



IP, TK and TCEs

**An overview of policy and legal issues from
an IP perspective**

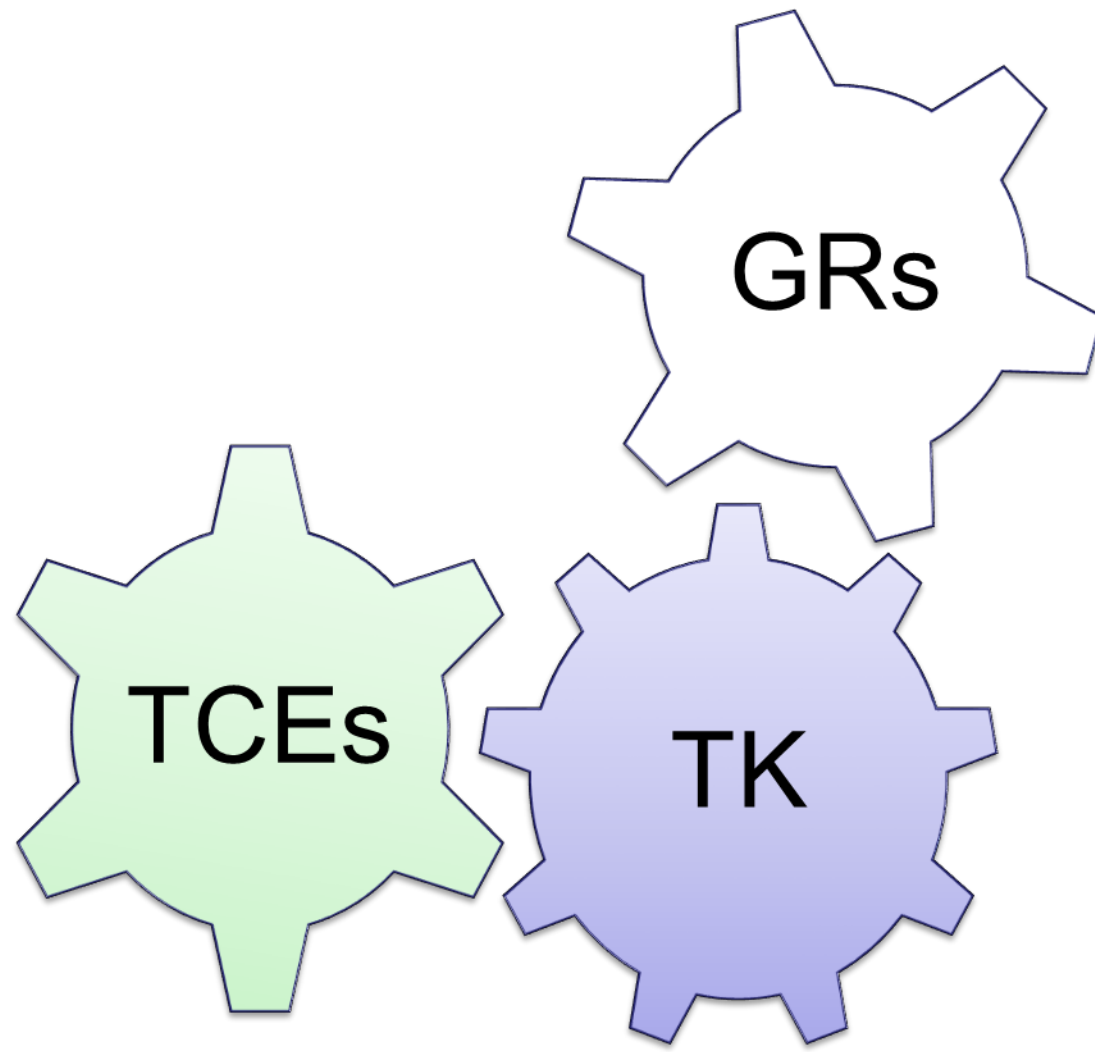
May 15, 2019

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Outline

- Describing the subject matter
- Relationship with intellectual property
- Overview of legal issue
- Options for protection
- WIPO's work
- Some tools and resources





Traditional cultural expressions

- Forms in which traditional knowledge and culture are expressed
 - Ex: songs, performances, crafts, names, symbols, art, narratives, designs, architecture and motifs
- May be tangible, intangible or mixed



Traditional knowledge

- Knowledge which results from intellectual activity in a traditional context
- Includes know-how, skills, innovations, practices, and learning
- Not limited to a specific technical field



Characteristics of TK and TCEs

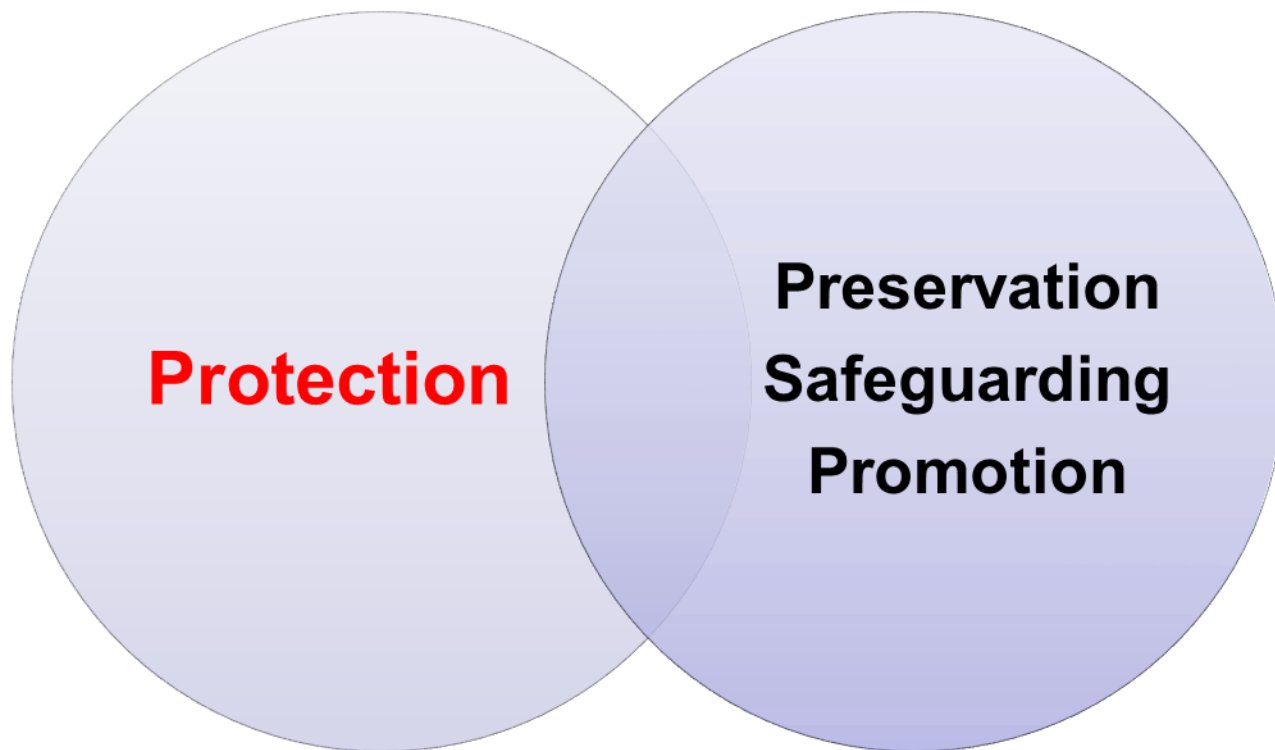
- Are handed down **from generation to generation**,
- Reflect a **community's cultural and social identity**
- Are often made by **“authors unknown”** and are regarded as **“belonging”** to a community under customary laws
- Are constantly **evolving, developing** and **being recreated** within a community



A need for protection

- TCEs are often considered as belonging to the common heritage of humanity – and as being in the “public domain”
- Growing awareness of:
 - The risk of **erosion** of local knowledge systems
 - The **economic** potential – for communities and industries
 - Their value as **cultural** “assets” – part of social and cultural identity
 - **Vulnerability** to misuse and misappropriation

What does intellectual property protection mean?



UNESCO
Convention
Safeguarding
Intangible
Cultural
Heritage, 2003

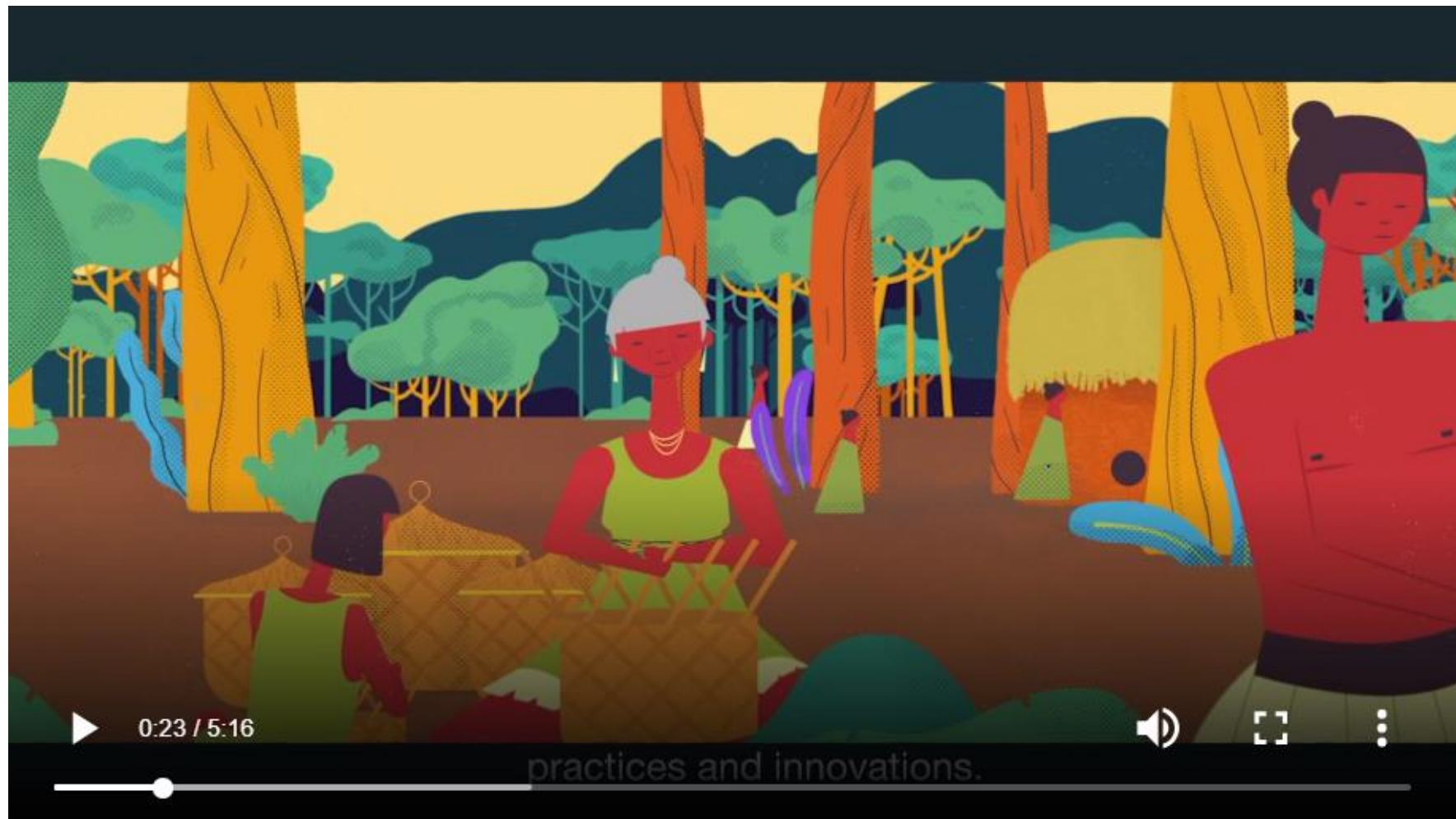
**Preservation
Safeguarding
Promotion**

UNESCO
Recommendation
Safeguarding
Traditional
Culture and
Folklore, 1989

UNESCO
Convention for
the Promotion
and Protection of
the Diversity of
Cultural
Expressions,
2005

How can intellectual property help?

<https://www.wipo.int/tk/en/tk/yakuanoi.html>





TCEs are intellectual property

- TCEs are creative expressions of **indigenous peoples and local communities**
- They are products of creative intellectual activity so they are “intellectual property”
- But since they are **traditional**, they cannot be fully protected by existing IP systems due to inadequacies of the system
 - Need for identifiable author/inventor
 - Lack of originality/novelty in the IP sense
 - Use in commerce
 - Etc..




Protection with intellectual property rights

- Protection with **conventional/existing** IP systems
- **Adaptation** of conventional/existing IP systems
- ***Sui generis*** protection

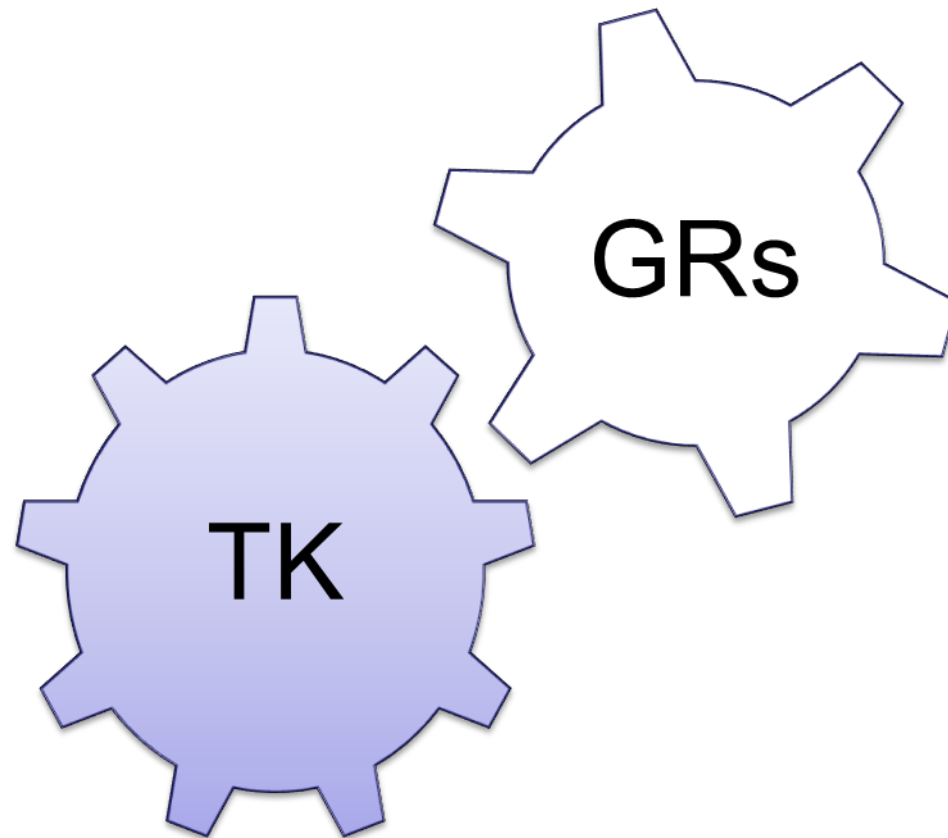


Sui generis protection of TK/TCEs

- TK/TCEs would be recognized as a form of “intellectual property”
- Protection would be provided by a special system based on the kinds of measures, principles and values that underlie the intellectual property system

- 
- Features of this system could include:
 - **Property rights** (e.g. exclusive rights) and **non-property rights** (e.g. moral rights, unfair competition, right to equitable compensation)
 - **Balance and proportionality** limitations and exceptions

TK associated with genetic resources





- What are genetic resources?
- How is access to genetic resources and benefit sharing regulated?
- What are the intellectual property issues?



What are genetic resources?

- “Genetic material of actual or potential value”
- “Genetic material” = “any material of plant, animal, microbial or other origin containing functional units of heredity”
 - Convention on Biological Diversity, 1992
- Ex: medicinal plants, traditional crops, animal breeds



How is access to genetic resources and benefit sharing regulated?

- Convention on Biological Diversity, 1992
- FAO International Treaty on Plant Genetic Resources for Food and Agriculture, 2001
- Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, 2002
- Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization, 2010



IP and GRs

- Genetic resources, as encountered in nature, are not “intellectual property”
- They are not creations of the human mind and **cannot be directly protected as IP**



IP related issues

- Preventing the grant of erroneous patents
- Using the patent/IP system to ensure and track compliance with ABS systems in national laws
- Protection of TK based innovation related to genetic resources

Proposed solutions

- Preventing the grant of erroneous patents
- Using the patent/IP system to ensure and track compliance with ABS systems in national laws
- Protection of TK based innovation related to genetic resources
- Databases/information systems, patent examination guidelines, and/or
- Mandatory disclosure requirements, and/or
- Managing patent/IP rights through contract (IP clauses in mutually-agreed terms)

WIPO's work on TK/TCEs

- Find the appropriate role of IP in the protection, preservation and promotion of TK/TCEs
 - Normative development
 - Capacity building



Normative development: WIPO IGC

- WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)

- Created in 2000

- IGC 40: June 17 to 21, 2019

- Forum where negotiations take place for an international legal instrument on TK, TCEs and GRs

- IGC participants: Member States, indigenous and local communities, business, civil society and other NGOs



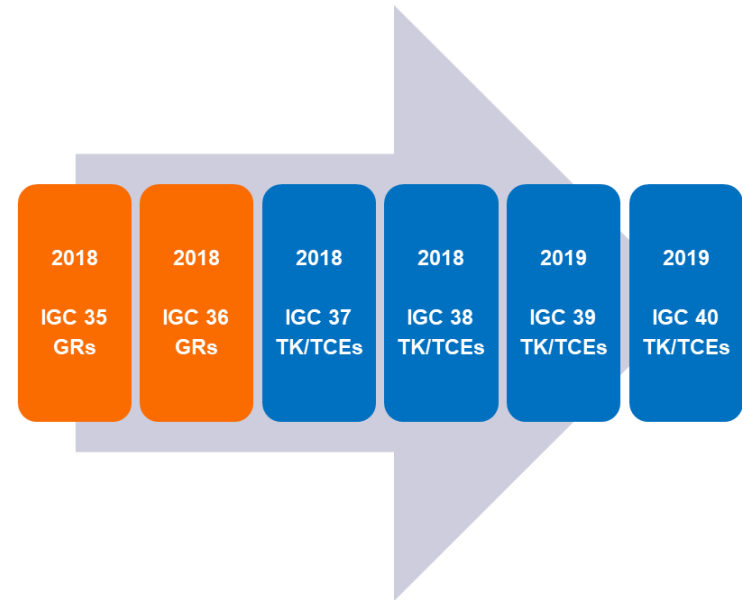


Normative development

- The IGC is developing a *sui generis* system of protection
- Use of IP principles, values and systems
- Focus on:
 - The prevention of **misappropriation and misuse**
 - As opposed to **preservation and safeguarding**

IGC mandate 2018-2019

...continue to expedite its work, with the objective of **reaching an agreement** on an **international legal instrument(s)**, without prejudging the nature of outcome(s), relating to intellectual property which will **ensure the balanced and effective protection** of GRs, TK and TCEs...





Negotiating texts

http://www.wipo.int/tk/en/igc/draft_provisions.html

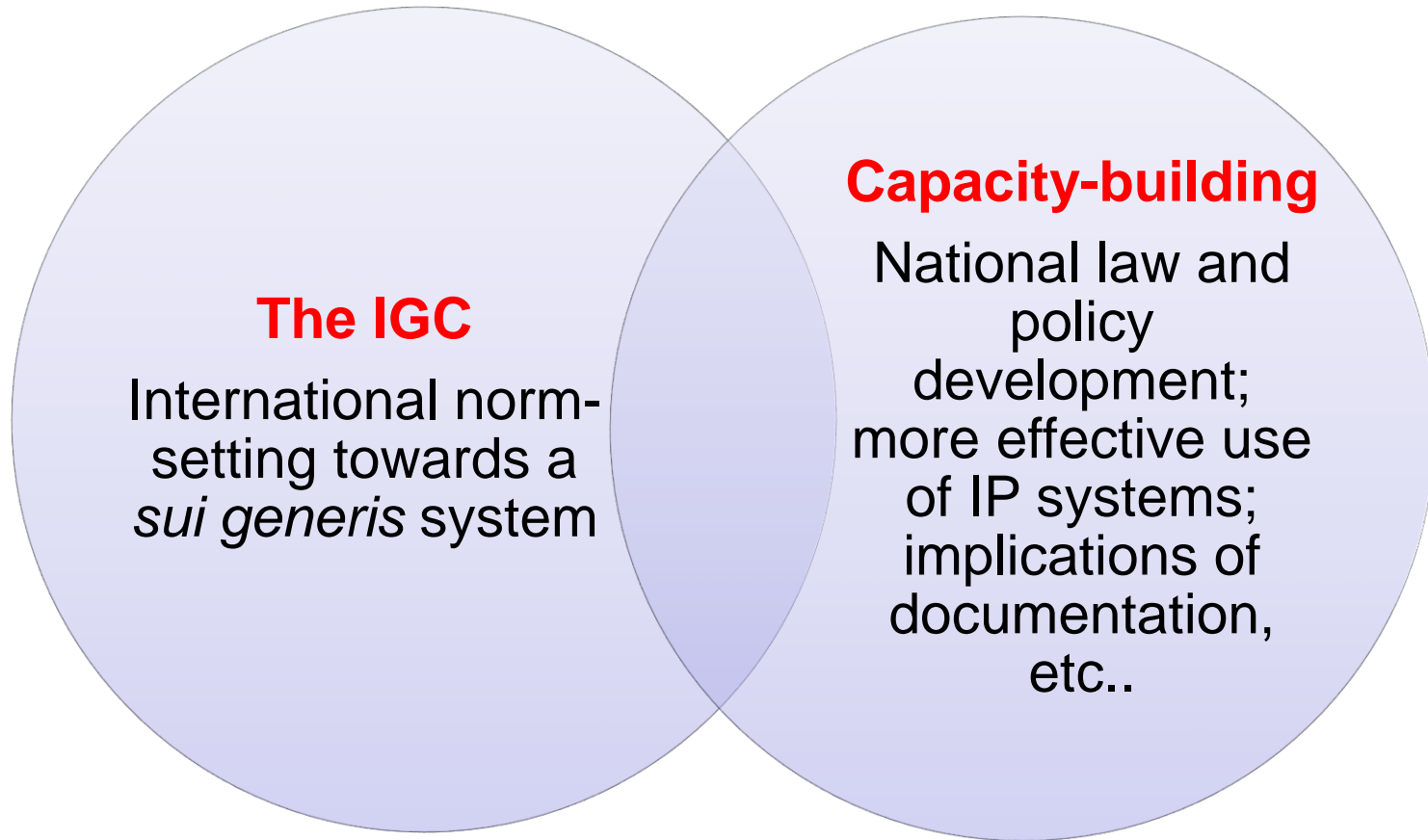
- The Protection of Traditional Knowledge: Draft Articles
- The Protection of Traditional Cultural Expressions: Draft Articles
- Consolidated Document Relating to Intellectual Property and Genetic Resources



Key questions in the negotiations on TK and TCEs

- **Why protect? *Aims and objectives***
 - **What to protect? *Subject matter***
 - **Who should benefit? *Beneficiaries***
 - **What acts should be forbidden? *Scope***
 - **Should there be exceptions and limitations?**
-
- For how long? *Duration*
 - Should there be formalities?
 - What sanctions or penalties apply?
 - Should rights be retrospective?
 - How should foreign right holders be treated?

TK Division





Capacity building program

Cultural
documentation
and IP
management

Legislative and
policy
development

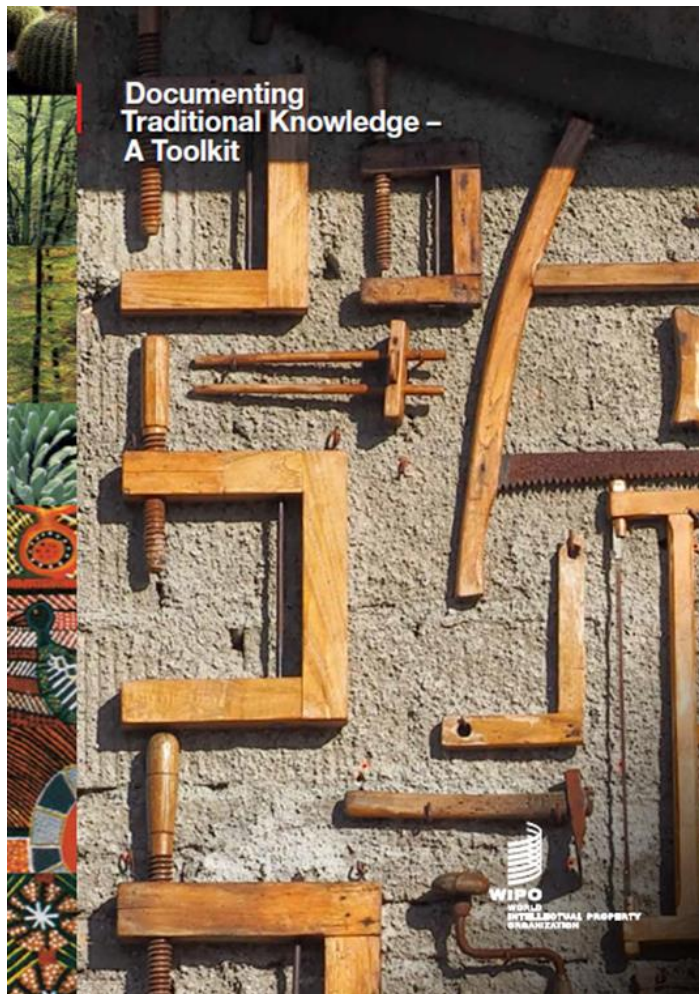
Effective use of
existing IP rights

IP and folk, arts
and cultural
festivals

Cultural documentation and IP management training program

- Hands-on training on how to safeguard TCEs
 - Assist communities to create IP rights in their cultural heritage (digital photographs, audiovisual material, sound recordings, databases)
 - Exercise control and make informed decisions on access and use by third parties





Documenting Traditional Knowledge – A Toolkit

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No. 9

Documentation of Traditional Knowledge and Traditional Cultural Expressions

Background Brief

Introduction

Documentation of traditional knowledge (TK) and traditional cultural expressions (TCEs) has attracted increasing attention in recent years from governments and cultural institutions as well as from indigenous peoples and local communities (IPLCs), in parallel with the growing recognition of the cultural and economic value of TK and TCEs. New information technologies, such as electronic digitization and the internet, have also made documentation easier and facilitated access and dissemination.

However, documenting TK and TCEs should not be regarded as an end in itself. It needs to be undertaken within a framework of sound objectives and principles, and guided by a clear assessment of the risks and potential benefits, particularly for the traditional holders.

The World Intellectual Property Organization (WIPO) does not promote documentation of TK and TCEs as such, but rather advises governments, cultural institutions and traditional custodians wishing to document TK and TCEs on related intellectual property (IP) issues. This brief describes the main objectives of documenting TK and TCEs, the IP issues that may arise and options for addressing them.

Definition and objectives of documenting TK and TCEs

For the purposes of this brief, documentation of TK and TCEs refers to all activities of identification, fixation and classification aimed at facilitating retrieval from an organized data set, such as paper files, digital databases, archives or libraries. In this brief, "registration" refers to a specific form of documentation that grants legal protection to its content through its inclusion in a register.

Documenting TK and TCEs may serve five valuable purposes, separately or in combination.

Safeguarding and preservation

The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage obliges Parties to document TK and TCEs as a means to safeguard cultural heritage. In this context, the aim of documentation is to ensure the maintenance, use and development of TK and TCEs by present and future generations of peoples and communities in a traditional context. Safeguarding appears to be the underlying purpose of most of the documentation undertakings initiated so far. Documentation in this sense may also extend to disseminating, promoting, revitalizing and repatriating TK and TCEs and, thereby, saving them from extinction.

Protection of secret and sacred TK and TCEs

Confidential or secret records or registers of TK and TCEs safeguard particularly sensitive cultural materials, access to which and use of which are exclusively reserved for the relevant traditional holders in accordance with their customary laws and practices. Restricted access contributes to the protection of TK and TCEs from an IP perspective, as it prevents disclosure and third-party uses prohibited by those customary laws.

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More effective use of existing IP systems

- Practical advice on
 - How to use existing IP tools
 - How to prevent others from exploiting TK/TCEs without permission
- Encourage and empower communities to make strategic use of IP
- Match communities with attorneys who can provide advice *pro bono*

Protect and Promote Your Culture

A Practical Guide to Intellectual Property for
Indigenous Peoples and Local Communities



No. 5

Intellectual Property and Traditional Handicrafts

Background Brief

Introduction

Traditional craftsmanship requires specialized and traditional techniques, skills and knowledge that are often of considerable antiquity and transmitted from generation to generation. Handicrafts can be traditional cultural expressions (TCEs) in their design, appearance and style, and can also embody traditional knowledge (TK) in the form of the skills and know-how used to produce them.

TK and TCEs, including handicrafts, are valuable cultural, social and historical assets of the communities who maintain, practice and develop them; they are also economic assets that can be used, traded or licensed for income generation and economic development. Unfortunately, however, traditional techniques - and the design, reputation and style associated with handicrafts - are vulnerable to imitation and misappropriation. All too often cheap imitations undermine sales of traditional handicrafts as well as the quality reputation of the genuine products.

Proposals and solutions are being identified for the legal protection of TK and TCEs to prevent their misuse, misappropriation, or other kind of illicit exploitation. These can also be useful for the protection of traditional handicrafts. Negotiations on a *sui generis* international legal instrument for the protection of TK and TCEs are currently taking place in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). These negotiations aim to address the linkages between the intellectual property (IP) system and the concerns of TK and TCE holders. A number of countries and regions have also developed their own *sui generis* systems for protecting TK and TCEs.

In the meantime, existing IP rights, such as trademarks, geographical indications, copyright, industrial designs or patents can also be used by artisans and handicraft organizations to promote their interests. In particular, they can be used to protect traditional handicrafts against unauthorized reproduction and adaptation, and against misleading use of their style and reputation.

This brief identifies practical, accessible and often community-based means of using the existing IP system for the effective recognition, protection, management, marketing and commercialization of traditional handicrafts as cultural and economic assets.

What Are "Handicrafts"?

Handicrafts are sometimes referred to as artisanal products, craft products, traditional creative crafts or works of artistic or traditional craftsmanship. There is no universally agreed definition of handicrafts, but the following common characteristics can be identified:

- they are produced by artisans, completely by hand or with the help of hand-tools or even using machinery, provided the artisan's direct manual contribution remains the most substantial component of the finished product;
- they are representations or expressions that are symbolic of the artisan's culture;
- they encompass a wide variety of goods made of raw materials;
- their distinctive features can be utilitarian, aesthetic, artistic, creative, culturally attached, decorative, functional, traditional, or religiously and socially symbolic and significant;
- there are no particular restrictions on production quantity, and no two pieces are exactly alike.



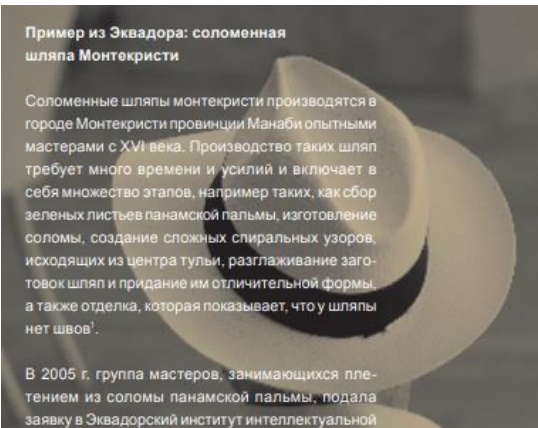
Geographical indications

Copyright



Пример из Ганы: ткани кенте

Ткани кенте производятся с помощью полосного ткачества. Узоры «вплетаются в ткань таким образом, чтобы при сшивании полос друг с другом общий рисунок напоминал шахматную доску»³. Это мозаичная ткань, состоящая из разноцветных нитей, а узоры на ней иллюстрируют исторические события или социальные представления важных для общины людей⁴. Ее производит этническая группа ашанти, а сама ткань часто используется королевской семьей ашанти⁵.




Пример из Эквадора: соломенная шляпа Монтекрести

Соломенные шляпы монтекрести производятся в городе Монтекрести провинции Манаби опытными мастерами с XVI века. Производство таких шляп требует много времени и усилий и включает в себя множество этапов, например таких, как сбор зеленых листьев панамской пальмы, изготовление соломы, создание сложных спиральных узоров, исходящих из центра тульи, разглаживание заготовок шляп и придание им отличительной формы, а также отделка, которая показывает, что у шляпы нет швов¹.

В 2005 г. группа мастеров, занимающихся плетением из соломы панамской пальмы, подала заявку в Эквадорский институт интеллектуальной

Trade secrets



Пример из Австралии: священный секрет Совета питджантджанджара

Австралийскому Совету питджантджанджара удалось остановить продажи книги «Кочевники австралийской пустыни», написанной Чарльзом Маунтфордом. В ней раскрывалась важная и секретная церемониальная информация, принадлежащая народу питджантджанджара¹. Совет питджантджанджара заявил, что информация о религиозных и священных вопросах была раскрыта Маунтфорду по секрету. Он зафиксировал ее с помощью «фотографий, рисунков и описаний»².

Collective marks



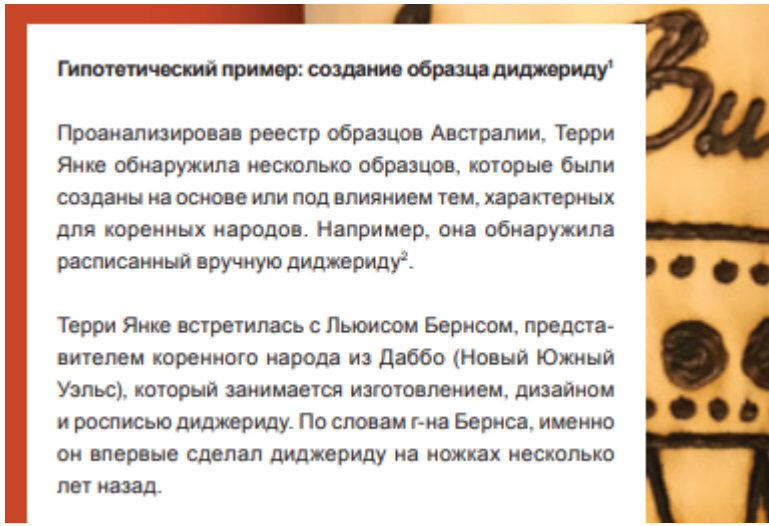
Пример из Кении: таитские корзины

В округе Кении Таита-Тавета женщины из местных общин занимаются производством сизальных корзин с помощью традиционных методов. Этот навык передается из поколения в поколение.

Сообщество изготовителей корзин учредило Ассоциацию таитских корзин, которой принадлежит коллективный знак «таитская корзина». Этот коллективный знак может использоваться членами Ассоциации для охраны и продвижения своих корзин. Ассоциация установила принципы использования знака и утвердила определенные стандарты качества. Она зарегистрировала знак в целях формирования сильного, узнаваемого и прибыльного регионального бренда⁴.

Как и в случае Sumaq Sonqo, этот пример показывает, что коллективные знаки могут быть полезны для коренных народов и местных общин.

Industrial designs



Гипотетический пример: создание образца диджериду¹

Проанализировав реестр образцов Австралии, Терри Янке обнаружила несколько образцов, которые были созданы на основе или под влиянием тем, характерных для коренных народов. Например, она обнаружила расписанный вручную диджериду².

Терри Янке встретилась с Льюисом Бернсом, представителем коренного народа из Даббо (Новый Южный Уэльс), который занимается изготовлением, дизайном и росписью диджериду. По словам г-на Бернса, именно он впервые сделал диджериду на ножках несколько лет назад.

IP and Cultural Festivals

- Festivals are opportunities to showcase elements of traditional cultures
- Performing and exhibiting TCEs can make them vulnerable to misappropriation
- Information and advice to festival organizers
 - Identification of main IP challenges
 - Effective IP management strategy



Intellectual Property and Folk, Arts and Cultural Festivals

Practical Guide




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No. 4

Intellectual Property and Arts Festivals

Introduction

Arts festivals celebrate the world's rich and diverse cultures, bringing together time-honored traditions and modern creativity in the form of dance, music, theater, film, photography, visual arts, crafts, and much else.

Culturally, arts festivals offer a unique snapshot of a community's identity, providing an opportunity to revitalize and preserve cultural practices, and serving as a creative laboratory for contemporary performers. Socially, they are a means of strengthening intercultural dialogue, promoting deeper understanding through shared experience. Economically, they can generate sizeable long-term financial benefits and significant business and employment opportunities.

Effective intellectual property management is an important consideration for arts festival organizers, to safeguard and promote their own interests and those of festival participants. WIPO is working with those involved in the organization of cultural events to develop and apply appropriate management strategies to deal with the various intellectual property issues that can arise before, during and after such events.

WIPO's Traditional Knowledge Division is particularly concerned with the protection of traditional knowledge and traditional cultural expressions, which are frequently represented and shared at festivals around the globe. This brief identifies the main intellectual property challenges faced by organizers of arts festivals and outlines some practical elements of an effective intellectual property management strategy.

Intellectual property risks

Artists, performers and artisans are the lifeblood of any arts festival. Their cultural expressions draw public interest and build the festival's reputation. Yet without appropriate intellectual property (IP) measures, the festival's various artistic manifestations—which may contain culturally sensitive material—can become vulnerable to unauthorized or inappropriate exploitation by others. Examples of unauthorized acts may include:

- the sale of postcards **reproducing images** of a sacred dance;
- use of a **video clip** of a traditional performance in a tourism promotion campaign;
- a **CD** of illegally recorded original songs inspired by traditional music;
- **replicas** of traditional **dance costumes** made using ancestral weaving methods;
- **ritual face painting** used out of context and in an offensive way.

Moreover, in the absence of a carefully considered IP strategy, festival audiences risk being duped into buying fake arts and crafts and other merchandise, and the interests of the event itself are undermined by opportunistic businesses that free-ride on the festival's reputation and popularity.


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Thank you!

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