

UNITED STATES OF AMERICA

Response to Question 1: The United States does not have intellectual property laws that provide protections specifically for “traditional knowledge”. This does not mean that existing intellectual property laws do not afford protection for traditional knowledge. U.S. laws can provide a means to protect traditional knowledge and also to prevent others from obtaining intellectual property rights based on such knowledge.

First, state trade secret laws may afford protection for traditional knowledge in certain circumstances. For those individuals, organizations and communities that take steps to maintain traditional knowledge confidential, state trade secret laws may apply. In most states, the trade secret law protects a formula, idea, process, compilation of information or other information that: (1) has actual or potential economic value; (2) is generally known or readily ascertainable; and (3) is treated by the party in control of the information in a way that can reasonably be expected to prevent the public from learning about it, absent improper acquisition or theft. When determining whether information qualifies as a trade secret under this definition, courts typically consider the following:

- the extent to which the information is known by others besides those in control of the information
- the extent to which the information is known by those within the owning entity and the measures taken to prevent broader disclosure
- the extent to which measures have been taken to keep the information secret
- the value of the information to the owning entity, and
- how difficult it would be for others to properly acquire or independently duplicate the information.

Although trade secret laws are commonly thought of in the context of business secrets, they may serve as well to protect traditional knowledge if the holder has sought to keep it secret from others. Courts have repeatedly enforced trade secret laws, and many businesses rely on this protection. We are unaware of Native Americans bringing cases in U.S. courts under state trade secret laws, though clearly some are aware of this protection. At the same time we are unaware of breaches of confidentiality incurred by Native Americans who have sought to keep their traditional knowledge secret and have had outsiders acquire and exploit such information.

Notwithstanding the standards of trade secret law, U.S. patent law requires that an invention be novel and non-obvious in order to be patentable. Thus, if traditional knowledge is considered “prior art” – even if the patent applicant did not rely on it – then no patent may issue; if a patent had been issued, that patent may be revoked. The case of the revocation of a patent claiming wound-healing properties of turmeric following a showing that written accounts of traditional uses of the wound-healing properties of turmeric in India constituted prior art under U.S. law, demonstrates that this protection can work.

Finally, with respect to U.S. Government bioexploration agreements, traditional knowledge identified under the terms of the National Institutes of Health/National Cancer Institute’s Letters of Collection, *inter alia*, keeps the knowledge of medicinal use of organisms (plants, etc.) provided by local populations and traditional healers confidential until both parties agree to publication.

Response to Question 2 : There are no *suigeneris* laws providing for the intellectual property protection of traditional knowledge in the United States.

Response to Questions 3 to 11 : Not applicable.

Response to Question 12 : No.

Response to Question 13 : Not applicable.

Response to Question 13 : No.

Response to Questions 15 to 16 : Not applicable.

Response to Questions 17 and 18 : No.

Response to Questions 19 to 23 : Not applicable.

Response to Questions 24 and 25 : No.

Response to Question 26 : The U.S. Patent and Trademark Office's (USPTO) Office for Independent Inventors has as its principal mission to ensure USPTO -based support and encouragement of independent inventors and small business concerns through focused, innovative activities and projects some of which are focused on independent Native American inventors. As part of the function of the Office for Independent Inventors, there is increased USPTO participation in inventor and entrepreneur conferences and seminar programs, outreach to regional inventor and entrepreneur organization meetings bringing patent and trademark information and issued discussions to the grassroots level and development of state-of-the-art educational tools and delivery modes including distance learning, virtual classrooms and Internet -based systems. While there are no rights in traditional knowledge in the United States, this USPTO Office encourages the development of traditional knowledge into patentable inventions where possible.

Response to Question 27 : Overall, the United States is not of the view that special intellectual property protection is needed for traditional knowledge. For those who take steps to keep the traditional knowledge out of the hands of outsiders, trade secrets law can provide protection. If on the other hand, traditional knowledge has become known outside of the indigenous community, then the patent requirement for "novelty" and "non-obviousness" would apply. Countries without established trade secret or similar regimes to protect information that an individual or group seeks to keep confidential may want to create such intellectual property protection either under the trade secret formulation or some similar format. Overall, however, it is important to keep in mind that intellectual property, whether or an existing *suigeneris* nature, serves as an incentive for future creative endeavors; by definition, traditional knowledge needs no incentive for development.

Nevertheless, the United States believes that the most appropriate way to "protect" traditional knowledge from misappropriation by unauthorized researchers is to encourage the collection of traditional knowledge into searchable prior art databases with the consent of the holders of the knowledge, encourage traditional knowledge holders to withhold the sharing of the knowledge with outsiders until they have determined mutually agreed terms (contract)

and, where appropriate, to use various existing IP and non-IP tools, including marketing methods to efficiently exploit their knowledge.

-IP tools, including marketing