing, or collective or reciprocal systems of administration on behalf of indigenous people or local communities.

See above paragraphs a) to l), in particular e) and h).

Instalment of Collecting Societies (e.g. as known for benefit-sharing in copyright)

National Groups are invited to comment on any additional issue concerning the relevance of TK to IP law.

Summary

In current Swiss laws, there is no explicit definition of the term "Traditional Knowledge" (TK), but TK can be described as knowledge, innovation and customs of indigenous and local communities in developing and industrialised countries, which have been created, improved and adapted to changing requirements and environmental conditions by these communities over generations, and handed down to subsequent generations, often in oral form.

Swiss laws do not provide for direct positive protection of TK, be it Swiss TK or TK originating in other (e.g., developing) countries. However, one could consider indirect positive protection of TK by a trademark (e.g. guarantee mark), indication of origin / geographical indication, patent, design or copyright, taking into account that there are no *sui generis* measures for TK protection in these existing IP laws and regulations. A kind of defensive protection is provided by the requirement of indicating the source of TK of indigenous and local communities connected with genetic resources, if an invention to be patented is directly based on such TK.

The Swiss National Group thinks that a harmonised definition of TK is desirable. Existing positive and defensive protection is comprehensive, and we do not see a need for *sui generis* positive protection. If, however, such a *sui generis* protection is taken into account we favour the following criteria for eligibility:

- (a) unique product of or distinctively associated with an indigenous people or local community; and
- (b) collectively generated, preserved and transmitted from generation to generation in a traditional context; and
- (c) integral to the cultural identity of such indigenous people or local community; and
- (d) not known outside that community.

In the interests of transparency, legal certainty and the conservation of traditional knowledge, relevant national authorities shall maintain registers or other records of traditional knowledge.

Zusammenfassung

In den heutigen Schweizer Gesetzen gibt es keine ausdrückliche Definition des Ausdrucks "traditionelles Wissen" (TK), aber traditionelles Wissen kann umschrieben werden als die Kenntnisse, Innovationen und Gebräuche von eingeborenen und lokalen Gemeinschaften in Entwicklungs- und Industrieländern, welche diese Gemeinschaften über Generationen geschaffen, verbessert und an die sich ändernden Bedürfnisse und Umwelteinflüsse angepasst sowie, häufig in mündlicher Form, an die nachfolgenden Generationen weitergegeben haben.

Schweizer Gesetze bieten keine direkten positiven Schutz für traditionelles Wissen, sei es traditionelles Wissen aus der Schweiz oder aus anderen Ländern, z.B. Entwicklungsländern. Man könnte hingegen indirekten positiven Schutz für traditionelles Wissen durch Marken (z.B. Garantiemarke), Ursprungsbezeichnungen und geographischen Angaben, Patente, Design oder Copyright in Betracht ziehen, wobei man berücksichtigen muss, dass es keine *sui generis* Massnahmen zum Schutz von traditionellem Wissen in diesen vorhandenen Gesetzen und Verordnungen des Geistigen Eigentums gibt. Eine Art defensiver Schutz stellt das Erfordernis dar, dass die Quelle des mit genetischen Ressourcen verknüpften traditionelles Wissen von eingeborenen und lokalen Gemeinschaften angegeben werden muss, wenn eine zu patentierende Erfindung direkt auf solchem traditionellem Wissen basiert.

Die Schweizer Gruppe ist der Meinung, dass eine harmonisierte Definition von traditionellem Wissen wünschenswert ist. Vorhandene positive und defensive Schutzmöglichkeiten sind umfassend, und wir sehen keinen Bedarf für einen positiven *sui generis* Schutz. Falls aber

ein solcher *sui generis* Schutz in Betracht gezogen werden sollte, bevorzugen wir die folgenden Auswahlkriterien:

- (a) einmaliges Produkt aus oder markant verbunden mit einer eingeborenen oder lokalen Gemeinschaft;
- (b) gemeinsam erarbeitet, bewahrt und von Generation zu Generation im traditionellen Zusammenhang übermittelt;
- (c) integraler Bestandteil der kulturellen Eigenheit einer solchen eingeborenen oder lokalen Gemeinschaft;
- (d) ausserhalb dieser Gemeinschaft nicht bekannt.

Im Interesse der Transparenz, Rechtssicherheit und Bewahrung des traditionellen Wissens sollten nationale Behörden Register oder andere Aufzeichnungen traditionellen Wissens führen.

Résumé

Dans les lois actuelles suisses, il n'existe pas de définition explicite du terme "savoirs traditionnels", mais le savoir traditionnel peut être décrit comme la connaissance, l'innovation et les coutumes des communautés autochtones et locales dans les pays en développement et pays industrialisés, qui ont été créés, améliorés et adaptés à l'évolution des besoins et des conditions environnementales par ces communautés au fil des générations, et transmis aux générations suivantes, souvent sous forme orale.

Les lois suisses ne prévoient pas de protection positive directe des savoirs traditionnels, que ce soit les savoirs traditionnels suisse ou les savoirs traditionnels en provenance d'autres pays (par exemple, pays en développement). Toutefois, on pourrait envisager une protection positive indirecte des savoirs traditionnels par une marque (marque de garantie, par exemple), une indication de l'origine / indication géographique, un brevet, un dessin ou par le droit d'auteur, en tenant compte du fait qu'il n'existe pas de mesures *sui generis* pour la protection des savoirs traditionnels dans les lois de propriété intellectuelle et règlements en vigueur. Une sorte de protection défensive est assurée par l'obligation d'indiquer la source des savoirs traditionnels des communautés autochtones et locales liées aux ressources génétiques, si une invention à breveter est directement fondée sur ces savoirs traditionnels.

Le groupe national suisse pense que d'une définition harmonisée des savoirs traditionnels est souhaitable. La protection positive et défensive existante est complète, et nous ne voyons pas la nécessité d'une protection positive *sui generis*. Si, toutefois, une telle protection *sui generis* doit être considérée, nous privilégions les critères d'éligibilité suivants:

- (a) produit unique ou associé de façon distinctive avec un peuple autochtone ou une communauté locale;
- (b) collectivement engendré, préservé et transmis de génération en génération dans un contexte traditionnel;
- (c) partie intégrante de l'identité culturelle de ces peuples ou communautés autochtones locales; et
- (d) pas connu en dehors de cette communauté.

Dans l'intérêt de la transparence, de la sécurité juridique et de la conservation des savoirs traditionnels, les autorités nationales compétentes devraient tenir des registres ou d'autres formes de documentation des savoirs traditionnels.