

WIPO Practical workshop on Traditional knowledge

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Ministère de l'Éducation et de la Culture



Main approaches and issues

- General approach
- Synergies
- Genetics Resources Act
- Nordic Saami Convention
- Unesco ICH Convention
- Needs of the Saami peoples for IP protection
- Protection of classics

Ministry's policy based on evidence and synergies

- The needs of indigenous peoples to protect their tradition and traditional cultural expressions **at the heart**
- Aim to check first the **different solutions already negotiated** to achieve the objectives of the international instruments in a comprehensive and coordinated way
 - Move to national/regional level needed
 - Experts of WIPO committees work often in silos
- Would it be better according to specific needs to COMBINE existing tools and look what gaps still remain?

Other International Conventions relating to Traditional Knowledge

Unesco
Cultural
Diversity
Convention
2005

non diminishment

Unesco
Intangible
Heritage
Convention
2003

Future WIPO Instruments on GRTKF

UNDRIP
2007

?

Mutually respectful

Nagoya
Protocol
2010

Intellectual
Property
Treaties

Genetic Resources Act – ABS for the Sámi

Section 6 - *The Sámi Database*

- The Sámi Parliament **manages a database for storing traditional Sámi traditional knowledge** related to genetic resources for research and development – and inform the GRs the TK relates to.

Section 7 - *Availability of traditional Sámi information related to genetic resources*

- The right of access to the database referred to in section 6 shall be sought **from the competent authority**. The application must **identify** the genetic resource, the purpose for which it is used and the user. The competent authority shall **notify the Sámi Parliament** of the application. (Has a templet for MAT)
- **Disclosure of the TK** from the database to the user requires that the competent authority **approves the mutually agreed terms** between the Sámi Parliament and the user. The Sámi Parliament may **require a fair and equitable sharing of the benefits** of using the knowledge to the Sámi in a way that promotes the Sámi's own language, culture and position as an indigenous people.
- Where appropriate, the competent authority shall consult with the Sámi Parliament on mutually agreed terms. Negotiations are in force, which Article 9 of the Sámi Parliament Act (974/1995) provides for the obligation to negotiate.

NORDIC SAAMI CONVENTION

- Nordic Saami Convention was parafied in 2016 as the negotiation result acceptable for Finland, Sweden, Norway
 - Now the three Sami Parliaments are deciding on whether to accept it and after this implementation starts

RELEVANT ARTICLES

- Article 11 Symbols
- Article 20 Right to language and culture
- **Article 22 Sámi cultural heritage, expressions of Sámi culture and Sámi traditional knowledge**
- Article 26 Cross-border cooperation
- Article 34 Sámi livelihoods
- Article 38 Duodji

WIKI of INTANGIBLE CULTURAL HERITAGE

- **Safeguarding, complementary measure**
- **The National Board of Antiquities** has opened a **WIKI Inventory** in February 2016 → National inventory → Unesco list on most vulnerable
- The WIKI gains its strength from communities and is dependent on those who pass on knowledge, skills and practices. It is the communities themselves which define the value and significance of living heritage, refer also to indigenous culture
 - **Now Sami peoples across Nordic countries are working together using frameworks to build knowledge of the assets**
- States responsibility to **AVOID NEGATIVE IMPACTS** of disclosing of TK in lists or databases – closed, separate from national
 - **secret or narrowly diffused TK should remain undisclosed**
 - **transparent norms on respectful use**
 - **metadata standards**

Needs of the Sámi people for intellectual property protection from the viewpoint of copyright and trademarks

Inari, 28.1.2019
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The background and the purpose of the study

- Commissioned by Ministry of Education and Culture of Finland
- The purpose: **to locate the relevant questions in order to protect TCE's**
- Is there a “gap” in legal protection?
 - “justified needs for protection but where protection cannot be provided
- In 2017; interviews and background literature
- Limited in scope and depth (duodji; copyright and trademarks)
- A discussion starter, in relation to WIPO/IGC -> ALSO Regional work
- Other linked studies:
 - A project by the University of Lapland related to traditional Sámi music
 - Duodji trademark project was carried out in 2015-2016 in co-operation with the Nordic Saami Council and the University of Lapland
 - Another study on Sami music by the Norwegian Government on the way

TCE's and IPR's in broader context

- What are the judicial (or other) needs concerning TCE's?
- What are the remedies of current legislative measure?
- What socio-political factors should be taken into account?

- Is the current IP legislation and its interpretation adequate?
- New interpretation of current (IP) laws?
- New clause of in the current (IP) laws?
- New law?

Main reasonings and findings

- Why to protect TCE's?
- From what are they being protected?
 - “we must give weight to how the concept is understood by the Sámi community itself”
- What are the threats from appropriation?
 - **Dilution of cultural significance to their holders – Not able to identify anymore with it**
 - “Unpermitted use can dilute the semantic content of cultural expressions as well as their appeal and authenticity, i.e. intellectual capital, and can, thus, also prevent the implementation of human and fundamental rights related to culture.”
- Economical harm (the economic viability of traditional crafts); 51% of all Sámi artists also created duodji handicrafts
 - Human rights view (appropriation of TCE's as infringement against self-determination)

Points of view to the use of IP's

- Applicability – grained, not holistic, (UNDRIP to build context?)
- Efficiency – not preventing the key harm, not familiar, have a term
- Access - not always available, language barrier/issue, lack education
- Usability – need management + enforcement, private/collective, more education, term

- Is there a “gap” in legal protection?

Applicability

- What IP laws can do (legal remedies)
- Copyright
 - Current provisions 45 § do not recognize Sami “folklore”; Do TCE’s fulfil the requirements as “copyrighted works”
 - Is the copyright still in force; to whom it belongs, who is the author?
 - *Protection of classics*
- Trademarks
 - Are TCE’s and their symbols distinctive in trademark sense?
 - Are they already being used as unregistered marks?
 - Can they be registered as trademarks?
- Legal IP-analysis of TCE’s (nature as copyrighted “work”; nature as a trademark)

The internal point of view

- IP analysis as such can be done, but... *the beneficiary/stakeholder Point-Of-View*
- Joint-view among the Sámi (throughout Sápmi)
 1. What is being protected?
 2. Against whom or what is protection sought?
 3. What is the content of the protection?
 4. Who has authority to manage the IPR's and who can grant permission for the (external) use of TCE's?
 5. Who has the right to the benefit from the protection and (external) use of TCE's?

PROTECTION OF CLASSICS, Part I

- Is based on § 53 of the Copyright Act, similar in all Nordic countries
- Classical protection can be applied to works whose protection has expired or have been created so long that they have never been protected by copyright
- Classical protection complements the author's moral rights. According to the law (HE 23/1960 vp), the purpose is "primarily to protect the ideological values of so-called free works, primarily classical masterpieces that have been offended from cultural interest p.o.v."
- An act offending the educational interests, for future generations?
- Possible only when the insult is gross - that is, in individual cases?
- The scope of the provision has been considered narrow

PROTECTION OF CLASSICS, Part II

- How to apply it?
 - Copyright Decree: The Ministry of Education and Culture would be assisted by a panel of experts whose work would lead to a ban
 - Includes an expert opinion but must be obvious also to a "civilized audience"; can be applied only afterwards and, upon request
 - Obvious to a non-expert audience: changes, abbreviations, truncations, vandalism of the work to offend cultural interests
 - How does it apply in context of different cultures? Or with customary law rules?
 - The Ministry can give advance ruling of any use to be considered contrary and/or decide on infringement/penalty 56 §, 58§ for the use
 - Dissatisfied may bring issue to court

PROTECTION OF CLASSICS, Part III

- Relationship with the cultural product and the state
 - This method should **not accumulate property to the state** but must be for the “benefit of society” → State is not taking over the "author"
 - Not “Domaine public payant”, use of the work should not be taxed
- It is about the lack of authority (Sami Parliament to represent?) in a situation where the author's (community's) moral rights are violated in a special way
- ONLY when intervention is necessary for the sake of the cultural interests of the spiritual expression embodied in the work
- A NORDIC STUDY a next step?

Summary

- Can the current IPR's provide remedies considering TCE's?
- Applicability
- Efficiency
- Access
- Usability
- Is there a legal "gap"?
- New interpretation of current law? New clause? New law?