

International Chamber of Commerce

Comments on WIPO paper: “The protection of traditional knowledge: revised objectives and principles”

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Summary

The discussion on protection of Traditional Knowledge (TK) has given rise to two documents, considered at the ninth meeting of the Intergovernmental Committee (IGC). One (WIPO/GRTKF/IC/9/5: *The Protection of Traditional Knowledge: Revised Objectives and Principles*) deals with objectives and principles for the protection of TK: the second (WIPO/GRTKF/IC/9/INF/5: *The Protection of Traditional Knowledge: Updated Draft Outline of Policy Options and Legal Mechanisms*) with policy options and legal mechanisms.

ICC supports initiatives to explore options for the protection of traditional knowledge, whether within the existing intellectual property framework or through development of new types of rights. However, ICC believes it is premature to take definitive positions on TK protection before having a clearer idea of what is included in this concept and how it is defined. Only when these points are clarified can an informed judgement be made as to whether there is a need for TK protection at an international level and what the scope of any such protection should be. To date, ICC has not reached any conclusion on these questions. ICC has raised a number of questions about TK protection in its paper “Protecting Traditional Knowledge”(12 January 2006)¹. These questions for the most part have not yet been adequately addressed by the IGC.

ICC's view is that objectives, principles, policy options and legal mechanisms form a natural hierarchy. Objectives must be broadly agreed before principles are settled: from these flow the policy and laws to implement them. In ICC's view, more discussion of objectives and a much greater measure of agreement about them is required before progress can be made. As ICC has maintained since the Committee was set up, the objectives to be reached must largely determine the form of the laws to implement them. Until consensus is reached on objectives, it is vain to expect progress. For these reasons, ICC limits its comments to the policy objectives of document WIPO/GRTKF/IC/9/5, and feels it is premature to update other sections of the document.

¹http://www.dcpo.biz/uploadedFiles/ICC/policy/intellectual_property/Statements/Protecting_Traditional_Knowledge.pdf

Objectives

Document WIPO/GRTKF/IC/9/5 lists sixteen possible policy objectives, as follows:

- (i) Recognize value
- (ii) Promote respect
- (iii) Meet the actual needs of traditional knowledge holders
- (iv) Promote conservation and preservation of traditional knowledge
- (v) Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems

- (vi) Support traditional knowledge systems
- (vii) Contribute to safeguarding traditional knowledge
- (viii) Repress unfair and inequitable uses
- (ix) Concord with relevant international agreements and processes
- (x) Promote innovation and creativity
- (xi) Ensure prior informed consent and exchanges based on mutually agreed terms
- (xii) Promote equitable benefit-sharing
- (xiii) Promote community development and legitimate trading activities
- (xiv) Preclude the grant of improper intellectual property rights to unauthorized parties
- (xv) Enhance transparency and mutual confidence
- (xvi) Complement protection of traditional cultural expressions

It is not in every case clear from the titles alone what is meant by each objective, but each is further elaborated subsequently - still, it may be said, not always fully clarifying what is meant. The listed objectives are not of equal weight: they overlap in some degree, but they may also conflict. The commentary says "The listed objectives are not mutually exclusive but rather complementary to each other. The list of objectives is non-exhaustive... the Committee members may supplement the current list with additional objectives.." (2nd paragraph, page 6). It is not clear to what extent they are generally accepted by members of the Committee. In ICC's view, the list as it stands is unsatisfactory. It must be clarified, supplemented and, most importantly, prioritised. Without a substantial measure of agreement on the underlying objectives, further discussion will be fruitless.

Priorities

The Intergovernmental Committee meets at WIPO because it recognizes that rights for TK, if implemented, will have strong affinities with existing intellectual property rights. WIPO's expertise is in IP laws. This influences the objectives, and how they should be selected. Compare TRIPs, and in particular, Article 7 (Objectives).

" Article 7

Objectives

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

As with IP rights, traditional knowledge rights cannot be absolute - they must balance the interests of holders with those of the rest of society. Knowledge has value, including, though not limited to, economic value. However, economic value depends on the balance of supply and demand- once knowledge is public, its supply is difficult to control. The presumption has to be that public knowledge is available to all unless made subject to specific prior rights of which the public have notice. Thus, if it were to be accepted that holders of traditional knowledge have the right to control its use, a balance of obligations requires holders to assume corresponding responsibilities. This may imply that holders have an obligation (like that of inventors who seek patents) to disclose their knowledge to the public, both so that the public know what is protected and how they may (subject to the holder's rights) make use of and derive benefit from it.

ICC believes that any implementation of TK rights must involve a balance of rights and obligations. This provides a criterion for organizing, prioritising, amending and supplementing the objectives suggested in document WIPO/GRTKF/IC/9/5.

Commentary on listed objectives

- Objective (i) *'Recognising value'* should be understood as directed primarily to economic value, since other values are not directly influenced by IP laws. So limited, (i) is an important objective, with the potential (if fully realized) to improve the economic circumstances of indigenous peoples and promote development.
- Objective (ii) *'Promoting respect'* is more tenuous. This might be the happy result of legislation, but it is difficult to legislate directly for respect, particularly in laws of this kind.
- Objective (iii) *'Meet the actual needs of traditional knowledge holders'* is an irreproachable objective, but begs the question of what these needs are. Further explanation (document WIPO/GRTKF/IC/9/5 Annexe, p3) indicates that these are seen as contributions to their welfare and reward for their contributions, together with respect for their rights as holders - and thus largely coincide with objectives (i) and (ii).
- Objective (iv) *'Promote conservation and preservation of traditional knowledge'* aligns closely with objectives (vi) *'Support traditional knowledge systems'* and (vii) *'Contribute to safeguarding traditional knowledge'*, and must be considered a subsidiary objective, though important. It is subsidiary because the interest of the public at large is not in supporting TK systems as such, but only in supporting those that offer benefits capable of being generally shared.
- Objective (v) *'Empower holders of traditional knowledge and acknowledge the distinctive nature of traditional knowledge systems'* comes in two parts: *'Empowerment'* will follow from objective (i)

'Recognising value'. As to *'acknowledge the distinctive nature of traditional knowledge systems'*, if this means defining enforceable legal rights while acknowledging the distinctive nature of TK, it is not so much an objective as a necessary restriction on the form rights can take.

- Objective (viii) *'Repress unfair and inequitable uses'* goes with (xiv) *'Preclude the grant of improper intellectual property rights to unauthorized parties'*, both proper and important objectives, but requiring a common understanding of what constitutes unfairness, and when IP rights are to be considered improper. For example, it must be wrong to acquire patent rights claiming known uses of TK but there is sharp disagreement about whether patent rights may be claimed on improvements of such known uses (as ICC believes should generally be the case), or whether the permission of the holder is required. Such questions can only be resolved when there is agreement on the objectives. Thus, it is premature to address what constitutes unfair or inequitable uses, or improper intellectual property rights, before agreeing objectives.
- Objective (ix) *'Concord with relevant international agreements and processes'*, like (v) (second part), is not an objective in itself but a limitation on the form protection might take. Certainly it is an important limitation. TK rights need to be consistent with obligations in widely adopted international conventions, including for example the CBD and TRIPs.
- Objective (x) *'Promote innovation and creativity'* is important because the whole of society - not just TK holders - benefit if this objective is achieved.
- The remaining objectives (xi) to (xvi) are worthy but not perhaps fundamental to the project.

Additional Objectives or Constraints

ICC proposes adding two further objectives, as follows:

- (xvii) Maintenance of the public domain
- (xviii) Proportionality to the ends to be achieved

Maintenance of the Public Domain

ICC regards it as a vital part of any balanced TK protection system that the public domain should be preserved and not encroached upon. To remove existing public knowledge from the public domain requires strong justification. People are entitled to retain knowledge they already have, and to make appropriate use of it. In particular, it is both unjust and inconvenient to prevent or control existing uses begun in good faith, perhaps widespread and of many years' duration. Rights should therefore not be awarded or asserted retroactively.

Proportionality

The measures to be instituted must be proportional to the ends to be attained. The effect of this objective will not be clear until other objectives are agreed. But it could notably affect the way objectives are realized. For example, it has been suggested to implement objective (viii) *'Suppress unfair and inequitable uses'* by a requirement that all patent applications should state the country of origin of genetic resources used in the invention. That requirement however would be disproportionate, given that in many cases the genetic resources are widely available, or are obtained in countries that allow free access to such resources:

in such cases the requirement, though burdensome to the applicant, does nothing to promote the objective of suppressing unfair use.

Two pragmatic reasons may be advanced for protecting TK: its value to its holders and its value to society as a whole. The first is primarily the concern of the holders: the value of TK to rightholders supports conserving TK, but not necessarily recognizing rights in it that limit its wider use. Its value to society may support limiting its use in order to provide benefits to the originators which encourage them to preserve and share it. Alternatively, starting with fundamental principle rights in TK may be proposed as a requirement of justice for those who hold them: but if so, such rights, like other IP rights, must still be balanced with those of the rest of society. This will require a proper respect for the principle of public domain. ICC suggests that the list of objectives should be pruned and amended with these points in mind, so as to establish a consensus. Unless there is consensus about the objectives, it is unrealistic to expect agreement about policies for implementing them, let alone detailed implementing provisions.