

Workshop on Indigenous Traditional Knowledge
Panama City, Panama
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Information Note
by the
Secretariat of the
World Intellectual Property Organization (WIPO)

I. SUMMARY OF KEY POINTS

WIPO and intellectual property

1. The World Intellectual Property Organization (WIPO) is the United Nations agency responsible for the promotion and protection of creative intellectual activity and for facilitating the transfer of technology in order to accelerate economic, social and cultural development. It has 182 Member States, who decide on, direct and monitor its program activities.
2. Intellectual property (IP) protection refers to the protection of the results of creative intellectual activity against misappropriation and misuse. IP protection may take the form of exclusive property rights (such as certain rights in copyright or patents) or non-proprietary measures, such as equitable remuneration schemes and moral rights in copyright; protection against consumer deception and unfair competition through the protection of trademarks, geographical indications and national symbols and the law of passing off; and, protection against the disclosure and misuse of confidential information.
3. IP systems are diverse in character, but they generally aim at giving the originators of intellectual works (including collectives) a say over whether, and if so how, their works are used by others, at providing for acknowledgement and respect for originators and their distinctive reputations, and appropriately sharing the benefits of use of their works - so addressing both economic and cultural interests. IP protection does not oblige the commercial exploitation of creative works, but rather offers a range of options for creators who may wish to disseminate their creative works, and safeguards against misleading attribution and deception of the public in the marketplace. Many IP rights endure for a limited time, while some may subsist indefinitely.
4. IP is a versatile and adaptable tool that can be used strategically to advance a range of IP-related objectives, which are best determined at the community and national levels, in line with broader public policy and development goals. IP is essentially implemented under national, and in some cases regional, laws. International and regional conventions and treaties help to establish the framework within which specific national and regional laws operate.
5. “Protection” in this sense is distinct from but complements the concepts of “safeguarding”, “conservation” and “preservation” in relation to cultural heritage, traditions and ways of life, and biological diversity. IP-type protection is only an element of the

protection, promotion and preservation of traditional knowledge (TK) and traditional cultural expressions (TCEs)¹, in a broader, more inclusive and holistic sense.

6. While the work of WIPO is not limited to the use of current IP systems to protect TK and TCEs, it addresses most directly the *IP-like protection* of TK and TCEs (in other words, protection against misappropriation and misuse of creativity, reputation and distinctiveness, whether through current IP systems, adapted IP systems and/or *sui generis* measures). Ideally, it aims at strengthening the capacity of the holders of TK and TCEs to determine how they are used and not used, and to provide legal measures against the unauthorized commercialization of these materials by third parties.

7. The work of WIPO, therefore, is and should be complementary to legal instruments and developments in other policy areas and takes into account the work of other relevant intergovernmental and non-governmental processes. To this end, the WIPO Secretariat welcomes the holding of this workshop and other initiatives aimed at promoting collaborative, complementary and holistic approaches to TK-related issues, enhancing the effective participation of indigenous peoples and traditional communities in the work of the various organizations and agencies, and facilitating the better understanding of indigenous concerns and their possible solution. As will be described below, there is already significant indigenous participation in WIPO's work.

Overview of WIPO's activities

8. The relationship between IP and TK and TCEs is the subject of active and inter-related policy development, norm-building and capacity-building programs at WIPO. WIPO also undertakes extensive work on the IP aspects of access to and benefit-sharing in genetic resources. Policy development and norm-building take place mainly within the scope of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the Intergovernmental Committee).

Indigenous participation and inter-agency cooperation

9. WIPO's most recent work program in these areas commenced, in 1998 and 1999, with a series of fact-finding missions in 28 countries during which more than 3000 persons, mainly representatives of indigenous and traditional communities, were consulted with. The many insights provided by those communities were distilled into a report prepared by a consultative review process, and these insights still guide WIPO's work in this area.²

10. Ongoing work involves direct participation by more than 120 non-governmental organizations (NGOs), many of whom represent the interests of indigenous peoples and traditional communities. See further under "Indigenous Involvement in WIPO's work" below.

¹ In IP discussions, some distinction is generally made between traditional knowledge as such ("traditional knowledge") and the forms and productions in which that knowledge finds expression ("traditional cultural expressions"). However, work on the two areas is conducted closely in parallel. See Annex for further information.

² WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders (Pub. No. 768), available at <http://www.wipo.int/tk/en/tk/ffm/report/index.html>

11. WIPO also works closely with many other United Nations agencies and intergovernmental organizations such as the CBD, UNESCO, FAO, UNCTAD, UNEP, the OHCHR, WHO and the Permanent Forum on Indigenous Issues (the Forum). Several WIPO activities directly address recommendations made by the Forum. Forum recommendations have been formally communicated to WIPO's Member States.

Accelerated progress and a wide-ranging and comprehensive approach

12. The relationship between IP and TK and TCEs raises a number of profound policy questions such as, (i) to whom, if anyone, do or should traditional knowledge and expressions of creativity belong as private property (including collective or communal property)?; (ii) what makes knowledge or a cultural expression "indigenous" or "traditional"?; (iii) who, if anyone, can or should enjoy the exclusive right to commercially exploit intangible traditional know-how and creativity?; (iv) should there be legal mechanisms and remedies against demeaning, derogatory or offensive use of, or derivations from, expressions of traditional cultures?; (v) how should assertions of exclusivity and proprietorship be reconciled with a balanced policy approach that encourages cultural exchange, promotes creativity and cultural development, and serves other legitimate goals such as research and education?; (vi) how should IP mechanisms function to complement initiatives in other related fields, such as the safeguarding of cultural heritage and conservation of biodiversity?; (vii) what are the appropriate boundaries and role of the "public domain", and should protection apply retroactively to material that has been considered "public domain"?; and, (viii) how best can local and community customary laws be a basis for effective and actionable systems of protection, especially regionally and internationally and in respect of persons from other communities and countries?

13. A further question that is the subject of policy examination and practical activity by States and communities is the role of documentation, recordal and registration of TK and TCEs for the purposes of their IP-like protection, whether "defensive" and/or "positive" protection (defensive protection basically means protection "from IP" and positive protection is protection against misappropriation and misuse "by IP"). The WIPO Secretariat does not promote the documentation and/or publication of TK by custodian communities; these are decisions that lie solely with the relevant communities. As the documentation, recordal and registration of TK raise certain IP issues, the WIPO Secretariat, as requested by the Intergovernmental Committee and recommended by the Permanent Forum, and in dialogue with stakeholders, is preparing some materials (a "Toolkit") that will strengthen the capacity of communities to be fully informed of the IP implications of documenting their knowledge should they wish to do so (see further under "Consultations, Capacity-building and Practical Resources" below).

14. These and other questions are the focus of intense and ongoing discussion between WIPO's Member States, representatives of indigenous peoples and traditional communities and other stakeholders. These discussions are complex and sensitive, and the legal, cultural, social, political and economic questions they address are the subject of rapidly-evolving policy and legislative development at WIPO and elsewhere.

15. WIPO Member States have recently called for accelerated progress in this area, stressed the "international dimension" of these questions and emphasized that no outcome of WIPO's work in this area is excluded, including the possible development of an international

instrument or instruments. They have also underscored that WIPO's work should not prejudice developments in other forums.

16. Participants in WIPO's work have supported a wide-ranging, flexible and comprehensive approach to resolving the issues. Protection should, they have discussed, combine proprietary, non-proprietary and non-IP measures, and use existing IP rights, *sui generis* adaptations of IP rights, and specially-created *sui generis* IP measures, including both defensive and positive measures.

17. While much attention is being paid to the development of *sui generis* systems, participants in IP discussions have also recognized that existing IP measures can provide some protection for TK and TCEs. For example, the protection of confidential information has been used to give indigenous communities the right to prevent unauthorized use of TK that has been kept within the community or which is subject to customary law restrictions on its use. In the domain of copyright and related rights, there is a range of measures that can give creators and performers within traditional communities the entitlement to prevent unauthorized copying and use of cultural expressions (for example, contemporary indigenous music and art are protected by copyright), and to prevent degrading use and the failure to acknowledge source (so-called "moral rights"). One example is the right of performers of TCEs to prevent the unauthorized recording of performances such as traditional songs, chants, dances and oral narratives and recitals, and to exercise control over whether and how such recordings are distributed, circulated and commercialized (if at all).³ One challenge is determining the precise interface between *sui generis* measures and existing IP measures.

Draft instruments

18. More recent sessions of the Intergovernmental Committee have examined draft principles and objectives⁴ that could shape *sui generis* instruments on TK and TCEs. This approach to protection could recognize, amongst other things, collective interests in traditional know-how and expressions of traditional cultures which are "characteristic" of a distinct cultural identity. These interests would be respected for as long as a traditional community continues to be associated with the knowledge or cultural expressions.

19. These drafts aim to clarify the policy and legal basis for the prevention of misappropriation and misuse of TCEs/EoF and TK held by traditional communities, including indigenous peoples, in line with their express objectives and interests. They include compliance with the "free, prior and informed consent" (FPIC) principle and the recognition of customary laws and practices. In line with the views of many indigenous and traditional communities, the draft provisions do not require the assertion of new exclusive property rights over TK or TCEs, but accommodate this option should communities wish to take it up. These current drafts emanate from previous drafts which were discussed at length by the Intergovernmental Committee and also underwent an open commenting and review process.⁵ In many cases, comments made by representatives of indigenous and traditional communities have been directly reflected in the draft instruments. Copies of the drafts are being made available at the workshop.

³ The WIPO Performances and Phonograms Treaty, 1996 (WPPT).

⁴ Current drafts were published as WIPO documents WIPO/GRTKF/IC/8/4 (TCEs) and WIPO/GRTKF/IC/8/5 (TK), both dated April 8, 2005.

⁵ Comments received are available at http://www.wipo.int/tk/en/consultations/draft_provisions/comments.html

Genetic resources

20. With respect to genetic resources, WIPO's work does not concern the protection of genetic resources *as such*. Genetic resources (such as microbes or plants) are physical resources, not IP, even though they are often integrally associated with TK and practices, and can embody TK and community values. WIPO does, however, deal with IP issues related to genetic resources (such as a biotech invention derived from a genetic resource). Because of the close association of genetic resources with some TK, some national biodiversity laws protect both genetic resources and TK. A "disclosure of origin" requirement in patent applications is regarded by many States and others as an instrument to ensure the traceability of genetic resources and associated TK, and to support compliance with FPIC and fair and equitable benefit-sharing, in furtherance *inter alia* of the objectives of the CBD. Others call for alternative approaches to strengthening the link between equitable benefit-sharing and the IP system. Discussions on these issues continue in WIPO and in other forums. WIPO cooperates closely with the Secretariat of the CBD in relation to these questions, and has prepared technical studies at the request of the CBD.

Available resources and final points

21. All working documents, comments, papers, studies, databases, questionnaires, and other material prepared for consideration by the Intergovernmental Committee, as well as comprehensive reports of its sessions, are publicly available, in English, French and Spanish at <http://www.wipo.int/tk/en/igc/documents/index.html>.

22. This Information Note seeks only to provide a brief and descriptive overview of some of the issues and activities being addressed and undertaken in WIPO, especially in the Intergovernmental Committee. It does not enter into or pre-empt policy decisions which are within the competence of Member States, nor seek to represent all the views of the diverse stakeholders participating in WIPO's work, including indigenous peoples and traditional communities.

23. The remainder of this Note will provide more detailed information on the following issues, as well as offer some concluding comments:

- (a) Indigenous involvement in WIPO's work;
- (b) Capacity-building activities, studies and other practical resources.

II. INDIGENOUS INVOLVEMENT IN WIPO'S WORK

24. The establishment of the Intergovernmental Committee in late 2000 was preceded by an intensive phase of fact-finding and consultation. For example, in 1998 and 1999, WIPO conducted the series of fact-finding missions mentioned above. These fact-finding missions resulted in a series of recommendations which still provide the basis of WIPO's work.⁶

25. More recently, through consultations, capacity-building activities and case studies, indigenous perspectives and experiences have continued to make an essential and valuable

⁶ WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders (Pub. No. 768), available at <http://www.wipo.int/tk/en/tk/ffm/report/index.html>

contribution to WIPO's work. For example, in 2000, indigenous lawyer Ms. Terri Janke prepared a series of case-studies of the experiences of indigenous peoples in Australia in using IP⁷. These case-studies have been widely distributed and have had a significant impact upon the search for practical solutions and policy development.

26. Turning more specifically to the Intergovernmental Committee, Member States of WIPO have expressed their "unanimous support for directly involving as much as possible representatives of Indigenous and local communities in the work of the Intergovernmental Committee."⁸ In this regard, a number of practical steps have already been undertaken, including:

(i) A fast-track accreditation procedure for all NGOs has been in place since the first session of the Intergovernmental Committee in April 2001. More than 120 NGOs have received accreditation, including many representing indigenous peoples. No applicant has been denied accreditation.

(ii) The WIPO General Assembly has extended a formal invitation to the Forum to take part in sessions of the Intergovernmental Committee and many participants have welcomed the active participation of the Forum.

(iii) A number of Member States have adopted the practice of funding the participation of representatives of indigenous and local communities in Intergovernmental Committee sessions.

(iv) The funds provided by WIPO to support Member State participation from developing countries have been used in some cases by such countries to support the participation of leaders of their indigenous or local communities.

(v) WIPO consultations and workshops at the national and regional level and other fora have included representatives of the Forum and indigenous and local communities as speakers and participants.

(vi) The WIPO web site provides for written contributions by accredited NGOs on the issues before the Intergovernmental Committee. See <http://www.wipo.int/tk/en/igc/ngo/index.html>

(vii) Specific briefings and consultations for NGO representatives, particularly representatives of indigenous and local communities, are undertaken within the framework of meetings of the Intergovernmental Committee.

(viii) The WIPO Secretariat has continued its practice of consulting with interested representatives of indigenous and local communities on draft documents and other material being developed for the Intergovernmental Committee.

(ix) Steps have also been undertaken to encourage voluntary donors to support the immediate participation of representatives of accredited observers in the Intergovernmental Committee's sessions. Furthermore, the Intergovernmental Committee has supported the establishment of a Voluntary Fund at WIPO to fund the participation of representatives of indigenous peoples and local communities in sessions of the WIPO Committee. A draft proposal for a Voluntary Fund will be considered at the next session of the WIPO General Assembly in September 2005.

(x) At its session in November 2004, the WIPO Intergovernmental Committee gave priority to extensive discussions on how to further enhance the participation by indigenous and local communities. It agreed, amongst other things, that each session of the Committee would be preceded by panel presentations chaired by a representative of an

⁷ Ms. Terri Janke "Minding Culture" (Case Studies on Intellectual Property and Traditional Cultural Expressions), Publication No. 781.

⁸ Report of Fourth Session (document WIPO/GRTKF/IC/4/15, para. 60).

indigenous or local community. Such a panel was held at the commencement of the most recent session in June 2005.

(xi) Each session of the Intergovernmental Committee is preceded by an independent indigenous forum, which has been welcomed by the Committee and facilitated by the Secretariat. Agreed statements from these forums are included in the record of Committee meetings, and contribute to the directions of debate.

III. CONSULTATIONS, CAPACITY-BUILDING AND PRACTICAL RESOURCES

27. In parallel with its policy development and norm-building work, WIPO undertakes a program of practical activities aimed at consultation, providing legal-technical assistance and capacity-building. Many of these involve representatives of indigenous peoples and traditional communities. A practice of consultation, free, prior and informed consent, and full participation, has been routinely applied in activities directly involving indigenous peoples and traditional communities.

28. These activities comprise workshops, provision of written advice, surveys of existing laws and practices, preparation of studies, collation of databases and so on. By way of a few examples:

(a) as the documentation of TK can raise a range of IP issues and, in cooperation and dialogue with many international, regional and community partners, WIPO is developing a “Toolkit” for identifying and managing the IP implications of the documentation of TK. This Toolkit will strengthen the capacity of communities to be fully informed of the IP implications of documenting their knowledge should they wish to do so;

(b) WIPO worked closely with Pacific Island countries and the Secretariat of the Pacific Community in preparing the *sui generis* Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002. Upon request, WIPO regularly provides legislative and policy information and assistance to a wide range of national governments, regional organizations and communities;

(c) in October 2005, WIPO will conduct a series of awareness-raising and training workshops for indigenous women in Panama, focussing on use of IP tools to protect their handicrafts;

(d) a distance learning course providing an introduction to IP, TK and TCEs issues and addressed at communities as well as other stakeholders is under preparation. An indigenous expert was commissioned by WIPO to provide resource materials for this course;

(e) in conjunction with cultural institutions and specialists, communities and relevant organizations, WIPO is developing IP-related “good practices” and guidelines for museums, archives, libraries and researchers, addressing in particular the management of IP issues that arise during the recording, inventorying, dissemination and re-use of traditional cultural expressions.

29. A wide range of case-studies, databases, surveys, laws and other resource are available at <http://www.wipo.int/tk/en/resources/>

IV. CONCLUDING COMMENTS

30. While the IP-like protection of TK and TCEs raises some complex questions, they are the subject of active and determined examination within WIPO by a diverse range of stakeholders, including indigenous peoples and traditional communities.

31. Examination of these questions has already yielded tangible and positive results. For example, draft *sui generis* instruments, based on extensive consultations and an open commenting process, have been prepared and are being discussed; existing documentation of already disclosed TK is now being included within the scope of “prior art” for patent examination purposes, helping to avoid cases in which patents are wrongfully granted over TK-based inventions; geographical indications have been registered in respect of handicrafts in Portugal, Mexico and the Russian Federation; Maori in New Zealand have recently registered a certification trademark to assure the authenticity and quality of Maori arts and crafts; and, Australia is preparing a draft amendment to the Copyright Act for the creation of communal moral rights in indigenous cultural materials.

32. There have also been certain intangible yet no less valuable benefits so far. The aspirations and concerns of indigenous and other cultural communities are now at the centre of IP policy-making; the work of the WIPO Intergovernmental Committee continues to be a process of reviewing the core principles and assumptions of IP; and, through the collection and analysis of actual experiences with IP, TK and TCEs, extensive practical and empirical information is now available, helping to ensure that solutions eventually arrived at are workable, real-world and actually useful to communities.

33. The WIPO Secretariat looks forward to continuing to build upon its productive and cooperative relationship with the Permanent Forum on Indigenous Issues. Moreover, and recalling the recommendation to this effect made by the Forum at its third session, we encourage representatives of indigenous peoples and traditional communities to participate actively in WIPO’s work through the various avenues established for this purpose.

[Annex follows]

ANNEX

Use of Terms “Traditional Knowledge” and “Traditional Cultural Expressions”

Introduction

1. The term “traditional knowledge” has sometimes been used in WIPO’s work as a general umbrella term, but it can also be misleading. In practice, IP discussions have distinguished between traditional knowledge itself (TK) and traditional cultural expressions (TCEs). TK concerns the *content* or *substance* of knowledge that is held by traditional communities (such as know-how about traditional medicine, or traditional ecological practices). TCEs (synonymous with “expressions of folklore”) are the *forms* or *productions* in which traditional culture and knowledge are expressed (such as songs and stories, designs, words and symbols, architecture, artistic productions and handicrafts). The two can be intertwined – TK may be used, for example, in creating a traditional craft production that is itself a TCE.
2. The protection of TK and TCEs are discussed in WIPO somewhat distinctly, but in parallel, to reflect that they raise certain different cultural and legal questions. As they are each subject to different forms of exploitation, when it comes to defining legal mechanisms for protection, it can be helpful to distinguish between the two. Furthermore, there is already considerable national experience with the protection of traditional cultural expressions/expressions of folklore.
3. However, it is fully recognized in WIPO’s work that from an indigenous perspective, traditional cultural expressions and knowledge are often perceived as integral parts of an holistic cultural identity, subject to the same body of customary law and practices. WIPO’s work on TK and TCEs is thus intimately complementary and coordinated. Furthermore, WIPO’s work concerns specific means of legal protection against misuse of traditional materials by third parties beyond the traditional and customary context, and does not seek to impose definitions or categories on the customary laws, protocols and practices of indigenous peoples and traditional and other communities. This approach is accordingly compatible with and respectful of the traditional context in which traditional cultural expressions and knowledge may be viewed as part of an inseparable whole.
4. Discussions within WIPO have also stressed that the specific choice of terms to denote the protected subject matter, and the precise scope of protected subject matter, should be determined at the community, national and regional levels.

Working descriptions

5. Purely as a basis for further consideration, and drawn directly from existing laws and experiences, below are the working descriptions of “traditional knowledge” and “traditional cultural expressions” presently being used in WIPO’s work. These are extracted directly from the draft instruments for the protection of TK and TCEs before the WIPO Intergovernmental Committee.

Traditional knowledge

6. Extract from “The Protection of Traditional Knowledge: Revised Objectives and Principles” (WIPO document WIPO/GRTKF/IC/8/5):

“GENERAL SCOPE OF SUBJECT MATTER

1. These principles concern protection of traditional knowledge against misappropriation and misuse beyond its traditional context, and should not be interpreted as limiting or seeking externally to define the diverse and holistic conceptions of knowledge within the traditional context. These principles should be interpreted and applied in the light of the dynamic and evolving nature of traditional knowledge and the nature of traditional knowledge systems as frameworks of ongoing innovation.
2. For the purpose of these principles only, the term “traditional knowledge” refers to 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.”

Traditional cultural expressions

7. Extract from “The Protection of Traditional Cultural Expressions: Revised Objectives and Principles” (WIPO document WIPO/GRTKF/IC/8/4):

“SUBJECT MATTER OF PROTECTION

(a) “Traditional cultural expressions” or “expressions of folklore” 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:

- (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- (ii) musical expressions, such as songs and instrumental music;
- (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances,

whether or not reduced to a material form; and,

- (iv) 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.

(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.”

[End of Annex and of Note]