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Intellectual Property and Sustainable Development: Documentation and Registration of Traditional Knowledge and Traditional Cultural Expressions

Background Paper*

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† WIPO a specialized agency of the United Nations that promotes balanced international intellectual property (IP) protection as a means of rewarding creativity, stimulating innovation, and contributing to economic development and access to knowledge in the public interest.

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INTRODUCTION

1. The documentation of traditional knowledge (TK) and traditional cultural expressions (TCEs) raises important legal, policy and operational questions as far as their intellectual property (IP) protection is concerned. Databases, registers and inventories may indeed be used to support or complement the legal framework for the protection of TK and TCEs against misappropriation and misuse. In fact, several initiatives are underway all over the world, from State-compiled databases to community-led documentation and cultural institution collections.
2. This document touches on the IP issues that arise in documentation, registration and other information systems dealing with TK and TCEs. National, regional and international experiences illustrate key aspects and provide sundry perspectives.
3. The chief purpose of this document is to lay a basis for discussion to allow the exploration of the implications of creating and maintaining a register or database of TK and/or TCEs.

TERMINOLOGY AND BASIC CONCEPTS

What are Traditional Cultural Expressions and Traditional Knowledge?

4. TCEs are any form, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested. They are products of creative intellectual activity, including individual and communal creations. They are characteristic of a community's cultural and social identity and cultural heritage and are maintained, used or developed by that community, or by individuals having the right or responsibility to do so in accordance with the customary laws and practices of that community. They are, for instance, songs, dances, textiles, designs, handicraft, tales, performances, theater plays, or other forms of artistic expression.
5. TK includes knowledge, know how, skills, innovations, or practices that are passed between generations and that form part of the traditional lifestyle of indigenous and traditional communities who act as their guardian or custodian. It can be, for example, agricultural, environmental or medicinal knowledge, or knowledge associated with genetic resources. Typical examples include knowledge about traditional medicines, traditional hunting or fishing techniques, knowledge about animal migration patterns or water management, among thousands of others.
6. It should be noted that TK can also have an all-encompassing meaning, where it refers to both TK, as described in the paragraph above, and TCEs, one paragraph further up. TK can thus be used (albeit infrequently) as shorthand for the entire field of TK and TCEs.

What is "Documentation"?

7. Documentation consists in the recording of material so as to preserve it and make it available for others. The recording may be done through written descriptions, photographing, audio recording, filming, etc. Documentation is often different from the traditional ways of preserving and passing on TK or TCEs within communities.

8. In a TK/TCEs context, examples of documentation activities may include:
 - recording traditional songs on audiotape;
 - videotaping the preparation and administration of traditional medical treatments;
 - photographing traditional textile designs;
 - writing down spoken traditional stories;
 - making an inventory of local biodiversity by recording bird species, medicinal plants or soil microbes; or
 - digitizing an ancient manuscript.
9. Documentation may also involve recording on new media or in new languages TK or TCEs that have already been documented in traditional ways. For example, it can involve scanning ancient texts into digital copies or copying stone carvings that contain TK.

Documentation and the Public Domain

10. Importantly, a distinction needs to be made between documentation, publishing, making available to the general public, and entry into the public domain. There are concerns that, in the course of documentation, holders may be placing their TK/TCEs into the public domain, without being informed about the consequences, such as the loss of confidentiality or the destruction of novelty, in cases when TK might otherwise be patentable.
11. In fact, some documentation projects are intended just to preserve TK and TCEs for the holders themselves and for future generations, and to keep them secret, confidential or restricted. In such cases, access to the documentation is possible only by certain approved parties, such as tribal elders, community members or initiates. The purpose of the development of many databases is not to put undisclosed TK into the public domain, but to achieve multiple IP objectives, namely positive and defensive protection, and to ensure the rights of TK holders to the continued control and enjoyment of their assets.
12. On the other hand, it may be necessary to document TK that is already categorically in the public domain, but is in danger of dissipating (due to the erosion of TK systems) or needs to be further documented for a specific purpose (such as patent examination).

Benefits and Advantages of Documentation

13. Documentation is potentially useful, in the interests of both holders and the public. In particular, documentation is important because it is often the way people beyond the traditional circle, including the wider public and other holders, get access to selected elements of TK/TCEs.
14. The point of access to the TK/TCEs is pivotal in determining whether documentation is beneficial or not. It is at that stage that the holders have the greatest say in the way their TK or TCEs will be used. Different IP objectives and interests may attach to different elements or aspects of TK and TCEs, and different documentation and protection mechanisms can correspond to these interests and objectives. For instance, there may be different elements of TK or TCEs that are secret, or relate to sacred material that is to be preserved, but not revealed beyond certain members of the community; knowledge about environmental management or medical treatment that the community wishes to share with other communities, or to commercialize to

promote community industries; and knowledge of a general nature that has been expressed widely, but needs to be written down to be preserved.

15. Various stakeholders may be taking part in a documentation exercise. They may include holders, legal or policy advisors of holders, research, educational or cultural institutions, private sector partners, and government and public sector agencies. They may all have different needs and roles.

Documentation as Distinguished from Legal Protection

16. It should be emphasized that documentation does not, in and of itself, ensure legal protection for TK or TCEs. Nevertheless, the process of documentation may create rights, whether these are to restrain use by third parties or used by the holders themselves to derive economic benefit from their TK/TCEs.
17. For example, a crucial step in the documentation process is the recording, or “fixation,” of the TK/TCEs in a material form or the copying onto another medium. It is often at that point that IP rights are determined. Different forms of rights can apply. Copyright and related rights, as well as *sui generis* database protection, can be useful in relation to documented TK and TCEs. It should be noted that it is the person recording the TK/TCEs that may acquire IP rights, such as copyright in written accounts derived from their oral disclosures. For example, while a traditional song may be treated by IP law as in the public domain, recording that song creates IP rights in the recording.

The Different Meanings of “Protection” and Implications for Documentation

18. Generally, the “protection” of TK and TCEs may be understood in two different ways: it can be a synonym for *preservation* or can be restricted to *IP* protection. Documentation activities may focus on preservation or on IP protection, or on both at the same time.

Preservation and Safeguarding

19. The protection of TK and TCEs may take the shape of “conservation,” “preservation” or “safeguarding” initiatives. Broadly speaking, these essentially consist in the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance or viability. In short, the objective of protection is to make sure that the TK or TCEs do not disappear and are maintained and promoted and that they are preserved for the benefit of future generations.
20. The UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*, 2003, describes safeguarding measures as those “aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non formal education, as well as the revitalization of the various aspects of such heritage.”
21. The notion of preservation consists of two main elements. The first element is the preservation of the living cultural and social context of TK and TCEs, so that the customary framework for developing, passing on and governing access to them is maintained. The second element concerns the preservation of TK and TCEs in a fixed form, such as when they are documented.

22. Preservation may have two goals. It may aim to assist the survival of TK/TCEs for future generations of the original community and ensure their continuity within a traditional or customary framework. Alternatively, it may aim to make the TK/TCEs available to a wider public (including scholars and researchers), in recognition of their importance as part of the collective cultural heritage of humanity.³
23. Examples of documentation initiatives conducted for safeguarding and/or preservation purposes include the aforementioned 2003 UNESCO Convention and the 1972 World Heritage Convention, both described hereinbelow.

The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage

24. According to the UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*, 2003, the intangible cultural heritage (ICH) – or living heritage – is the mainspring of cultural diversity and its maintenance a guarantee for continuing creativity.⁴
25. The Convention defines ICH as the practices, representations, expressions, as well as the knowledge and skills that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.
26. Two lists have been designed under this Convention: (1) the List of Intangible Heritage in Need of Urgent Safeguarding and (2) the Representative List. These lists serve identification and safeguarding purposes.
27. The first list currently includes 12 elements *whose viability is endangered* despite the efforts of the community or group concerned. By inscribing an element on this List, the State undertakes to implement *specific safeguards* and may be eligible to receive *financial assistance* from a Fund set up for this purpose.
28. The second list, the so-called Representative List, introduces the idea of “representativeness.” This might mean that an element is, at the same time, representative for the creativity of humanity, for the cultural heritage of States, as well as for the cultural heritage of communities who are the bearers of the traditions in question. This List currently includes 166 elements. Inscription criteria are defined in the operational directives of the Convention. These elements must help enhance the visibility of the intangible cultural heritage and raise awareness regarding its importance; they must benefit from measures to promote their continued practice and transmission, and must have been nominated by States with the active and widest possible participation of the communities concerned, and with their free, prior and informed consent.

³ Overview of Activities and Outcomes of the Intergovernmental Committee (WIPO/GRTKF/IC/5/12), para. 19.

⁴ For more information, see <http://www.unesco.org/culture/ich/index.php?pg=00002>

29. In addition to these two lists, UNESCO holds a list of safeguarding programs, projects and activities that best reflect the principles and objectives of the Convention. This *register of good practices* is designed to raise *public awareness* of the importance of intangible heritage and the need to safeguard it.

The 1972 World Heritage Convention

30. UNESCO seeks to encourage the identification, protection and preservation of cultural and natural heritage considered to be of outstanding value to humanity. This goal is embodied in the *Convention concerning the Protection of the World Cultural and Natural Heritage*, or World Heritage Convention, 1972.⁵
31. One of UNESCO's mandates is to pay special attention to new global threats that may affect the natural and cultural heritage and ensure that the conservation of sites and monuments contributes to social cohesion.
32. The World Heritage List includes 911 properties forming part of the cultural and natural heritage which the World Heritage Committee considers as having outstanding universal value. These include 704 cultural, 180 natural and 27 mixed properties in 151 countries. As of June 2010, 187 States Parties have ratified the World Heritage Convention. The list serves identification and preservation purposes.
33. To be included on the World Heritage List, sites must be of *outstanding universal value* and meet at least *one out of ten selection criteria*.⁶ These criteria are explained in the Operational Guidelines for the Implementation of the World Heritage Convention which, besides the text of the Convention, are the main working tool on World Heritage. The criteria are regularly revised by the Committee to reflect the evolution of the World Heritage concept itself.
34. The selection criteria are accessible online.⁷
35. The protection, management, authenticity and integrity of properties are also important considerations. Since 1992 significant interactions between people and the natural environment have been recognized as cultural landscapes.

Intellectual Property Protection

36. The protection of TK and TCEs in the IP sense refers to their protection against some form of unauthorized use by third parties, such as reproduction or adaptation. The objective of protection, in short, is to make sure that the TK or TCEs are not used without authority or misused.

⁵ See <http://whc.unesco.org/en/about/>

⁶ Until the end of 2004, World Heritage sites were selected on the basis of six cultural and four natural criteria. With the adoption of the revised Operational Guidelines for the Implementation of the World Heritage Convention, only one set of ten criteria exists.

⁷ See <http://whc.unesco.org/en/guidelines> and <http://whc.unesco.org/en/criteria>

37. Two forms of protection may be encountered: positive and defensive protection. Multi-purpose registers, inventories, databases and lists of TK and TCEs may play a role for both positive and defensive types of IP protection.
38. As will be further developed below, the IP objectives of documentation can be manifold. Documentation can be linked to a defensive strategy, i.e., to prevent others from claiming IP rights, such as patents, over TK and TCEs. It can also assist in the development of IP rights in TK/TCEs, as a basis for a community industry or in order to prevent others from misusing TK/TCEs. The objective may also simply be to avoid culturally offensive use of TCEs or TK, such as in the USPTO Insignia Database. A documentation project can also be used to facilitate the licensing of the use of TK or TCEs to commercial partners.

Positive Protection

39. Positive protection consists in the granting of IP rights to TK/TCEs holders. The granting of a right or rights may have two objectives. First, protection is aimed at preventing unauthorized use by others. For instance, protection seeks to prevent others from gaining illegitimate access to TK/TCEs or using them for commercial gain without equitably sharing the benefits. Second, protection enables active exploitation of the TK/TCEs by the originating community itself. For instance, IP is used by the holders to build up their own enterprises based on their TK/TCEs.
40. National laws in a number of countries have established documentation systems linked to IP positive protection. These systems are based on the establishment of databases, collections or registers to maintain an inventory or catalogue of the protected TK or TCEs, including those in the public domain.
41. One example is the 2000 Panama *Law on the special intellectual property regime upon collective rights of indigenous communities, for the protection of their cultural identities and traditional knowledge*,⁸ which focuses both on folklore and TK relating to the environment.
42. The law's objective is to protect the collective IP rights and TK of indigenous communities through the registration, promotion, commercialization and marketing of their rights in such a way as to give prominence to indigenous socio-cultural values and cultural identities and for social justice, along with the protection of the authenticity of crafts and other traditional artistic expressions.
43. Technically, the law protects the collective rights of the indigenous communities; either the respective general congresses or the indigenous traditional authorities may apply for registration of these rights to the Department of Collective Rights and Forms of Folkloric Expression (no form of traditional culture can be registered for IP protection by a third party). The law confers copyright exploitation rights—which, according to Article 7, are indefinite—without requiring any fees. In an international

⁸ Available from <http://www.wipo.int/tk/en/laws/folklore.htm#special>

perspective, Article 25 indicates that other states will benefit from the same rights based on reciprocity.

Defensive Protection

44. Simply put, defensive protection consists in ensuring that third parties do not unduly acquire IP rights over TK or TCEs.

In the field of TK

45. For example, one documentation measure for defensive protection is the making available of TK which is in the public domain to patent-granting authorities for prior art searches in order to prevent the grant of any IP rights over such TK.⁹ This is precisely one of the purposes of the Indian Traditional Knowledge Digital Library (TKDL).¹⁰
46. The TKDL was initiated in 2001 as a tool to provide defensive protection of already disclosed TK. The TKDL involves the documentation, in digitized format, of public domain TK in the form of existing literature.¹¹ The database contains information on TK existing in India, in languages (English, French, Spanish, German and Japanese) and format understandable by patent examiners at International Patent Offices for the purpose of carrying out search and examination. The TKDL thus acts as a bridge between the TK information existing in local languages and the patent examiners at IPOs.
47. The TKDL is a database with a tool to understand the codified TK existing as prior art. It is aimed at patent examiners, who can search relevant TK information as part of their prior art search. The TKDL is not the prior art in itself; the books on Indian Systems of Medicine are the prior art which act as the source of information for TKDL.
48. The information on traditional medicines appears in a standard format in the TKDL. For example, formulations on Indian Systems of Medicine appear in the form of a text, which comprises the following main components: name of the drug, origin of the knowledge, constituents of the drug with their parts used and their quantity, method of preparation of the drug and usage of the drugs, and bibliographic details.

In the field of TCEs

49. In the field of TCEs, an example of a documentation system linked to defensive protection is to be found in the United States of America. The United States Patent and Trademark Office (USPTO) established in 2001 a comprehensive database for purposes of containing the official insignia of all State and federally recognized Native American tribes: the Database of Official Insignia of Native American Tribes.¹²

⁹ See for example Position Paper of the Asian Group and China (WIPO/GRKTF/IC/2/10), para. 7(b)(ii).

¹⁰ The present section is taken from <http://www.tkdil.res.in/tkdil/langdefault/common/Abouttkdil.asp?GL=Eng>

¹¹ See <http://www.tkdil.res.in/tkdil/langdefault/common/Home.asp?GL=Eng>

¹² See <http://www.uspto.gov/trademarks/law/tribal/index.jsp>

50. Under Section 2(a) of the Trademark Act, a proposed trademark may be refused registration or cancelled (at any time) if the mark consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.
51. On that basis, the USPTO may refuse to register a proposed mark which falsely suggests a connection with an indigenous tribe or beliefs held by that tribe. The database may thus prevent the registration of a mark confusingly similar to an official insignia. Such a provision provides not only protection for folklore aspects of Native American tribes, but also “those of other indigenous peoples worldwide.”
52. The database is for notice purposes and relies on self-certification. The database may be searched and thus prevent the registration of a mark confusingly similar to an official insignia. While the database does not grant rights *per se*, it does provide registered tribes with evidence of the relationship between the tribe and their insignia. All trademark applications containing tribal names, recognizable likenesses of Native Americans, symbols perceived as being Native American in origin, and any other application that the USPTO believes suggests an association with Native Americans, are examined with reference to the database by an attorney who has developed expertise and familiarity in this area.
53. The term “Official insignia of Native American tribes” refers to “the flag or coat of arms or other emblem or device of any federally or State recognized Native American tribe as adopted by tribal resolution and notified to the USPTO” and does not include words. If signs or symbols contain tribal names, recognizable likenesses of Native Americans or symbols perceived as being Native American in origin they are included in the database.
54. The legal protection is intended both to protect and preserve cultural heritage, and to prevent commercial interests from falsely associating their goods or services with indigenous peoples.

Developing Synergies between Preservation and IP Protection

55. At times, the aims of documentation for preservation and safeguarding purposes have been seen to contradict the IP-related interests of TK/TCE holders. There are concerns that documentation can make TK and TCEs freely available and lead to their misappropriation and uses in ways not intended by the holders and against their wishes. In concrete terms, documentation of TK and TCEs, particularly digitization, can make them more accessible and vulnerable to unauthorized use and exploitation, thereby undermining the efforts to protect them.
56. This may, in turn, lead to cultural erosion and loss of cultural identity.¹³ Indeed, ill-considered documentation projects may damage holders’ interests, including cultural, economic and IP interests and may inadvertently prejudice or destroy important rights

¹³ Draft Outline of an Intellectual Property Management Toolkit for Documentation of Traditional Knowledge (WIPO/GRTKF/IC/4/5)

and options. There is therefore a need to strategically address and manage the risks and IP issues attached to documentation, be it recording, digitization or dissemination.

57. Nevertheless, preservation/safeguarding and IP protection are not mutually exclusive. Having different objectives, initiatives established for cultural heritage preservation purposes and different kinds of IP registers may be implemented in conjunction with one another and help promote each other. Databases used for defensive protection may be, for example, very important for preserving threatened cultures and to safeguard against the disappearance of TK and TCEs.
58. Clarifying IP issues and options in relation to safeguarding cultural heritage should help strengthen synergies between the protection of cultural documentation and its preservation, while contributing towards the respect for traditional cultures. Concrete examples of taking advantage of possible synergies are the Fiji Cultural Mapping Project and the Guatemala Cultural Heritage Protection Law.

Fiji's Indigenous Intellectual Property Rights and Cultural Mapping Project

59. In 2004, Fiji began a Cultural Mapping Program for its 14 provinces.¹⁴ Given the traditional medium of "verbal relay" in which TK and TCEs are being passed down from generation to generation, documentation is the first step envisaged to capture, analyze and store cultural data from Fiji.
60. The main objective of this initiative is to collect and document aspects of Indigenous Fijian culture such as ceremonies, dialects, and heritage sites which stories are well and alive in local villages. With the continual loss of one's grasp of the local cultural ideals and value, a team of researchers is tasked with the documentation, edition and input of information into a database for future generations. The program foresees the research of all the various *vanua* around Fiji before knowledgeable elders pass away.
61. The program's primary focus is on documentation of TK and TCEs, with a wider view on protection, promotion and revitalization. The establishment of a National Inventory for Traditional Knowledge and Expressions of Culture and its subsequent protection was initiated with the following issues in mind:
 - the preservation and safeguarding of tangible and intangible heritage;
 - the promotion of the value of cultural diversity;
 - the respect for cultural rights;
 - the promotion of tradition-based creativity and innovation as ingredients of sustainable economic development.
62. In addition, the identification of true or original custodians or to various *iTaukei* knowledge in the area of performing arts, crafts, and various TCEs is part of the long term goal of the exercise, that includes the development of a Model Law to ensure protection from exploitation or commercialization.

¹⁴ The present section is taken from <http://www.fijianaffairs.gov.fj/IFLC%20IPR.htm>

63. The program was the first of its kind to be developed in the Pacific. It was developed to cater to specific needs in documentation of *iTaukei* cultural data. The program has become popular in cultural circles both at the regional and international level. Fiji is the first to carry out such a comprehensive exercise which includes mapping and creation of a tangible and intangible cultural heritage inventory.
64. Fiji is currently in negotiation with the Secretariat of the Pacific Community (SPC) for release of specifics of the database for development of a standard database for all countries in the Pacific. In addition, the Papua New Guinea Cultural Commission sent one of its officers to be on a three week attachment at the institute to study and find ways in which Fiji's Cultural Mapping program can be of assistance to Papua New Guinea.

The Guatemala Cultural Heritage Protection Law

65. Guatemala's *Cultural Heritage Protection Law* extends protection to intangible cultural property that is not protected under the existing IP right laws of Guatemala. Any person owning a cultural good may register it in the Cultural Goods Registry (which is part of the Ministry of Cultural Affairs) in order to benefit from indefinite protection, while still being responsible for its conservation. Civil and criminal remedies are available, which are generally enforced by the attorney general.

REGISTRATION ISSUES IN EXISTING INTELLECTUAL PROPERTY SYSTEMS

66. The existing IP system can play a part in protecting TK and TCEs, depending on which elements are to be protected and why precisely they are to be protected. For instance, trademarks and geographical indications can be helpful in protecting the reputation associated with TK and TCEs. One advantage is that these rights can be enforced internationally.
67. Several existing IP systems rely, in part or totally, on a registration mechanism. For example, there are registration systems for patents, trademarks, appellations of origin, industrial designs, etc.
68. To give an idea of how current negotiations operate in the field of registration within an existing IP system, two relevant examples are developed below. First, developments in the role of registration and documentation in the field of copyright are described. Second, the World Trade Organization (WTO) negotiation on a register for geographical indications is summarized.

Copyright Registration and Documentation

69. Formalities, including registration, are prohibited for copyright protection. The Berne Convention for the Protection of Literary and Artistic Works relies on the principle of formality-free protection, reflected in Article 5(2), according to which the enjoyment and the exercise of copyright are not subject to any formality.

Voluntary Registration and Deposit Systems under Copyright

70. While respecting the "formality-free" principle, several countries have voluntary national registration systems for copyright and related rights. In this view, registration facilitates the exercise of copyright, by providing right owners with a simple and effective means to prove authorship and/or ownership of rights. Voluntary registration

varies from one country to another; some have systems of registration (where the work is actually deposited) and others have systems of recordation (where only declarations are submitted, without deposit of the work).

71. National registration and recordation systems often hold valuable information on creativity, both from a legal and economic standpoint. A copyright registry can make available certificates of registration, certified copies of registry documents that provide important information on a work or other subject matter, its author or, through a documented chain of transfer, its present ownership. Registration can also help to delimitate the public domain, and facilitate access to creative content for which no authorization from the right owner is needed. The information contained in national registries may also serve the public interest by providing a source of national statistics on creativity and culture. Finally, national registries may constitute a repository of cultural and historical heritage, as they represent collections of national creativity, including works and other creative contributions.
72. In recent years a number of issues have been raised concerning registration of copyright in the digital environment. With the advent of digital technology, the flow of content and multiplying creators, often completely unidentified, justifies a renewed interest in available and accurate ownership data and therefore in documentation and recordation under different forms.
73. Beyond its conventional functions, registration can play an important role in addressing some of the problems related to the use of creative content, including in regard to works whose copyright owner cannot be identified or located, so-called “orphan works.” Likewise, identification of a work can be complex, as digital technology allows content to be recast into a variety of forms. While there are many ways to locate a copyright owner, it is clear that, for countries where a registration system exists, search of registrations can help in both locating the copyright owner and in assessing whether sufficient efforts have been made to that effect.
74. Moreover, the role of Rights Management Information (RMI) has potential for identifying and locating content. RMI is increasingly used in the networked environment and helps users to customize their searches, find content, and enter into licensing agreements with right owners. With the support of RMI, a number of private entities collect data on copyright status and ownership for collective management societies and private registries. Different approaches to the data collected and its availability are followed. For example, collective management organizations collect data for their members with the objective of managing the rights entrusted in them. Conversely, other entities undertake data collection as a commercial operation for third parties.
75. The WIPO Committee on Development and Intellectual Property has approved, as a way to implement the WIPO Development Agenda, a Thematic Project on Intellectual Property and the Public Domain, which provides *inter alia* for the elaboration of a Survey on Voluntary Registration and Deposit Systems under Copyright.¹⁵ This covers the use of copyright documentation, including in the form of RMI, by entities such as collective management organizations or the Creative Commons system. The project

¹⁵ See http://www.wipo.int/copyright/en/general/public_domain.html

examines how these systems identify content that is protected or in the public domain. Under the same Development Agenda project, a Conference on Copyright Documentation and Infrastructure will be organized following completion of the two Surveys and other initiatives.

A Proposed WIPO International Music Registry

76. The amazing growth of the Internet as the delivery mechanism for music over the last decade has rattled the architecture of music rights management, which was not designed to facilitate use of music in the digital world. To keep up, rights management has to be made faster, easier, and simpler for those who want to use music and to find out who owns what rights in music—and this, throughout the world. What this points to is the need to create an international system that ties together the different rights-management systems used in different countries.
77. As a first step, WIPO is facilitating a dialogue in the music sector to look at the challenges it faces in the digital environment and to define the purpose, scope and main features of a proposed International Music Registry (IMR).
78. The WIPO IMR project is a collaboration of the worldwide music sector aimed at facilitating licensing in the digital environment by providing easy access to information about musical works and sound recordings. An accurate and reliable registry of information about the different rights in different territories related to musical works, sound recordings and music videos can indeed support a healthy system for digital music.
79. The IMR would help right owners market their creations and help users rapidly locate and pay for the content they wish to use. It would be available to all as a basis for all types of business models as long as they are based on content that can be accurately identified and thus accessed and remunerated in a secure and fast way.
80. Both development and administration of the IMR would be organized in close association with right owners. Participation in the IMR would be voluntary, consistent with the Berne Convention's rules against mandatory copyright formalities. Governance models would reflect the control of right owners over data relating to their content and the voluntary character of the registry.
81. Any controversy regarding accuracy in data registration could be dealt with expeditiously by a dispute resolution service that WIPO can develop specifically for the project. The Arbitration and Mediation Center in WIPO has a record of success in developing and running dispute resolution mechanisms specifically tailored for different sectors and needs, such as in the field of domain names. The resolution of controversies could take place electronically, thus providing a fast and reliable solution to disputes as they arise.

A Proposal for Creating a Multilateral Register at the WTO

82. The international protection of wines and spirits named after geographical locations is under negotiation at the World Trade Organization (WTO) as part of the Doha Round. Discussions on the GI register fall under a Special Session of the Council on TRIPS. Particularly, legal effects and costs of a register for such wines and spirits are currently being addressed.

83. Geographical indications (GIs) are place names, or words associated with a place, used to identify the origin and quality, reputation or other characteristics of products. They receive protection under the Agreement on Trade-Related Aspects of Intellectual Property Rights (The TRIPS Agreement). Famous examples include “Champagne,” “Tequila,” “Darjeeling” or “Roquefort.”¹⁶
84. Two main issues are being negotiated at the WTO TRIPS Council. The first concerns the creation of a multilateral registration system for GIs for wines and spirits, which are given a higher level of protection than other GIs. The second concerns the possible extension of the higher level of protection beyond wines and spirits,¹⁷ and is being advocated by the historic proponents of the GI register, such as the European Union and Switzerland. The GI register extension has been linked to a separate proposed amendment to TRIPS Agreement, Article 27.3(b), to include a mandatory disclosure requirement of the source of genetic resources and traditional knowledge in patent applications. The issue is linked to a TRIPS Council discussion about the relationship to the United Nations Convention on Biological Diversity (CBD).
85. Three proposals are on the table, representing the two main lines of argument in the negotiations and some proposed compromises.¹⁸ The first proposal is referred to as the Joint Proposal and proposes the setting up of a database rather than a register, only for wines and spirits. The so-called joint proposal group, composed of countries such as the Argentina, Australia, Canada, Japan, Mexico, South Africa, and the United States, advocate a non-binding register and no extension of protection to other products than wines and spirits. They also refuse to discuss the CBD component in this round of negotiations. This group simply proposes a decision by the TRIPS Council to set up a voluntary system where notified GIs would be registered in a database. Those governments choosing to participate in the system would have to consult the database when taking decisions on protection in their own countries. Non-participating members would be “encouraged” but “not obliged” to consult the database.
86. A second proposal envisions a register that every WTO member would have to take into consideration and calls for an amendment of TRIPS to include mandatory requirements for the disclosure of origin of genetic resources and TK in patent applications, as well as an extension of the higher level of protection to GIs for all products. The proposal states that registration of a GI establishes a rebuttable presumption that the term is to be protected in other WTO members—except in a country that has lodged a reservation within a specified period, e.g., when a term has become generic or when it does not fit the definition of a GI.

¹⁶ The present section is taken from http://www.wto.org/english/tratop_e/trips_e/gi_e.htm. This backgrounder has been prepared by the Information and Media Relations Division of the WTO Secretariat to help the public understand the main issues. It is not an official interpretation of the WTO agreements or members' positions; and because of the need to simplify and summarize, it cannot cover all nuances or all points of the debate in detail. These can be found more precisely in the documents cited. See also Intellectual Property Watch articles: “WTO GI Discussions Gather Speed, Parties Watchful Until Negotiations”, <http://www.ip-watch.org/weblog/2011/02/15/gi-discussions-gather-speed-parties-watchful-until-negotiations/> and “No Toast Yet To WTO Consensus On Wines And Spirits Geographical Indications”, <http://www.ip-watch.org/weblog/2011/04/21/no-toast-yet-to-consensus-on-wines-and-spirits-geographical-indications/>

¹⁷ Article 23 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) provides a higher or enhanced level of protection for geographical indications for wines and spirits: subject to a number of exceptions, they have to be protected even if misuse would not cause the public to be misled.

¹⁸ This information, which is current as at May 10, 2011, is an informal summary of the relevant positions and proposals.

87. A third proposal was submitted as a compromise. In this proposal, the system would be entirely voluntary and the scope of participation would be revisited after four years of operation of the system. Here, a registered term would enjoy a more limited presumption than under the second proposal, and only in those countries choosing to participate in the system.
88. A draft composite text compiles all the proposals, in mostly bracketed text, reflecting areas of lack of agreement. The six focal and contentious points of discussion are notification (mandatory elements, optional elements, format and other aspects), registration (“formality examination”, reservations, content of registrations, form of register), legal effects and consequences of registration (in participating members, in non-participating members, in least-developed country members), fees and costs, special treatment for developing countries, and lastly, participation. At the heart of the debate are a number of key questions, which might shed light on a discussion of a register for TK and TCEs. If the register is to serve the purpose of “facilitating protection”, what legal effect, if any, would a registered GI have? And to what extent, if at all, should the effect apply to countries choosing not to participate in the system? There is also the question of the administrative and financial costs for individual governments and whether they would outweigh the possible benefits.
89. In the spring of 2011, WTO Director General Pascal Lamy held informal consultations on the register extension and on the relationship between the CBD and TRIPS. According to the Lamy report, no convergence was found on the specific question of extension of Article 23 protection to all products, as trademarks were put forth as existing legitimate forms of protecting GIs. On the CBD issue, the report said members “have agreed to the need to take steps to avoid erroneous patents, including through the use of databases, as appropriate, to avoid patents being granted on existing TK or genetic resources.” However, members “continue to differ on whether the formulation and application of a specific tailored disclosure mechanism” would be useful and effective in “ensuring that the patent system promoted CBD objectives.”
90. Negotiations are ongoing and formal meetings may take place before or after the next regular TRIPS Council meetings on 7-8 June and 25-26 October, 2011.

SUI GENERIS PROTECTION: WHAT ROLE FOR REGISTRATION AND DOCUMENTATION?

Conditions of Protection: the Place and Nature of Registration and Documentation

91. Databases and documentation raise controversial issues when it comes to protecting TK and TCEs from misuse and misappropriation. Various concerns often surface in discussions about databases, either international or national.
92. When designing a specific framework of protection for TK and TCEs, a key choice has to be made concerning formalities, including registration and documentation. In making this choice, three approaches may be followed. The protection framework may:
- provide that protection does not require formalities;
 - establish registries or databases, but not link them to the acquisition of rights; or
 - expressly require registration of the TK or TCE as a condition of protection.

93. According to the first approach, protection is automatic and is granted without formalities, following the copyright model. As noted above, the Berne Convention expressly prohibits member countries from subjecting the “enjoyment and exercise of [...] rights” to any formality.¹⁹ This option is currently the one favored in the text being negotiated in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), entitled *The Protection of Traditional Cultural Expressions: Draft Articles of the Open-Ended Informal Drafting Group of IGC 17*. Article 7 currently states: “As a general principle, the protection of traditional cultural expressions shall not be subject to any formality.” This point is developed further below.
94. According to the second approach, registration is available but merely has a declaratory effect, an informative function. Proof of registration may be used to substantiate a claim of ownership, custodianship or other type of control. A certificate of registration may serve as presumptive, albeit rebuttable, proof that the facts registered are valid. A register may put third parties on notice that a particular country or community asserts an interest in a particular form of TK or TCE. However, while the register may serve to deter third parties from misappropriating and misusing the TK/TCEs, their registration does not in and of itself amount to the recognition of enforceable rights.
95. According to the third approach, registration is a requirement of protection. Registration thus creates rights.

Major Points of Discussions on Documentation of TK and TCEs

96. Fundamentally, it should be determined at the outset who can apply for registration or who can decide if and which information can be included in a database. A commonly voiced claim is that databases should be created after direct consultation, with the free, prior and informed consent of the holders of the TCEs/TK, and on mutually agreed terms. The involvement of the holders, and the recognition of their aspirations, is often put forth in discussions about the creation and maintenance of registers and databases, especially concerning the kind of information to be documented and stored.
97. One of the questions that arise is the determination of the manner in which applications for registration are made. For example, what kind of information and representations of the TK or TCEs are required to provide? In which form? In which language(s)? The objective and purpose of a documentation exercise may guide the type of information that is necessary to include; information systems set up for positive or defensive protection are likely to contain different kinds of information. One should also bear in mind that a database, no matter how extensive, could probably never be exhaustive and could perhaps never capture all of the details of the TK or TCEs, given the complexity of customary laws, the secrecy and the sacredness of a lot of the subject matter.

¹⁹ See Berne Convention, Art. 5(2). The TRIPS Agreement and the WCT, as well as the WPPT, incorporate this provision.

98. Furthermore, depending on the way the system is designed, there could be concerns about the artificial categorization of TK and TCEs. For instance, documentation could create a false impression of a hierarchy in the documented material, which could have the effect of privileging some over the other. It could also create a false distinction between the material that is documented, which could benefit from protection, and that which is not.
99. A germane consideration pertains to the accessibility and affordability of the registration process. On the flipside, the budgetary implications of setting up and maintaining a register or database are substantial and are often put forth as a serious matter for consideration. The administrative costs are of course an issue, but so are the important investments in time and human resources that the development, building and management of databases represent. The entity paying may be the one who also manages the information system, but this is an important policy consideration, which has ramifications beyond funding questions.
100. It also has to be determined to what extent and for what purposes applications are examined by the registration office: is the examination purely superficial or does it comprise a substantive aspect? Likewise, how is the validity and authenticity of applications for registration tested?
101. Moreover, the treatment of competing registrations of the same or similar TK/TCEs has to be determined. Where the holders of TK/TCEs are living on the territories of different countries, there are risks that a national registration system or database fails to take all concerns into consideration, not to mention the practical difficulties in consolidating information in different languages and from different sources. At the international level, if more than one country attempts to register the same or similar TK or TCEs, how and on what basis can the dispute be resolved? Could appeals be lodged against any registration? Could joint registrations by more than one applicant be envisaged? One further question worth examining in detail is the legal effect a national register can have in the absence of any special protection for TK or TCEs at the international level.
102. The use of a single centralized, universal database or registration system is perhaps unachievable. But should several national databases be put in place, their interconnectedness or interoperability should be ensured, notably through the design of compatibility interfaces, in particular concerning the standards used. The possibility of "tapping into" national or community databases has been raised in various instances.
103. The public disclosure and release of confidential or sensitive information in databases is also problematic and many holders have uttered their preoccupations in that respect. It is worth investigating whether the information contained in a register should be publicly accessible and, if so, on what terms. One danger is that registering TK/TCEs in open-access registers provides increased access by third parties, without increasing holders' rights in their TK/TCEs. In the absence of strong positive protection, databases may aggravate misappropriation, rather than making it a useful instrument for defensive protection. The security system designed to prevent any kind of illicit access to the data should include components for the authentication of users. But at the same time, publicly accessible information can provide useful precision, transparency and certainty to third parties about which TK/TCEs are protected and for whose benefit.
104. One last important issue is to ensure that the register respects and responds to the dynamic and evolving nature of TK and TCEs and guarantees that their fixation in a

register does not stifle their evolution and vitality. One of the major limitations of databases is that, unless updated constantly or periodically, they can render their contents static and therefore an unfaithful representation of the TK or TCEs they intend to hold.

Current Status at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)

105. Negotiations on the protection of TK and TCEs are taking place internationally at WIPO in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC).
106. Draft texts for the *sui generis* protection of TK and TCEs are currently under negotiation. The provisions seek, *inter alia*, to respond to the needs of safeguarding and to the specific IP aspects of registering and documenting TCEs and TK.
107. In September 2009, WIPO Member States renewed the mandate of the IGC, adopting a clearly defined work plan and terms of reference to guide the Committee's work over the next two years. They agreed the IGC would undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) that will ensure the effective protection of genetic resources, TK and TCEs.

Negotiations on TCEs

108. As mentioned above, Article 7 of *The Protection of Traditional Cultural Expressions: Draft Articles* (document WIPO/GRTKF/IC/19/4) currently states: "As a general principle, the protection of traditional cultural expressions shall not be subject to any formality." This means that registration of TCEs cannot be a condition for their protection. Protection is automatic.
109. A former draft of Article 7, as contained in the *WIPO Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore*²⁰ combined both options of automatic protection and registration. It stated that, as a general principle, the protection of TCEs should not be subject to any formality; TCEs should be protected from the moment of their creation.
110. The idea behind that choice was that the acquisition and maintenance of protection should be easily and practically available. Excessive administrative burdens had to be avoided, bearing in mind the hardship that would be placed on holders who would fail to comply with the registration formalities.
111. However, that Article 7 also provided for the particular case of *specific* TCEs of *particular cultural or spiritual value or significance* and which should be *registered* with

²⁰ The draft provisions are available at http://www.wipo.int/export/sites/www/tk/en/consultations/draft_provisions/pdf/tce-provisions.pdf (last visited January 24, 2011).

a competent authority²¹ by the relevant community.²² These TCEs would receive the strongest protection: prior informed consent.²³

112. Such registration was optional: it was a matter for decision by the relevant TCE holders. Should the holders elect not to do so, another form protection would still be available. Indeed, some holders prefer that their TCEs not be recorded or documented because of the risks of disclosure of secret TCEs. Therefore, registration was applicable only for TCEs which are known and publicly available. Secret TCEs did not need to be registered, because they were separately protected under a different regime that took into account their undisclosed nature.
113. Under those WIPO *Draft Provisions*, registration was declaratory and did not constitute rights. Nonetheless, entry in the register presumed that the facts recorded are true, unless proven otherwise. Any entry as such did not affect the rights of third parties.
114. Uncertainties or disputes as to which holders were entitled to registration could be resolved by using customary laws and processes, alternative dispute resolution and existing cultural resources, such as cultural heritage inventories, lists and collections like those established under the UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage, 2003*. This UNESCO framework is described further above in this note.

Negotiations on TK

115. Article 8 of *The Protection of Traditional Knowledge: Draft Articles* (document WIPO/GRTKF/IC/19/5) states:

Option 1

8.1 The protection of traditional knowledge should [shall] not be subject to any formality.

Option 2

8.1 The protection of traditional knowledge requires some formalities.

²¹ While initially national registers or other notification systems would be put in place, a regional or international organization could conceivably administer such a registration or notification system. Such an international system of notification/registration could perhaps draw from existing systems such as Article 6*ter* of the Paris Convention or the registration system provided for in Article 5 of the Lisbon Agreement for the International Registration of Appellations of Origin, 1958.

²² Article 7 goes on to say that, if such registration or notification involves the recording or other fixation of the TCEs concerned, any IP rights in such recording or fixation should vest in or be assigned to the relevant community. Indeed, fixing in material form TCEs which would not otherwise be protectable, establishes new IP rights in the fixation and these IP rights could be used indirectly to protect the TCEs themselves.

²³ This provision draws broadly from existing copyright registration systems, the Database of Native American Insignia in the United States of America, the Panama Law, 2000, the Andean Decision 351, and the Peru Law, 2002 (see generally WIPO/GRTKF/IC/7/3).

[8.2 *In the interests of transparency, certainty and the conservation of traditional knowledge, relevant national authorities may [should/shall] maintain registers or other records of traditional knowledge.]*

116. In the legal protection of know-how and innovation, there are trade offs between legal predictability and clarity on the one hand, and flexibility and simplicity on the other hand. A registration-based system provides greater predictability and makes it easier in practice to enforce the rights. Nonetheless, it can mean that the TK holders need to take specific legal steps, potentially within a defined timeframe, or risk losing the benefits of protection; this may impose burdens on communities who lack the resources or capacity to undertake the necessary legal procedures. A system without formalities has the benefit of automatic protection, and requires no additional resources or capacity for the right to be available.
117. Article 8 clarifies that the general safeguard against misappropriation would not be conditional on registration of TK in databases, registries or any other formalities. This reflects the concerns which some have expressed about the use of registry and database systems.
118. However, a number of countries have established *sui generis* systems which provide for registration as a condition of acquiring exclusive rights over registered TK. Therefore, paragraph 2 clarifies that such additional protection, established subject to national law and policies, may require formalities. It thereby recognizes the diversity of existing protection systems which include registration-based systems, but does not prescribe any approach which requires formalities. In addition, it clarifies that appropriate registration or recordal should not jeopardize or compromise the rights and interests of TK holders in relation to undisclosed elements of their TK.

COMMUNITY-LED CULTURAL DOCUMENTATION

119. Many communities are actively exploring how best to protect their heritage while at the same time preserving it for future generations. In strengthening the capacity and promoting the interests of TK and TCE holders, many successful documentation projects make use of databases and register as operational mechanisms for defensive and positive protection.²⁴
120. New technologies provide communities with fresh opportunities to document and digitize TK and TCEs, meeting their desire to preserve, promote and pass on their cultural heritage to succeeding generations. Yet, as mentioned above, these new forms of documentation and digitization can leave this cultural heritage vulnerable to unwanted exploitation.
121. WIPO's Creative Heritage Project is developing practical tools for managing IP options when documenting, recording and digitizing cultural heritage.

²⁴ See, e.g., Technical Proposals to the WIPO Intergovernmental Committee on IP and Genetic Resources, Traditional Knowledge and Folklore, (WIPO/GRTKF/IC/4/14).

122. As part of this project, WIPO has established a database of IP protocols, codes of conduct, contracts and strategies for the use of TCEs and TK established by indigenous and local communities. These may inspire other communities to foster balanced relationships with third parties, such as researchers and the private sector. WIPO also makes available an interview with ethnomusicologist Dr. Wim Van Zanten on prior and informed consent in ethnomusicology.²⁵
123. More particularly, WIPO has established a cultural documentation and IP management training program for communities, in partnership with the American Folklife Center and the Center for Documentary Studies in the United States of America. The program responds to the utility of technology for communities and the need to empower them to make informed decisions about how to manage IP issues in a way that corresponds with their values and development goals. The primary goal of the program is to provide community members with the practical skills and technical knowledge needed in the fields of cultural documentation, archiving and IP management, which would enable them to record, archive and manage access to their own cultural heritage. The program is designed to assist communities to document their own cultural traditions, archive this heritage for future generations and manage their IP interests when doing so, by developing their own IP policies, protocols and technology-based tools.

DOCUMENTATION, INTELLECTUAL PROPERTY AND CULTURAL INSTITUTIONS

124. Museums, archives, libraries, galleries, anthropologists and ethnologists play an invaluable role in preserving the world's cultural heritage. By recording and making available the music, arts, knowledge and traditions of indigenous communities, such institutions help to spread a broader understanding and respect for different cultures. However, some communities voice concerns that sometimes activities by museums and cultural specialists do not take adequate account of their rights and interests, and that documenting and displaying, say, a traditional song or a tribal symbol, make them vulnerable to misappropriation. Indigenous peoples also cite numerous cases in which commercial users have exploited cultural heritage collections without seeking the consent of the relevant community, let alone acknowledging the source or sharing the commercial benefits.
125. Cultural institutions seek to strike a balance between the preservation and the protection of cultural documentation. This introduces questions about the role of IP law, policy and practice in activities aimed at preserving cultural heritage. Many institutions already have policies on research, collection and preservation, as well as codes of ethics. Indigenous declarations also address these questions. Few existing resources, however, address IP issues in detail or questions related to the treatment of TK and TCEs. WIPO has made available a database²⁶ of such institutional protocols, policies, codes and practices as well as and standard agreements relating to the recording, digitization and dissemination of intangible cultural heritage, with an emphasis on IP issues. The database also contains surveys of experiences in several countries.

²⁵ See http://www.wipo.int/multimedia/en/cultural_heritage/wim_van_zanten/index.html

²⁶ See www.wipo.int/tk/en/folklore/culturalheritage/

126. WIPO has also published a resource book, entitled *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives*, on IP issues for museums, archives, libraries and other cultural institutions, which specifically deals with the management of IP in relation to TK/TCEs collections.²⁷ This publication offers IP information for cultural institutions and presents examples of best practices from around the world, drawn from various institutional and community experiences. It also includes a set of practical guidelines for indigenous and local communities on developing IP protocols. Such a resource may also benefit institutions establishing inventories of intangible cultural heritage, as provided for under the recently-adopted UNESCO *Convention on the Safeguarding of the Intangible Cultural Heritage*.

[End]

²⁷ This publication is available on the WIPO website in PDF format:
<http://www.wipo.int/export/sites/www/tk/en/publications/1023.pdf>