

*Intellectual Property issues related to Traditional
Knowledge and Folklore*

**WIPO-SCIPS Training Program on
Intellectual Property for Small and
Medium Sized Enterprises**

November 25, 2008

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*IP issues related to Traditional Knowledge (TK) and
Traditional Cultural Expressions (TCE's)*

- α Subject to active policy development, norm-setting and capacity-building programs at WIPO
- α Based on a wide fact-finding mission performed in 1998/99 on needs and expectations of the indigenous and local communities

α ... Adoption by the ONU GA (September 13, 2007) of the

Declaration on the Rights of Indigenous Peoples

See article 31:

1. Indigenous Peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions (...) They have also the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.”

Protection and Preservation of TK and TCE's

1. Protection of traditional knowledge (TK) and traditional cultural expressions (TCEs) against misappropriation and misuse
different from
but supportive of
2. Preservation/Conservation of TK and TCEs
(UNESCO Conventions)

The subject matter of protection : TCE's

- α Any forms in which traditional culture and knowledge are expressed (...)
 - Verbal expressions (stories, legends, names...)
 - Musical expressions
 - Expressions by action (dances...)
 - Productions of art
- α Which are :
 - Characteristic of a community's cultural identity and heritage
 - Maintained, used or developed by such community

The subject matter of protection : TK

Content of knowledge

- Resulting from intellectual activity in a traditional context (passed between generations)
- Includes
 - ⌚ know-how, skills, practices, learning processes
 - ⌚ Knowledge embodying traditional lifestyles of indigenous and local communities
- May include agricultural, environmental and medicinal knowledge and knowledge associated with genetic resources

The potential beneficiaries from protection

The indigenous and local communities

- In which the safeguarding of the TCE's/TK's are entrusted
- Who maintained, use or develop TCE's/TK's as being characteristic of their cultural and social identity and cultural heritage

What kind of protection for TCE's and TK ?

defensive protection of the rights of the legitimated custodians

- safeguard against third-party claims of IP rights over TK/TCEs
- protect TK/TCEs against unauthorized disclosure or use,
- prevent culturally offensive or inappropriate use of TCEs/TK

Positive protection of the rights of the legitimated custodians

- Protect distinctive TK/TCE-related commercial products through exclusive rights granted to legitimated custodians
- License and control the use of TCEs and TK by third-parties (Free, Prior and Informed Consent and Benefit –sharing principle)

The WIPO Intergovernmental Committee (IGC)

- α Establishment in 2001
- α Inclusive approach : TK, TCE's and Genetic Resources
- α Membership
 - intergovernmental : 184 WIPO Member States
 - with a strong participation of accredited observers
 - many observers representing indigenous and local communities

The IGC : Ten basic issues

1. Definition
2. Beneficiaries
3. Which objective is sought (economic/moral rights)?
4. What behavior should be considered illegal?
5. Any exceptions or limitations?
6. For how long should protection be accorded?
7. What sanctions or penalties should apply?
8. Which issues should be dealt with internationally?
9. How should foreign rights holders be treated?
10. To what extent do existing IPRs already afford protection? What gaps need to be filled?

TCE's : Existing IP Instruments...

α Berne Convention and protection of 'folklore'

- ⌚ protection of works derived from TCE's
- ⌚ 1967 Article 15.4 : *in the case of certain unpublished works of unknown authorship*

α Trademarks

α Geographical Indications

α Fair competition

α WIPO Performances and Phonograms Treaty (WPPT) - 1996 (Inclusive definition of "performer")

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Arguments for a "sui generis" IP protection of TCE's

- α Collective rights/individual rights
- α Tradition based/original
- α Oral transmission/usually fixed on support
- α Public domain/exclusive rights
- α Importance of defensive protection

Arguments for a “sui generis” IP protection of TK

- α Role of customary laws / Formal Patent IP systems
- α Oral transmission/written documentation
- α Tradition based / novelty
- α Duration of protection

National and regional initiatives on TCE's

- α Tunis Model Law on Copyright (1976)
- α Sudanese Copyright Act, 1996
- α Bangui Agreement of OAPI
- α Panama Law No. 20 of 2000 (Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge)
- α Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002
- α Indigenous Peoples Rights Act of 1997 of the Philippines
- α Database of Official Insignia of Native American Tribes of the United States of America, established pursuant to section 2(a) of the Trademark Act, 1946, as amended (the US Native American Insignia Database');
- α New Zealand's Trade Marks Act,
- α Indian Arts and Crafts Act, 1990, USA
- α >>>
- α **But this would not replace an international instrument for protection...**

Discussions around a “sui generis” international instrument...

In 2006, two sets of “**draft provisions**” for protection of TK and TCE’s, on the table

... include policy objectives, core principles and substantive provisions

document **WIPO / GRTKF / IC / 12 / 4(c)**

document **WIPO / GRTKF / IC / 12 / 5(c)**

Which objectives and guiding principles?

Some of them...

- ✧ *Recognition of Value, Respect, Responsiveness*
- ✧ *Empower the communities, Customary Practices*
- ✧ *Safeguarding & Promoting creativity, fair exchange, cultural diversity*
- ✧ *Promote community development*
- ✧ *Consistency with other international agreements*
- ✧ *Flexibility, accessibility, comprehensiveness*

Substantive provision on TCE's : Scope of protection

- ☒ **culturally significant/sacred (and registered) TCEs:**
 - prevent use of; modification of, distortion of or other derogatory action in relation to; and the acquisition by third parties of IP rights (...) without Free, Prior and Informed Consent
- ☒ **secret TCEs**
 - prevent unauthorized disclosure and subsequent use of and acquisition by third parties of IP rights, in any circumstances
- ☒ **performances of TCEs**
 - protect moral and economic rights as per WPPT
- ☒ **other TCEs (not registered):**
 - Obligation to identify source; no offensive use, prevent misleading indications, and provide for equitable remuneration

Substantive provisions for the protection of TK

Contracting parties should agree to

- ⊠ prevent misappropriation of IP rights on TK
- ⊠ prevent the commercial use of TK
 - without the consent the legitimate holders
 - without sharing benefits
- ⊠ prevent acts of unfair competition

by adopting legal means deemed as appropriate, related to IP laws, competition laws etc...

Traditional knowledge documentation initiatives

India's Traditional Knowledge Digital Library (TKDL)

- ⌚ Published and codified traditional medicine
- ⌚ 36, 000 Ayurvedic formulations from ancient Sanskrit texts, available to examiners in English, French, German, Spanish and Japanese

An on-going process

- ⌘ Mandate (to be renewed by the GA) until September 2009
- ⌘ Political decision remains as to what legal status and future process is needed to carry this forward.

In parallel Capacity-building programs

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- ⌘ General awareness
 - Case studies
 - Fact-finding missions
 - Surveys of national and regional experiences
 - Overview of legal and policy options

Capacity-building

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Legislative Texts: Traditional Knowledge - Microsoft Internet Explorer provided by WIPO

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Legislative Texts on the Protection of Traditional Knowledge

TRADITIONAL KNOWLEDGE, GENETIC RESOURCES AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE

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This compilation includes some examples of (i) special laws and measures which specifically protect traditional knowledge, sometimes referred to as "sui generis" laws, (ii) patent laws which provide protection of a sui generis nature for traditional knowledge, and (iii) laws and measures which establish regulatory frameworks for traditional knowledge that have an effect on, or relate to, intellectual property-type protection.

A comparative table provides an overview of key features of a range of sui generis laws that protect traditional knowledge.

Special Specific Laws and Legislative Measures

Organization of African Unity.

RELATED LINKS
Human Rights
Life Sciences

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<http://www.wipo.int/admin/grextlang.jsp?lang=fr>

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Capacity-building

- α Strengthening practical capacity and enabling holders of TK and TCEs
 - TK documentation toolkit
 - Practical guide on protection of TCEs
 - Distance learning course on TK/TCEs

Capacity-building

α Shaping institutions

- Questionnaire to support the definition of a policy framework
- Models for legal protection
 - Ⓢ UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation & Other Prejudicial Actions
 - Ⓢ the *Draft Provisions*

Legal assistance to the drafting process of an ARIPO/OAPI regional legal framework for protection of TCE's

- Guidelines for examination of TK-related patents and standards for documenting TK

The WIPO Creative Heritage Project

Objectives :

1. developing best practices and guidelines for managing IP issues when recording, digitizing and disseminating intangible cultural heritage.
2. Provide basic Information Technology support
3. Development of the WIPO Creative Heritage Digital Gateway (WIPO portal access to third-parties websites)

For more information...

Global Issues Division website :

<http://www.wipo.int/tk>

Global Issues Division email : grtkf@wipo.int

THANK YOU !