



**WIPO Regional Seminar on
Intellectual Property and
Traditional Knowledge, Genetic
Resources and Traditional
Cultural Expressions**

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The WIPO Intergovernmental Committee (IGC): Latest Developments and Perspectives on Future Work

**John O. ASEIN
Director, Nigerian Copyright Institute
Abuja, NIGERIA**

aseinjohn@yahoo.com



Introduction . . .

Although they do not often appear to be so valuable in their traditional contexts, Genetic Resources (GRs), Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) have become huge cultural, economic and scientific assets that are prone to abuse and exploitation.

Apart from their economic importance, these assets also have deep social and spiritual significance; another reason to protect and safeguard their integrity.

With increased protection for other knowledge systems, local communities find justification for the legal protection of their own knowledge systems which provide the base materials for many other knowledge systems. Their arguments are more convincing in view of the growing economic implications.

The myth of public domain does not sit well in the context of TK and TCEs.

Definition of Terms: Expressions of folklore

- “Expressions of Folklore” (EoF) or “Traditional Cultural Expressions” are:
 - *any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:*
 - *verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;*
 - *musical expressions, such as songs and instrumental music;*
 - *expressions by action, such as dances, plays, ceremonies, rituals and other performances,*
 - *whether or not reduced to a material form; and,*

Definition of Terms: Expressions of folklore 2

- *tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;*

which are:

- *(aa) the products of creative intellectual activity, including individual and communal creativity;*
- *(bb) characteristic of a community's cultural and social identity and cultural heritage; and*
- *(cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.*



Definition of Terms: Traditional knowledge

Traditional Knowledge

- “The content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.”
- Indigenous vs. Traditional Knowledge – This dichotomy may be more in some societies than others
- They are often non-dominant sectors of society and are particularly concerned about the preservation, development and transmission to future generations of their ancestral territories and ethnic identities in accordance with their cultural patterns, social institutions and legal systems.



Early African Initiative

- Many African countries got independence in the 1950s/60s.
- With independence came a wave of cultural renaissance, resurgence of national identities and stronger bond of affinity.
- 1963 Brazzaville – African Study Meeting on Copyright
 - Noted the need for a form of protection for “native music and folk-lore in the absence of a material fixation thereof.” – Represents the earliest categorical statement on the need to give special attention to the delicate subject of unfixed expressions of folklore.
 - Considered the possibility of “inventorization” and clear definition of the various categories of folklore as a first step in the determination of their paternity.
 - Recommended special provisions to safeguard interests of African countries in their own folk-lore, on the one hand, and the permission of free use of protected works for educational and school purposes



Early UNESCO/WIPO Forum

- 1964 UNESCO/WIPO Committee of African Experts – Came up with a draft model which included “works inspired by folklore” within the framework of copyright – an unsuccessful experiment.
- The 1967/1973 Draft Model Law provided for economic and moral rights in “works of African folklore” and authorization for exploitation.
 - Primary aim: “to give African countries an opportunity to supervise and benefit financially from the exploitation of their folklore heritage,”
- Rationale for protection:
 - Folklore represents an important part of the living cultural heritage of the nation, the dissemination of which may lead to improper exploitation;
 - Abuse or distortion is prejudicial to the cultural and economic interests of the people.
 - Folklore constitutes manifestations of intellectual creativity deserving of protection.



Pre-IGC

Historically, discussions on the protection of expressions of folklore at the international level has been on since the 60s

The current round of discussions within the WIPO -IGC context was renewed during discussions leading up to the WPPT and the extension of the term “performer” in the final text of the treaty to include “performers of expressions of folklore”.

Before then it was generally accepted that the definition in Article 3(a) of the Rome Convention was limited to persons who performed literary or artistic works

WPPT drew attention to the need to address issues affecting traditional communities over their genetic resources, traditional knowledge and, particularly, expressions of folklore.



Puckhet Recommendations

The 1997 UNESCO-WIPO World Forum on the Protection of Folklore which was held at Phuket, Thailand concluded:

- there was no international standard of protection for folklore and copyright was inadequate to ensure such protection
- there was need to define, identify, conserve, preserve, disseminate, and protect folklore as the living cultural heritage of great economic, social and political significance
- it was imperative to strike a balance between the competing interests of holders and users of expressions of folklore
- **closer regional and international cooperation was vital to the successful establishment of a new international standard for the protection of folklore**

Puckhet Recommendations

It was also specifically recommended that:

- a Committee of Experts be set up consisting of a geographically balanced number of experts in both the conservation and protection of folklore;
- Regional consultations be conducted;
- **the Committee of Experts should complete the drafting of a new international agreement on the *sui generis* protection of folklore by 1998!**
- The 26th Session of the WIPO General Assembly in October 2000 agreed on the creation of the IGC
- **How far have we gone after more than a decade?**



The IGC

- WIPO Intergovernmental Committee was established in late 2000 and had its first session in April 2001
- Comprises all WIPO Member States, IGOs and NGOs with high participation by indigenous and local communities
- **Older mandate of the IGC from WIPO General Assembly:**
 - Accelerated progress on its work
 - No outcome excluded including possible development of an international instrument (s)
 - Focus on “international dimension”
 - No prejudice to ongoing work at other forums
- **Critical points of divergences**
 - Strong expectations for an outcome
 - Content and legal character or nature of the outcome?
 - The best procedure to follow to achieve the outcome?

Three steps to nowhere?

1. **Draft provisions** for protection of TK and Expressions of Folklore
 - Based on studies, extensive comments and national /regional experiences
 - *Sui generis* provisions; Collective rights; No formalities; Indefinite protection. . . **No agreement on content and form**
2. **List of ten (10) questions** (core policy issues) evolved at 10th session
 - Member states responses collated at the 11th session
 - Factual extractions made for the 12th session
3. **Request for Gap Analysis** made at 12th session
 - The analysis has been reviewed at the 13th session

A short menu of options

- As far as the African group is concerned it appears the most critical issue is the legal character or nature of the outcome of this process
 - Binding international instrument like the Paris Convention or the Berne Convention

Although of no appeal to the African group, there are the options of:

- Interpretations or elaborations of existing international instruments
- *A non-binding normative international instrument be acceptable? Like the Universal Declaration on Human Rights; the Bonn Guidelines;*
- *A high level political declaration or resolution like the UNESCO Declaration on Cultural Diversity*

Challenges

Some of the challenges of the past are still with us:

- The inherent difficulty in defining the meaning and scope of some of the concepts and the fluidity of the very subject of TK and TCEs.
- The delicate interlock of TK and TCEs with other aspects of culture, rights of indigenous people, etc., some of which have blurred the core issues.
- Lack of sufficient national and regional experiences for guidance at the international level although experiences should not be a prerequisite.
- The weak position of many of the potential beneficiary-states within the wider economic and political world order .
- The pressure from other IP and non-IP forums within and outside the WIPO system .



Lessons so Far

The gains of the IGC so far are evident in the following areas:

1. A more realistic appraisal of the challenges of protection
2. Better understanding of the importance of Genetic resources, TK and TCEs and existing experiences at regional and national levels
3. Enrichment of national and regional discussions on the protection of the subject matters
4. Greater involvement of non-governmental organizations and stakeholders in the debate sensitization of local communities
5. Evolution of a more stable and better articulated framework to guide future discussions
6. Formulation of clearer and more specific objectives and principles which should help in the formulation of policies



Lessons 1: Challenges of protection

- We have overshot the 1998 timeline set in Puklhet! This is instructive.
- While many are passionate about the urgency of a suitable international protection regime, we are still far away from reaching consensus on many issues.
- If there is a political will, then the challenges are not insurmountable. There is need for positive, constructive and sustained dialogue and the deepening of understanding.
- The classical IP regime does not have answers to all the questions; a more flexible but practical approach is required in formulating solutions.
- Unfortunately, the three subject matters do not have the same benchmarks and levels of maturity.



Lesson 2: Better sharing of separate experiences

- Sharing of regional and national experiences within the IGC has increased knowledge levels on the subject and possible options available for addressing the concerns of various communities.
- Different countries have addressed the subject matters differently and with varying degree of success.
- Learning from the experiences of others, there is need for constant reviews of national and regional efforts .
- The failure of the Africa Model Law (for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources) is instructive.
- Conversely, the success stories from other regions should be helpful in finding appropriate models. Many models exist particularly in the area of traditional medicine



Lesson 3: Enrichment of local discussions

- Rather than focus on the singular agitation for protection, more concrete discussions on the various aspects of the protection are going on. For instance, the ARIPO/OAPI process has benefited and also drawn from the IGC in a complementary manner.
- Encouraged by the increased global attention to the subject matters, many countries have also been encouraged to initiate or improve their national laws for the protection of aspects of genetic resources, traditional knowledge and expressions of folklore.
- The IGC has propelled more research and writings in the field thereby bringing about a more robust exchange of ideas across cultures. Some of these researches and writings fresh and less politically motivated insights to the issues



Lesson 4: Involvement of NGOs

- More than ever before, the IGC process has provided a wide platform for the active participation of non-governmental organizations and civil society groups, indigenous communities and other stakeholders. While it may be argued that the wide opening has in fact helped to disperse discussions on certain issues, it is nevertheless healthy for the evolution of a credible and workable system solution.
- The establishment of a voluntary contribution fund to support participation of indigenous and local communities has helped representations from the poorer regions.
- The predominance of State interests over local communities and the absence of indigenous communities means weaker representation from communities in Africa.



Lesson 5: Stable and Better Framework

- Unlike earlier debates, the articulation of possible options and frameworks for addressing various concerns are more detailed. The IGC documents had made incremental gains until the the setback from about the 9th session.
- Despite disagreements on further discussions on the substantive issues and matters of procedure, the IGC has evolved a template which should guide members in addressing the substantive issues.
- The templates have also been useful for the regional and national efforts at developing legal instruments and frameworks for the protection of TK and TCEs. A good example is the ARIP/OAPI Legal Framework



Lesson 6: Formulation of Objectives and Principles

- The policy objectives and core principles as formulated under the IGC process is a tremendous improvement on earlier attempts. And it sufficiently represents the aggregate concerns of developing countries and local communities.
- The policy objectives and core principles highlights the cultural and economic value of TK and TCEs as well as the real threats they face in an ever widening commercial environment
- That the policy options draws from both IP systems, non-IP systems and sui generis regimes allows for greater flexibility in the entire process without compromising the essential needs of holders of TK and TCEs.



The Current mandate

- WIPO General Assembly (GA) in October 2009 agreed to renew the mandate of the IGC in the 2010/11 biennium on these terms:
- Undertake text-based negotiations;
- With the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs.
- Focus is to build on the existing work carried out by the Committee and use all WIPO working documents, including WIPO/GRTKF/IC/9/4, /9/5 and 11/8A.
- The Committee to submit to the 2011 General Assembly the text (or texts) of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs.
- The General Assembly in 2011 will decide on convening a Diplomatic Conference.



Where Does this New Highway Lead

- Unless the IGC moves more rapidly in its work, the optimism that greeted the renewed mandate may soon wear out. The 2011 General Assembly is less than 2 years away.
- While there is so much heat, sincerity and trust is still in short supply. One hopes the text based discussions will be carried through in the 2010/2011 biennium.
- It does appear that the exploiters wish to continue on the free ride while the holders of the rights (?) are now more awake to the exploitation. It is too late to put them back to sleep.
- Concerned member states should be more active in improving the documents and pushing the issues forward. Developing countries should drive the spirit of negotiation and not relapse to mere talk sessions. But negotiations require at least two parties.
- Collaboration amongst like-minded countries and regions should be intensified and better coordinated



Conclusion

The protection of TK, GR, and TCEs should never be seen as an end in itself; but as a tool for achieving the goals and aspirations of communities for whom these assets have more than a cultural relevance. It is part of a larger drive for sustainable development.

Rather than be fatigued at this point in the work of the IGC, concerned members should bring more pressure to bear on other members to show real commitment to the renewed mandate of the IGC. Decades of lip service to international protection should move to more serious negotiations.

In the meantime, the right balance must be found between the legitimate call for effective protection and the sustainable use of TK, GRs and TCEs in a fair and equitable manner. Strong safeguards should be erected to ensure that misappropriation and abuse are put in check so that the hemorrhage arising from the delay in finding an international instrument is abated.

Thank you

*Nigerian
Copyright
Commission*



John O. ASEIN
Director,
Nigerian Copyright Institute
Abuja

aseinjohn@yahoo.com