

Perspectives on and Experiences with
Sanctions and Remedies, Management of
Rights, Term of Protection, Formalities,
Transitional Measures, Relationship with
other International Agreements, National
Treatment and Transboundary Cooperation

SEMINAR ON INTELLECTUAL PROPERTY AND
TRADITIONAL KNOWLEDGE – ROUNDTABLE 4

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CARICOM Policy Directive and Implementation

Revised Treaty of Chaguaramas

- Established the Caribbean Community (CARICOM)
- Article 66 provides that the Council for Trade and Economic Development (COTED) should
 - promote the protection of IP rights
 - identify and establish through Member States, “mechanisms to ensure indigenous Caribbean culture and the legal protection of expressions of folklore, other traditional knowledge and national heritage particularly of indigenous populations in the Community”

CARICOM Policy Directive and Implementation

- WIPO Ministerial-Level Meeting on Intellectual Property for Caribbean held in 2006
- Resolution passed requesting WIPO's assistance regarding developing the appropriate framework for the protection of traditional knowledge
- Pursuant to this resolution, a Working Group was established which was divided into two teams
 - Consultation Team
 - Research Team

Some Key Findings of Working Group

Consultation Team

- (Little or no distinction between artistic forms of traditional knowledge and technical and scientific forms of traditional knowledge)

Research Team

Existence of basic legislative provisions for the protection of traditional knowledge (conceptualized as either “folklore” or “expressions of “folklore”)

Intellectual Property and Traditional Knowledge – General Observations

Some challenges to using an intellectual property system to protect traditional knowledge

- Intellectual property generally provides for individual and not collective or group rights, with few exceptions
- intellectual property legislation usually (though not exclusively) requires that protected subject matter must be fixed in some material form as a pre-condition for protection

Intellectual Property and Traditional Knowledge – General Observations

- traditional knowledge is **pre-existing**, passed from generation to generation, may not satisfy either the **originality criteria** in copyright law or the **novelty criteria** in patent law
- the **durational limits** for protection of intellectual property rights inconsistent with certain objectives of protecting traditional knowledge which hinge on the protection of the cultural identity of the source community or country of the traditional knowledge

Intellectual Property and Traditional Knowledge – General Observations

- **exceptions to rights** generally provided by intellectual property laws may not be suitable in relation to some forms of sacred or secret traditional knowledge

Traditional Knowledge Protection in the Caribbean

Antigua and Barbuda

- Copyright Act, 2003, protects *performers* of expressions of folklore but not “expressions of folklore”

Dominica

- Copyright Act, 2003, protects *performers* of expressions of folklore as well as “*expressions of folklore*”

Barbados

- Copyright Act, 1998, protects “*folklore*”

St. Christopher and Nevis

- Copyright Act, 2000, protects “*folklore*”

Models for Developing Caribbean Regional Framework

- Draft WIPO Articles on TK and TCEs
- African Regional Intellectual Property Organization (ARIPO) Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore
- Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture
- Draft Legal Instrument for the South Asian Association for Regional Cooperation (SAARC) Countries on the Protection of Traditional Knowledge.

Policy Issues Relevant to Roundtable 4 Discussions

- Sanctions and remedies
- Management of rights
- Term of Protection
- Formalities
- Transitional Measures
- Relationship with other International Agreements
- National treatment
- Transboundary Cooperation

Sanctions and remedies

This may include a range of

- civil and criminal remedies
- administrative sanctions such as warnings, fines, cancellation of authorizations and licences (see Brazilian Provisional Measure No.2.186-16)
- public apology (see Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture)

Management of Rights

Beneficiaries should have the option to exercise rights directly or through a designated agency.

Such an agency may have administrative and quasi-judicial functions, for example:

- grant of authorizations
- distribution of monetary and non-monetary benefits
- awareness-building (about how to protect TK)

Management of Rights

- advisory services on terms and conditions of benefit-sharing agreements
- monitoring use of TK
- maintenance of TK register
- maintenance of registered TK users
- resolution of disputes

Term of Protection

- Unlimited duration of protection for secret TK as long as secrecy maintained
- Limited duration of protection for TK that is “public”
- No protection for TK that is “public”

How does one define “public”?

Public but within the community?

Public within and outside the community?

What about TK which represents the cultural identity of source community?

Formalities

- Automatic protection once criteria for protection met or registration as a prerequisite for protection?
- Maintenance of registers in the interests of transparency and certainty, with restricted access for sacred and/or secret traditional knowledge .

Transitional Measures

- Transitional provisions deal with the issue of the treatment of prior use of traditional knowledge, which may be deemed unlawful once protection measures are put in place. They can range from positions of absolute retroactivity to non-retroactivity.
- An intermediate approach to formulating transitional provisions is another alternative, in that prior and continuing acts or use of traditional knowledge which would be unlawful with the commencement of the new protection measures, should be brought into conformity with the new protection measures within a reasonable period of time thereafter.
- Further, provision should be made for the equitable treatment of rights acquired by third parties in good faith.

Relationship with other International Agreements

There are different approaches to this issue including:

- *An expressed statement on the mutual supportiveness and complementarity and non-subordination of the proposed instrument and existing instruments*
 - See the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, Article 2005, Article 20
- *Subordination of the proposed instrument to existing instruments*
 - see the Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, Article 3(b)

Relationship with other International Agreements

- No statement on the relationship between the proposed instrument and existing instruments

See generally, Martin Girsberger, Legal Protection of Traditional Cultural Expressions: a Policy Perspective, in Christoph Beat Graber and Mira Burri-Nenova, *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (2008)

Relationship with other International Agreements

- There should be, where possible, compatibility with other international agreements, the most obvious being international intellectual property agreements.
- However, in light of the fact that a sui generis regime for traditional knowledge protection, albeit inspired by conventional intellectual property principles, is being negotiated because of the inherent difficulty of intellectual property principles to accommodate subject matter having the characteristics of traditional knowledge, any proposed international traditional knowledge protection regime should be *complementary to but not subordinate to* international intellectual property agreements.

National Treatment

- The principle of “national treatment” is a good starting point for policy makers when determining how foreign rights holders will be dealt with under national jurisdiction. That principle requires a state to treat foreign rights holders in the same way that traditional communities and individuals are treated within the particular jurisdiction
- This approach may not always produce an ideal result because customs and practices may vary across traditional communities and countries, and applying the principle of national treatment will entail using customs alien to the foreign rights holders to determine, for example, the appropriate use of that foreign right holder’s traditional knowledge: see Peter Drahos, “Towards an International Framework for the Protection of Traditional Group Knowledge and Practice” 2004

National Treatment

- The principle of national treatment could be subject to or supplemented by other approaches, for example, “mutual recognition” which could allow for the recognition of another community’s or country’s laws.
- Applying the principle of mutual recognition will allow the use of the foreign right holder’s customs to determine the appropriate use of their traditional knowledge outside of the country in which they are located.
- This may be more appropriate in the context of the existing and proposed frameworks of traditional knowledge protection, where customary law plays an important part in diverse aspects of such protection (from defining the subject matter to determining which actions constitute infringements)

National Treatment

- The principle of “mutual recognition” needs to be supported by the principle of reciprocity and grounded in an environment of minimum agreed standards across communities, countries and regions.

Trans-boundary Cooperation

Since traditional knowledge may be shared by more than one “indigenous”, “traditional” or “cultural” group or held by the same group across geographical boundaries, trans-boundary cooperation is important, even critical, to any effective regime for the protection of traditional knowledge.

Thank you for your attention

All comments and questions are welcomed