

Protecting Traditional Knowledge, Stimulating Research and Sustaining Creativity: an Intellectual Property Perspective

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Transformations in the Intellectual Property Landscape

- Economic
 - The centrality of IP in the “knowledge economy”
 - Exploitation of **existing rights** in developed countries and North East Asia (from 1990 to 2002, number of new inventions per year: 563,000 to 834,000; in cultural and creative industries estimated to comprise over 7% of world GNP). **But** – African music is only 0.4% of global music sales; only 2% of Africans have seen an African film
 - Calls for **new rights** (databases; broadcasts; traditional cultural expressions and traditional knowledge)
 - Globalization of the economy
- Political and Social
 - The emergence of horizontal global alliances: activist NGOs and activist States; resurgence of indigenous peoples’ organizations
 - Experimentation in **creativity and innovation models**
 - open access, open source, open licensing, a2k, Creative Commons, Adelphi Charter
 - Changes in the way businesses operate in a “networked” economy
 - Movement towards a **more nuanced IP regime**
 - “all rights reserved” to “some rights reserved”

- Policy and Legal

- Recognition of relationship of IP to **other public policies**; TRIPs Agreement, Arts. 7 and 8
- Work programs of increasing number of international organizations include IP components
 - WIPO, WTO
 - WHO, UNESCO, CBD, FAO, ITU, human rights fora
 - IP considered from the perspective of other public policies
- **Whither multilateralism?** Regional and bilateral trade agreements

- Geographical

- Changing geo-politics

- Technological

- Large-scale deployment of the Internet and biotechnology
- Technologies of **perfect imitation and immediate distribution**
- Broadband penetration and connectivity
- The possibility of democratization

Access to Research and Learning Materials

- The “knowledge economy” and the promises and threats of the digital environment
 - abundance of content, empowerment of users and multiple opportunities to re-use, mix, re-mix and share content
 - enhanced access to information and knowledge, incl. digital libraries
 - distance learning
 - yet, technological protection measures can control access to and use of digital resources
- Competing ideas as to generation, use, access to and regulation of technology and knowledge
 - diverse interests, amidst economic, technological, political, geographical, legal and social transformations
- A right to education – art. 26, UDHR
- **Limited access** to learning materials in Southern Africa
 - pricing; suitability; availability; government procurement constraints; literacy and a “book culture”
 - size of markets; extent of competition; presence of local publishers; VAT and other taxes
- **Limited opportunities** for indigenous African research to be gathered, published, disseminated, used
 - conventional and commercial publishing models, indexing tools and practices

• **What role does intellectual property law play?**

Intellectual Property and Research and Learning Materials

- Between “total control” and “total freedom”
 - balancing rights and interests (to information, education, expression, to authors’ rights . . .)
 - balancing reward and access, functionality and fairness, promotion and protection
- **Existing systems:** using flexibilities, limitations and exceptions
 - for access to and reproduction of learning materials; translation; sensory disabled; libraries, archives and museums; online distance learning
 - parallel importation
 - compulsory licensing
 - IP and competition policy
- **New systems:** emerging new hybrid models of authors rights
 - “open access (and dissemination)”, “open content licensing”; “access to knowledge”
 - “access” to “knowledge”
 - “no one size fits all”: entertainment goods and services and educational materials
- Important international, national, regional and local initiatives
 - A2k movement; IFLA, eIFL and other library groups; African Access to Knowledge Alliance; Creative Commons; African Digital Commons, UCT Copyright Working Group, etc.

- World Intellectual Property Organization (WIPO), Geneva
 - dedicated to developing a balanced and accessible international intellectual property system which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest
 - **Development Agenda**
 - a robust “public domain”; flexibilities
 - Standing Committee on Copyright and Related Rights
 - work program on **flexibilities, limitations and exceptions**

IP and Traditional Knowledge/Traditional Cultural Expressions

- Traditional knowledge (TK), traditional cultural expressions (TCEs):
 - valuable elements of a nation’s or community’s living heritage, cultural identity and sustainable livelihood
 - until recently regarded as “common heritage of humanity”
 - growing recognition of **economic potential** – for communities as well as for industries; new bio and information technologies
 - also **cultural assets** - balancing conservation/preservation/promotion and protection
 - questions concerning role of IP – is IP part of the **solution** or part of the **problem**?

Is there a problem? What is it?

- Intellectual property laws protect only ‘original’ and ‘novel’ works by known individuals, for a limited time; often only ‘fixed’ works
 - IP laws places traditional expressions and knowledge in the ‘public domain’ (‘negative exclusionary effect’)
- Productions based upon tradition can be protected as ‘original’ creations (‘positive exclusionary effect’)
 - but no legal duty to acknowledge or share benefits with tradition bearers

Yet. . .

- Existing copyright and related rights can protect TCEs to some degree
 - copyright protection for **contemporary adaptations** and interpretations
 - copyright for **unpublished and anonymous** works (Berne Convention, art. 15.4)
 - related rights protection of **recordings** of TCEs and for “**performers** of expressions of folklore” (WIPO Performances and Phonograms Treaty, 1996)
 - **databases** and compilations of TCEs and TK can be protected as copyright works or by *sui generis*

From a threshold policy question. .

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Should there be new IP-like protection for TCEs and TK that are currently in the “public domain”, providing a “people” or “community” with control over their use outside the “customary context”?

. . . to a complex policy debate

- “Square pegs and round holes” -
 - “a song or story is not a commodity or a form of property but one of the manifestations of an ancient and continuing relationship between people and their territory”
 - a “potent modern reinvention of colonialism”
 - the “artificial reification of tradition”, turning local culture into a scarce resource and rival good, creating competition within and between communities
 - extravagant claims, based on intuitive yet vague and unprovable “cultural rights”
 - culture as ‘tradition’ denies indigenous peoples a “contemporary voice”

Some core policy and legal questions

- Preservation of **tradition** or protection of **creativity**?

“Cultural policies encompass not only the preservation of traditions and of the values and norms handed down by past generations, but also issues related to the present and contemporary creativity”

Cultural Policy of Botswana, 2001

- The role, contours and boundaries of the “public domain”?

. . .TCEs of Europe's various regions are part of the public domain. . . The exploitation of TCEs, even on a commercial scale, by persons outside the region where the folklore originates, has not been seen to have a negative impact. . . on the contrary, it has stimulated cultural exchange and fostered regional identities. . . authentic TCEs have become inherently better known and of higher economic value. . . those who advocate IP protection for their own TCEs would create monopolies of exploitation. . . exchange or interaction could thus be made more difficult, if not impossible.

(European Community, WIPO/GRTKF/IC/3/11.)

. . . the application of classical IP thinking and terms in the field of folklore might easily distort the picture and at best confuse issues. . . while it is admitted that TCEs might have been publicly available. . . this does not mean that such materials had fallen into the “public domain”, a term of art which suggests an expiration of protection. One is dealing with subject matter that has never enjoyed formal protection. Most communities have their traditional mechanisms for the protection of their TCEs.

Nigeria (WIPO/GRTKF/IC/9/14)

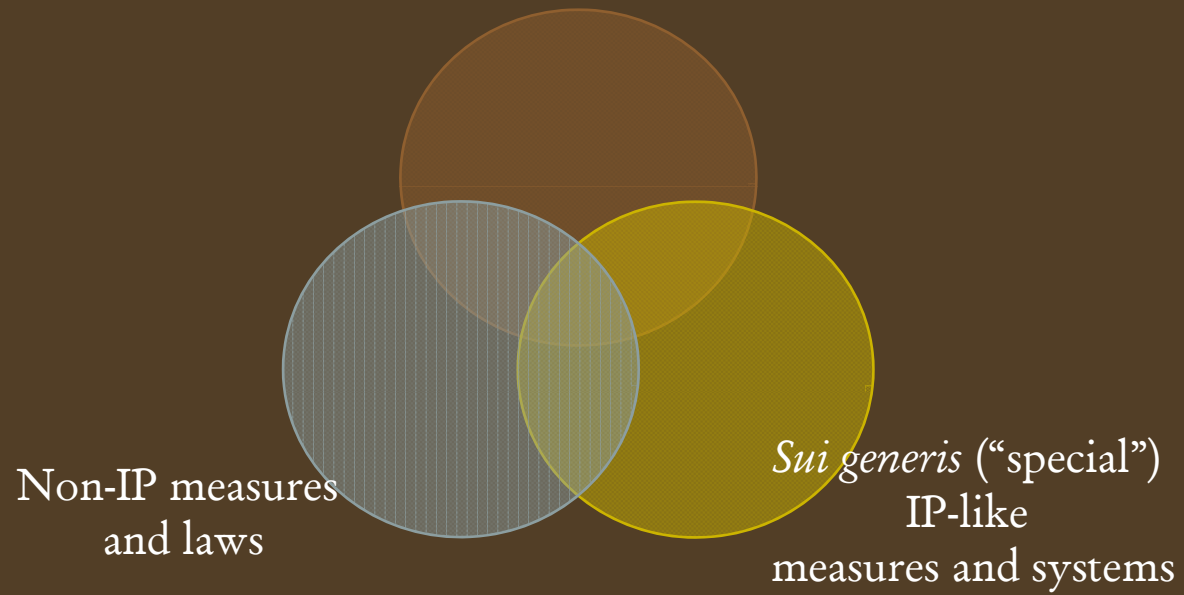
- What is “traditional” knowledge”
 - why should the works of Shakespeare be public domain but traditional cultural expressions would be protected indefinitely?
- “Traditionality” refers to the **social process** by which the cultural expressions and knowledge are created, used and shared
 - tradition-bearers continue to create and innovate
 - (traditional) innovation and creativity marked by dynamic interplay between collective and individual creativity

- Conceptual ambiguity of “protect”
 - protection of TK/TCEs *as* IP or *against* IP?
- What role for customary laws?
- Is the documentation of TK/TCEs a form of protection?

Developing IP-related strategies for TK and TCEs

- **What** do you want to protect and **why?** (what do you want to allow others to do/stop others from doing?)
- **Who** are the rights holders?
- **How** will rights be exercised and managed?

Conventional IP systems



Examples of policy initiatives

- Example,

South Africa's **Indigenous Knowledge Systems Policy**, 2004

Kenya's "**TK Task Force**"; Bolivia's TK Survey and Needs Assessment

Examples of “*sui generis*” IP measures and systems

- National: Panama 2000, Peru 1999, Portugal 2002, Costa Rica, Thailand, New Zealand, U.S.A., various copyright laws (Ghana, Nigeria, Kenya, Tanzania...)
- Regional: Pacific Islands Model, African Union Model, **ARIPO and OAPI draft regional laws**
- International: UNESCO-WIPO Model Provisions, 1982; WIPO Performances and Phonograms Treaty, 1996 (performances of expressions of folklore protected)

Traditional knowledge documentation initiatives

- India's Traditional Knowledge Digital Library (TKDL)
 - Published and codified traditional medicine
 - 36, 000 Ayurvedic formulations from ancient Sanskrit texts, available in restricted form to patent examiners in English, French, German, Spanish and Japanese

Trademarks, geographical indications



“... certification trade mark used in relation to authentic Maori creative arts has caused the Maori cultural industry to flourish.”

Maori leader, September 2005



Registered trademarks: all rights reserved

WIPO fact-finding and consultations since 1998...



- Consultation with traditional healers, herbalists and birth attendants, Mpgi Health Project, Kasabanda, Uganda, September 6, 1998

WIPO Intergovernmental Committee

- Establishment of WIPO Intergovernmental Committee in late 2000 and first session in **April 2001**
 - Member States, other organizations and NGOs
 - participation by indigenous and other local communities: speedy accreditation and **WIPO Voluntary Fund**
 - **current mandate** from WIPO General Assembly:
 - accelerated progress; no outcome excluded including possible development of an international instrument or instruments; focus on “international dimension”; no prejudice to work of other forums
 - 12th scheduled for February 2008
- Draft *sui generis* instruments developed and under discussion

Africa's leading role

- **Written submissions** to IGC (documents 1/10, 1/12, 3/15 and 6/12)
- **Comments** on IGC texts at sessions of IGC and during inter-sessional processes (including by ARIPO, OAPI)
- ARIPO/OAPI **development of draft frameworks/instruments – potential guidance for IGC?**
- Documentation of TK initiatives, including by ARIPO
- Participation in inter-regional consultations

From aspiration to norm-building. . .

- TCEs/TK/GRs now part of mainstream IP discourse:
 - IGC is a space for **new voices** and claimants in IP discourse (over 180 NGOs)
 - But - high expectations, non-IP aspirations
 - ongoing **re-evaluation** of core IP principles (“fair use”, “public interest”, “public domain”, “author”, “original”, etc.)
 - **new applications** for **core values** embedded in IP system – preventing free-riding exploitation of creativity, safeguarding distinctiveness and reputation, providing attribution and integrity

Protecting TK and Enhancing Access to Research and Learning

“There is no public domain in traditional knowledge”

(Tulalip Tribes, 2003)

“Despite pretensions as a social movement, the global humanitarianism of furthering access to knowledge has progressed with no Indigenous involvement, consent or inclusion”

(Bowrey and Anderson, 2006)

- “[the WIPO IGC should] focus and accelerate discussions with the view to achieving the Group’s aim, which was the establishment of a legally binding instrument [for the protection of TK and TCEs]”

Statement by African Group, April 2006

- “Recognizing the need for greater disclosure of knowledge and for new incentives to create and share knowledge resources without restrictions on access”

Draft a2k Treaty, Preamble

TK and a2k - Intersecting circles?

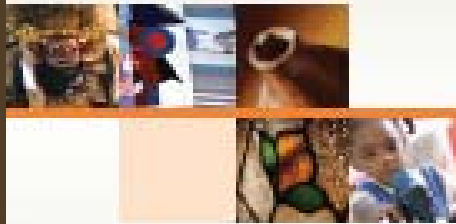
- What is to “protect” TK and TCEs?
 - Preventing access to TK and TCEs
 - Securing a positive right to exploit
 - Ensuring equitable benefit-sharing
 - Promoting research, creativity and innovation based on TK/TCEs, including by the tradition-bearers themselves
 - Preventing IP rights over TK and TCEs
- Protection of TK/TCEs need not run counter to aspirations of a2k movement

- New models for promoting and disseminating research and indigenous peoples' aspirations raise conceptually similar challenges to IP
 - “collective” creations/ “collaborative” research and innovation
 - notions of “authorship”, “originality”, “ownership”, “fair”
 - post-national solutions
 - concerns with attribution and distortion, especially of culturally sensitive materials
 - “public domain” question – “shared knowledge spaces” and an “information commons”

- Internet, software tools and rights management technologies can help indigenous peoples to:
 - preserve, promote and protect their TCEs, and
 - define and control usage rules associated with their TCEs



World
Intellectual
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Organization



Creative Heritage Project

IP Guidelines for Digitizing
Intangible Cultural Heritage



These resources could be valuable for:

- **Indigenous peoples and local communities** who wish to benefit from their cultural assets through digitizing and making available their cultural expressions while preventing their illegitimate exploitation and misuse;
- **museums, galleries, libraries and archives** who wish to devise IP-related strategies in support of their safeguarding, educational and, in some cases, income-generation objectives;
- **Governmental agencies and cultural institutions** compiling inventories of intangible cultural heritage as required by the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, 2003;
- **creators, researchers and scholars** wishing to access, study, share and re-use intangible cultural heritage.

An example

- San (Bushmen) people of South Africa, Namibia and Botswana
 - unauthorized sound recordings of San trance music – “public domain” status of trance music
 - in response, San musicians collaborate with music industry to record their own CD – in which new IP rights vest
 - commercial media contract developed by San to control sales of CD and generate royalties

Some final thoughts

- Limited **access** to foreign research and **dissemination** of indigenous African research are significant problems
- Identifying the IP dimension – part of the problem and/or part of the solution?
- Flexibilities, limitations and exceptions in existing IP systems should be taken full advantage of - challenge of implementation
- New hybrid models – no one size fits all
- A2k and TK/TCEs: some conceptual bridge-building and cross-pollination needed
- Universities have key role to play: institutional, national, regional and international policies
- WIPO stands ready to assist if so wished

Thank you

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www.wipo.int/tk