

# Commission on Intellectual Property Rights

## Workshop 4: Traditional Knowledge

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**Commissioners:** Ramesh Mashelkar (Chair), Daniel Alexander, John Barton, Carlos Correa, Gill Samuels.

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**Summary:** The need to protect, maintain and preserve traditional knowledge was outlined. The importance of customary laws and practices in contributing to the protection and dissemination of TK within communities was emphasised, and models for encouraging the fair exploitation of TK were also discussed. The workshop considered the role of TK based digital libraries in preventing the misappropriation of TK through the patent system, and other forms of IP protection, e.g. copyright and trademarks. A wide range of recommendations were also presented to the Commission.

### SESSION 1: TRADITIONAL KNOWLEDGE – GENERAL DISCUSSION

The workshop opened with two informal presentations illustrating, from two slightly different perspectives, the value of TK and the need for protecting it.

#### **Preservation and cultivation of TK – a view from Peru**

The importance of TK to local communities was outlined together with concern about the ongoing erosion and loss of that knowledge.

Customary laws play an important role in protecting, maintaining and preserving TK in many communities. Such laws may be based on the principles of collective rights, free flow of knowledge and/or reciprocity. Exclusivity may apply in certain instances, for example in relation to ritual knowledge. Seeking to extend existing modern systems of IP protection to such communities might undermine their existing customary systems of protection. The developed world's concept of wealth is not necessarily shared by indigenous communities.

TK should also be thought of as a traditional way of knowing, for example the selection of odd plant varieties for further propagation or the identification of different varieties. Such activities, which might be generalised as knowing, improving, practicing and refining, are often undertaken by different people within the community.

### Legislative initiatives

A brief overview of the objectives of the Peru's draft law the protection of Collective Knowledge of Indigenous Peoples was provided. The main features of the proposals are:

- Any commercial access to TK possible only with the prior informed consent of TK holder.
- Collective TK that is not in the public domain is protected against disclosure acquisition or use.
- A register of collective traditional knowledge is established. This register would not be available to the public – access only available with the prior written consent of the knowledge holders and entry of data into the register would be optional.
- A national trust fund is established into which part of any royalties obtained from licences granted in relation to TK are paid. The fund will be used to assist development of all indigenous communities including those not actively exploiting their TK.

Indigenous communities are consultations on the draft proposals. The next stage is a national strategy meeting in late March on enacting the Law.

The requirement to obtain prior informed consent might lead to problems where knowledge is held by more than one community and one of those communities was unwilling to provide the consent. It was also noted that there was an unreal expectation among some of the communities of the value of their TK.

Further discussion on the draft law can be found on the WIPO website [http://www.wipo.int/news/en/index.html?wipo\\_content\\_frame=/news/en/conferences.htmlsite](http://www.wipo.int/news/en/index.html?wipo_content_frame=/news/en/conferences.htmlsite) in document **WIPO/GRTKF/IC/2/9**

### **Exploitation of TK – a view from India**

A representative of India's National Innovation Foundation (NIF) and the Honey Bee Network (HBN) provided an oversight of how TK could be exploited for the benefit of the community and the TK holder.

The NIF and HBN seek to link local innovators and innovations with science and technology experts, investors and entrepreneurs. A database has been

established, containing over 20,000 local innovations. The NIF's aim is to set up a few incubator project at leading academic institutions to convert some of these innovations into viable business solutions.

Central to the operation of the database is the principle that the innovator retains control over how his innovation or knowledge is exploited. The NIF is duty bound to share any benefits accruing from the knowledge in its database with, inter alia, the provider of that knowledge.

Prior informed consent is effectively operationalised at the time of registration. A number of patents have apparently been obtained for innovations included in the database. Although one of the aims of the database is to facilitate the sharing of knowledge, the need to prevent a prejudicial disclosure prevents some the knowledge being shared openly.

The possibility of establishing an international register of traditional knowledge might facilitate a greater uptake of TK whilst at the same time reducing transaction costs for those accessing the register.

#### Legislative initiatives

India has also enacted new plant variety and farmers' rights legislation which provides for community based rights and also appears to allow commonly known varieties that have not been commercially exploited, to be protected. The act also allows communities or their representatives to seek remuneration from the breeder for any contribution made by that community in the evolution of the protected variety.

The act also requires the applicant to disclose the contribution made by communities in developing or evolving the variety. Failure to do so could lead to refusal of the application or cancellation of the right.

#### Possible model for promoting and protecting TK

A model for protecting TK developed by the Indian lawyer Pravin Anand was discussed. He proposes establishing perpetual but limited rights for community based traditional knowledge. The rights, which would be managed by a collecting society type of body, would include an acknowledgement and a right to prevent the distortion or harmful use of the TK and a reproduction right. Licences would be available as of right on payment of a small fee.

### **WIPO's activities relating to traditional knowledge**

WIPO has undertaken considerable work in the area of traditional knowledge. A recent survey of WIPO Members on TK revealed an almost equal split, among the albeit few respondents, between those who felt that existing forms of IP protection were adequate to protect TK, those who felt existing forms of IP protection if complemented by other forms of protection would suffice, and those who felt that existing IP systems would always have limitations when seeking protection of TK. The survey also showed that three countries had

enacted, or were in the process of enacting specific legislation covering TK (Guatemala, Panama & Peru).

In addition to the ongoing discussions on TK in the intergovernmental commission, WIPO is also providing assistance to countries seeking to protect TK through workshops, studies, informational material and training. Particular issues to be covered include:

- The development of information materials on intellectual property options for the protection of TK
- Practical, national information and training workshops on the intellectual property system and the protection of TK
- Intellectual property information, training and standards for the documentation of TK

Furthermore additional studies/projects will also be undertaken to assess:

- Actual examples in which TK protection has been sought under the intellectual property system
- The feasibility of applying customary laws to TK
- A pilot project on collective acquisition, management and enforcement of intellectual property systems in TK

Additional information on WIPO's work on TK can be found at [http://www.wipo.int/news/en/index.html?wipo\\_content\\_frame=/news/en/documents.html](http://www.wipo.int/news/en/index.html?wipo_content_frame=/news/en/documents.html).

### **Comments arising from the informal presentations**

Customary laws should be respected, and rights of communities in respect of their land are essential. However, some of the developing countries taking a lead on TK are not necessarily the most sympathetic to the rights of their own indigenous communities.

In order to provide a greater recognition for customary laws, it was suggested that the UK should sign and ratify Convention 169 of the International Labour Organisation. (This Convention does not deal directly with IPRs – more info at <http://www.ilo.org/public/english/employment/strat/poldev/papers/1998/169guide/169guide.htm#C1>)

Concern was raised about the suitability of WIPO as a forum to discuss and formulate a coherent policy on the protection of TK, as there is a lack of direct participation by indigenous communities and ability to address non-IP issues. Funding is likely to be made available to facilitate the participation of indigenous people in the discussions in WIPO.

## **SESSION 2 - DISCUSSION OF PARTICULAR ISSUES RELATED TO TK**

### **Extent of the patenting of inventions based on developing countries' TK and genetic resources**

The Government of India has undertaken an analysis of patents relating to TK and genetic resources, and revealed a split between “white patents” (those which clearly involved an inventive step), “grey patents” (those that might have involved an inventive step), and “black patents” (those that clearly did not demonstrate either novelty or an inventive step).

For white patents, the concern is that the patentee may be unfairly benefiting directly from the TK or genetic resource possibly without any form of benefit sharing or recognition being provided to the guardians of the knowledge or resource.

For black patents the issue is why these patents were granted. Possible reasons might include output pressure on examining authorities or the lack of adequate prior art information available to the examiner considering the patent. This latter issue is already being addressed in WIPO and certain developing countries with the creation of TK Digital Libraries (TKDL). These digital libraries will not only detail, in writing, considerable amounts of TK already in the public domain but will do so taking into account international classification standards (WIPO International Patent Classification system IPC) so that the data will be easily accessible to patent examiners.

Ideally as these TKDL come on stream there will be incorporated in the PCT's minimum search documentation list therefore ensuring that the data in these libraries will be considered during the processing of patent applications filed under the PCT system.

It was also suggested that search and examination guidelines in patent examining authorities be updated to ensure that TKDLs are consulted and that assistance be provided to the developers of TKDLs, and TK holders, so that they can manage the documentation process and safeguard any inherent IP in the TK.

### **Disclosure of origin in patent applications**

Should patent applicants be required to disclose, in the patent application, the source of origin of any genetic material or TK on which the invention is based? Disclosure of origin by itself might not be sufficient, as many applications already give some indication of the origin of essential genetic material (A rough online search of patent documents showed over 196 referring specifically to Peru, Peruvian, Andes or Andean in their abstract – at least 27 of these related to genetic material from those regions), yet the legitimacy of that genetic material was rarely examined.

Only a few countries have implemented the CBD in general or introduced specific legislation covering access to TK and genetic resources in particular. (Access might however still be regulated under other laws).

### **Non-patent based protection of TK**

The suitability of other non-patent forms of IP protection for TK were considered. Suggestions and examples included the Australian use of copyright to protect against misuse of aboriginal sacred marks, the international protection accorded to the Red Cross and Red Crescent symbols, use of geographical indications by for example Champagne producers, utility model protection, trade secrets, plant variety legislation and unfair competition rules. In respect of GI's it was suggested that the scope of extended protection under TRIPS, available at present to wines and spirits, should be extended to other products of more relevance to developing countries.

Collecting societies have assumed a greater role in representing communities in a number of countries for example Algeria and Australia.

For more information on the Australian protection of TK see Issues: Intellectual Property at [http://www.atsic.gov.au/default\\_ie.asp](http://www.atsic.gov.au/default_ie.asp)

### **Novelty Requirement and the protection of TK already in the public domain**

TK that is known to one community but which is not used (or presumably known) outside of that community should be protectable under existing IP systems. Essentially such knowledge would be considered as not having been made available to the public. The presence of customary laws or practices within a community, limiting or prohibiting use and dissemination of such knowledge outside of the community, might be sufficient to demonstrate that unfettered disclosure, as recognised by modern IP systems might not have occurred. In the absence of any such customary laws or practice, or in the case where the knowledge/invention had been unconditionally disclosed outside of the community (even just to one person) then established IP laws would most likely consider the knowledge/invention disclosed.

A further suggestion was that a grace period dating back to the agreement on the CBD should be provided in respect of knowledge disclosed as a result of, or with a view to satisfying the requirements of, that agreement.

## SESSION 3 - TOUR DE TABLE OF KEY ISSUES FOR THE COMMISSION

### General Points

- Key question is how to help poor people earn more from their TK. In the list of effective means of achieving this, legal (IP) means may in practice turn out to be near the bottom of this list.
- Look at this issue from the perspective of empowering poor people within the current international IP system, not isolating them further from it.
- Re-balancing the IP system from the perspective of the key issue of “fairness”. On the other hand, even if its decided that the formal IP system is not the right place to do this, that’s not to say that its not possible to have national systems address “fairness” through rules on benefits sharing (in so far as that is what is meant by the term “fairness”).
- Key importance of definitions of “TK” and “protection”. And whether we mean “protection” or actually “commercial exploitation” of TK.
- When considering the application of IP tools, important not to focus on one or two tools (such as patents): look at the range of IP tools across the board (collective trademarks, trade secrets, and geographical indications, copyright). At the same time, worth looking at the potential for new forms of IP tools for protecting
- Design and selection of the particular IP tools for TK protection has to take into account of broader context of the TK owners and their livelihoods as part of the decision criteria. Eg there is little point in protecting the TK whilst not recognizing the importance of preservation of the habitats of the TK holders.
- May be different reasons for protecting TK as compared to non-TK, and the formal IP systems currently used for protecting non-TK may not be considered appropriate for application to TK from these perspectives.
- Scope for more dialogue in this area in international and national fora. This more likely to yield progress in the next decade or so, rather than expecting the development of new international rules or treaties. However, there is potential at the national level for development of legislation for the protection of TK. This will require capacity building in poor countries, which rich countries should support
- Experimentation with different institutional structures and mechanics that may be built upon for low-transaction cost TK protection systems. This could include:

- Incorporation of journals, newsletters, and gazettes which publish disclosed TK into the PCT minimum documentation list
  - Collective management of IPRs in TK
  - Reduction of transaction costs of acquiring, using, maintaining and enforcing intellectual property rights, etc
- There is a need to continue the basic research on using a multiplicity of intellectual property tools for TK protection, even while Member State discussions are on-going, in order to provide technical input into that debate and facilitate substantive progress. This could include research on:
    - Use of a multiplicity of intellectual property tools,
    - Interfaces with informal systems,
    - TK-terminology in the intellectual property context, etc.
  - Work should proceed simultaneously and in a complementary manner on 'positive' and 'defensive' TK protection.
  - Specific strategy should be taken up to periodically review all the patents granted anywhere in the world on herbal based knowledge and resources so that one can have a clear understanding of the extent to which biopiracy exists and continues to flourish.

### **Exploiting TK**

- An international registry for providing low transaction cost facility for short-term protection to traditional knowledge and small innovations around the world through an agreed treaty among the WIPO member countries. The transaction cost of the innovators will be obviously reduced. But more importantly it will also reduce the transaction cost of potential entrepreneurs and investors who may like to join hands with the innovators to complete the value chain.
- Unless the protection is provided to small innovators, the legitimacy of the IPR system will become suspect. While existing IPR system can indeed help to some extent, there is a need for considerable modification to make it accessible to the dispersed, disadvantaged traditional knowledge holders. In the absence of such a system, Honey Bee Network is not able to disclose large part of a database fearing that it might pre-empt the possibility of protection.
- A 5 year grace period for application for formal IP protection of TK after disclosure by local communities of that TK to a third part (this to allow for cases where the TK holders would have wanted to acquire the IPRs themselves, but did not realize that this was possible due to lack of information)
- The social research councils and national research councils of developed and developing countries must enforce copyrights of local



knowledge holders and providers. For every grantee of funds from these institutions, acknowledging the identity and interests of communicators and innovators must be obligatory.

- Knowledge of indigenous communities which is not reasonably accessible (ie not part of the databases) should not be considered as prior art in patent applications.
- The collective management systems for protecting individual IP of traditional knowledge holders and grassroots innovators must be institutionalised so as to make IP system accessible to large number of small people. The issue relating to enforcement and infringement can also be pursued by the collective association.
- Collective trademarks to protect sacred rights should be allowed by modification of the existing trademarks regime nationally and internationally.
- Protection of Geographical Indications should be expanded for other products of interest to developing countries, as this is a good means of protecting both specific instances of TK but also the other constituent elements of the local communities and environment from where this TK originates. International registry for geographical indications, registration to be negotiated among the member countries should not restrict itself to only wines and spirits but include other products as well.
- Plant varieties discovered in the wild should also be protected as already done in China and France. The uniformity and stability should not be considered as necessary condition for plant variety protection. These conditions have evolved keeping in mind the varieties for irrigated regions in mind. In rain fed regions there are buffering populations where uniformity would not be viable and stability can be judged only over a longer term cycle of six to nine years.
- For protection of plant varieties bred by small farmers and local communities, they should not be required to provide data needed by the plant variety authority because of their inability to generate such data. Authority should get such data generated at their cost.
- Large numbers of local animal breeds are considered non-descript and there is no system of recognition and protection of the traditional breeds as well as improvements therein. There is no international agreement on animal breeds and their IP protection. Some countries include these within the Plant Varieties Act.

## **Policy Formulation and Decision Making**

- Participation of TK holders in international/national IP rule making processes is essential for their legitimacy.
- WIPO should be mandated by member states to reach out to wider constituencies who are important stakeholders in the debate over protection of TK, folklore and genetic resources (both in terms of funding and reform of procedures for WIPO meetings to facilitate greater participation).
- Closer collaboration between WTO, WIPO, FAO, UNESCO, CBD on their deliberations and rule-making on TK, folklore and genetic resources. In these for a, keep these debates pragmatic and technical, rather than too political. Should deal with the issues in a business like way, reflecting that they should be of importance to all member states. In particular, member states need to provide more and more substantive inputs to these for a, and these should be better informed by the views of stakeholders at the national and regional level.
- Ensure that necessary budgetary resources are added within WIPO for the exploratory work on intellectual and traditional knowledge. In particular WIPO should be enabled to reach out more effectively to a wider constituency in these cross-cutting areas, in particular local and indigenous communities, and also the private sector. This would need to be done both on a:
  - Resource basis, i.e. funds for travel and participation of TK holders;
  - Procedural basis;
- WIPO should hold more consultations at the local, national, regional levels to develop substantive inputs from the Members of the Intergovernmental Committee. What is needed are technical submissions and proposals for practical improvements of existing IP systems or for new IP systems;

## **Misappropriation of TK**

- Scope for action in developed countries to counter-act cases of misappropriation of TK from poor countries (eg bio-piracy). Developed countries seem to feel they have no responsibility in making the access and benefits sharing aspects of the CBD work: this is not true.
- There should be an international registry for existing TK and new innovations to assist the prosecution and enforcement of community rights over their TK worldwide. Local databases and registers of TK should also be given value at the national level.
- Local language databases of patent information must be created so that communities can monitor directly or through NGOs whether their

knowledge has been expropriated by somebody without their authorization.

- Disclosure requirement in patent offices in developed and developing countries should be modified. There is no great purpose served by mere disclosure of country of origin. One should disclose whether the material and associated knowledge used for making claims in the patent applications have been obtained lawfully and rightfully.

### **Access and Benefit Sharing**

- Benefit sharing and PIC mechanisms should reflect local values and the views of local stakeholders as to what is appropriate.
- Requirement for disclosure of source of origin of material and for PIC of local communities in patent law in developed countries.
- Experimental national legislation models on how the full range of IP tools can be used to protect TK. In addition, need to make resources available to study these experiments through case studies, to learn lessons of experience. In particular, key issues to examine would be different institutional approaches.