

INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS

WIPO Report on Fact-Finding Missions
on Intellectual Property and Traditional
Knowledge (1998-1999)

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Executive Summary

This Report presents information compiled by the World Intellectual Property Organization (WIPO) from nine fact-finding missions conducted by WIPO in 1998 and 1999 on the intellectual property (IP) needs and expectations of holders of traditional knowledge (TK).¹

The fact-finding missions (the FFMs) were designed to enable WIPO to identify, as far as possible, the IP needs and expectations of TK holders. While the needs of TK holders have been referred to in other international fora, there has been to date no systematic global exercise by international organizations to document and assess, first-hand, the IP-related needs of TK holders. As the United Nations specialized agency responsible for the promotion of the protection of IP, WIPO undertook the FFMs as part of a new programme of activities, initiated in 1998, to explore and study current approaches to, and future possibilities for, the protection of the IP rights of holders of TK.

The purpose of the Report is to provide information to WIPO Member States, holders of TK, including indigenous peoples, the private sector, intergovernmental and non-governmental organizations, academic and research institutions and other interested parties, on the IP needs and expectations of TK holders expressed to WIPO during the FFMs.

It is expected that the findings of this Report will be discussed with WIPO Member States and others with a view, particularly, to defining and guiding future WIPO activities on the protection of TK.

The main body of the Report is contained in the chapters **“Framing the Intellectual Property Needs and Expectations of Traditional Knowledge Holders”**, **“Identifying the Intellectual Property Needs and Expectations of Traditional Knowledge Holders”** and **“Summary, Reflections and Conclusions”**.

The first section of the chapter **“Framing the Intellectual Property Needs and Expectations of Traditional Knowledge Holders”** provides a basic and general introduction to the IP system, containing an overview of the different types of protection offered, as well as the management, transfer and enforcement of rights.

This section points out *inter alia* that IP is not limited to existing categories such as patents, copyright and trademarks. Indeed, the definition of IP in the Convention Establishing the World Intellectual Property Organization, 1967 makes it clear that “intellectual property” is a broad concept and can include productions and matter not forming part of the existing categories of intellectual property, provided they result, as the definition states, *“from intellectual activity in the industrial, scientific, literary or artistic fields.”*² This part of the

¹ Terms such as “traditional knowledge”, as used in this Report, are described in the “Terminology” chapter.

² Article 2 (viii), Convention Establishing the World Intellectual Property Organization, 1967.

chapter also demonstrates that IP is evolutionary and adaptive. New advances in technology – information technology and biotechnology particularly – and changes in economic, social and cultural conditions require continuous appraisal of the system and at times adjustment and expansion, accompanied often by controversy. For example, the last few decades have seen the recognition of new or extended IP rights, such as *sui generis* forms of protection for plant varieties (in the 1950s and 1960s) and layout designs (topographies) of integrated circuits (1980s), and patent protection for biological material, plants and animals (in the 1970s and 1980s), copyright protection for computer software (1980s) and protection for databases and compilations of data (1980s and 1990s). The possible protection of tradition-based innovations and creations by the IP system, the subject of this Report, is a more recently articulated question.

The second section of the chapter **“Framing the Intellectual Property Needs and Expectations of Traditional Knowledge Holders”** describes briefly other multilateral institutions and initiatives in which TK protection has emerged and is being addressed, while the final section presents information, with examples from the FFMs, of how customary laws and protocols are being applied to the protection of TK.

The chapter **“Identifying the Intellectual Property Needs and Expectations of Traditional Knowledge Holders”** contains individual, detailed reports on each of the nine FFMs. The earlier chapter on **“Methodology”** provides information on how the FFMs were planned, conducted and subsequently reported on.

The chapter on **Terminology** describes certain terms as they are used by WIPO in the Report. The Chapter seeks less to define such terms, than to provide some clarity and a common basis upon which the Report can be understood.

The **“Summary, Reflections and Conclusions”** chapter seeks to summarize, reflect upon and draw broad conclusions on what may be considered to be the main and most prevalent IP-related needs and expectations expressed to WIPO during the FFMs by TK holders and others with whom WIPO consulted. The main needs and expectations may be summarized as follows:

- ▶ The selection of an appropriate term or terms to describe the subject matter for which protection is sought.
- ▶ A clear definition or description of what is meant (and not meant) for IP purposes by the term or terms selected.
- ▶ The adjustment of expectations through effective awareness-raising as to the role and nature of IP protection in relation to TK.
- ▶ The prevention of the unauthorized acquisition of IPRs (particularly patents) over TK by documenting and publishing TK as searchable prior art, where so desired by the relevant TK holders.
- ▶ An analysis of how prior art is established for purposes of patent examinations in the context of TK.
- ▶ Greater awareness-raising on the IP system, particularly among sectors of society and communities unfamiliar with it, such as indigenous and local communities and Governmental offices not directly involved in IP law and administration.
- ▶ Greater understanding by the IP community of the perspectives, expectations and needs of TK holders.
- ▶ Facilitation of dialogue and contact between TK holders, the private sector, Governments, NGOs and other stakeholders to assist in development of modalities for cooperation between them, at community, national, regional and international levels.
- ▶ Enhanced participation by the national and regional IP offices and the IP community at large in TK-related processes in which IP issues are raised.
- ▶ Study of the relationship between collectivity of TK and IPRs, more particularly testing of options for the collective acquisition, management and enforcement of IPRs by TK holders’ associations, including the applicability of collective management of IPRs to TK.
- ▶ Study of customary laws and protocols in local and traditional communities, including conclusions relevant for the formal IP system.

- In the shorter term, testing the applicability and use of existing IP tools for TK protection, through practical and technical community-level pilot projects and case studies; and, provision of technical information and training to TK holders and Government officials on possible options under the existing categories of IP for TK protection.
- In the longer term, the possible development of new IP tools to protect TK not protected by existing IP tools, the elaboration of an international framework for TK protection, using *inter alia* the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982 as a possible foundation, and the development of a *sui generis* system of “community” or “collective” rights to protect TK.
- Facilitating access to the IP system, to enable TK holders to use and enforce rights under the IP system.
- The provision of information, assistance and advice with respect to the enforcement of TK protection.
- The provision of legal/technical assistance with TK documentation, including information and advice on the IP implications of TK documentation.
- The provision of IP advice and assistance in respect of legislation, regulations, guidelines, protocols, agreements (including model terms), policies and processes on access to and benefit-sharing in genetic resources.
- Assistance and training for TK holders in the negotiation, drafting, implementation, and enforcement of contracts.
- The development and testing, with the close involvement of indigenous peoples and local communities, of “best contractual practices”, guidelines and model clauses for contracts, as well as the provision of information on and protection against “unfair contract terms”.
- Awareness-raising on the potential commercial value of TK and the development of tools for the economic valuation of TK.

It is evident that some of the needs and expectations conflict, or reflect competing policy objectives. WIPO has not attempted to mediate the needs or “resolve” conflicts, but rather to report as fully as possible on the information received from FFM informants. WIPO recognises that it cannot address all these needs and a collaborative effort by other relevant organizations and processes would be desirable. The needs as identified pose challenges for the entire IP community – national and regional IP offices, collective management societies, the private sector, NGOs, civil society, consumers, and the international community, including WIPO and its Member States. The needs and expectations as identified do not, therefore, represent a work program for WIPO, although they are reflected in WIPO’s activities relating to TK in the 2000-1 biennium, which was developed based on the information obtained during the FFMs and other activities. These are described at the end of the “**Summary, Reflections and Conclusions**” chapter.

Further exploration of the role of IP in TK protection also requires a technical understanding of IP and application in the specifics of concrete uses of TK (in other words, it is more helpful to test the functionality of IP in relation to specific cases, than merely in a theoretical or ideological context). In addition, effective IP systems that protect and maintain TK will depend on a better understanding of the various systems of innovation and intellectual property (formal and customary) and, equally, upon the participation of all stakeholders, governments and local communities in the process. For its part, as the specialized United Nations agency responsible for the promotion of IP worldwide, WIPO is committed to continuing to address conceptual problems and undertake a practical and technical examination of the application of the IP system to various forms of TK in order to provide an informed and realistic analysis.

An efficient IP system that protects TK will promote continued creation and innovation based on that knowledge. IP is not only about conferring property rights. It is also about recognition of and respect for the contributions of human creators. From this perspective, IP has a very important role to play in protecting the dignity of holders of TK and, by recognizing property rights in relation to such knowledge, giving those holders a degree of control of its use by others. The protection of TK also benefits third parties, who are able to enjoy access to protected tradition-based innovation and creation that may not be collected, recorded, or find channels of distribution without IP protection.

The FFMs have shown the richness and diversity of TK on a global scale, both in terms of its inherent creativity and as potential subject matter for protection. The IP system cannot, however, respond fully to all the needs of TK holders. Many of the problems encountered by TK holders are less “legal” than “operational” – TK holders (as do some other sectors of society) often lack the know-how and financial resources to take advantage of the IP system, whether in its present or in an evolved form, and they need support in this respect. There are nevertheless certain conceptual difficulties. However, the fact that existing standards of IP may not be in perfect harmony with elements of TK worthy of protection, should not be seen as an insuperable obstacle. IP has consistently evolved to protect new subject matter, such as software and layout-designs, the emergence of which was unforeseeable even twenty years earlier. Copyright protection has been extended to the digital environment. IP is now moving forward to protect databases. Given its evolutionary and adaptive nature, it is not inconceivable that IP principles might provide effective protection for traditional knowledge.

Acknowledgements

This Report is the outcome of nine fact-finding missions (FFMs) to various regions of the world which WIPO undertook from May 1998 to November 1999. These missions were made possible through the active support and advice of numerous individuals and institutions, both governmental and non-governmental. WIPO wishes to thank all those who supported the FFMs, who are too numerous to recount individually.

Most of the information included in this Report has been generously provided to WIPO by holders of traditional knowledge, innovations and culture, including indigenous peoples. This information constitutes the most important and valuable part of this Report and WIPO wishes to thank in particular the holders of traditional knowledge who shared and contributed their knowledge, experiences and wisdom, and for the trust, confidence and cooperation which their contributions imply.

In preparing the reports of each of the FFMs in the chapter entitled "Identifying the Intellectual Property Needs and Expectations of Traditional Knowledge Holders: Results of the Nine Fact-finding Missions", WIPO requested several persons to review and comment on drafts of the reports, or parts thereof, for factual accuracy, currency and completeness and any other comments. We wish to thank all those concerned for their assistance in ensuring that the information contained in the Report is as accurate and up-to-date as possible. They are¹:

FFM to the South Pacific: Mr. Stephen Gray, Lecturer, Law Faculty, Northern Territory University, Darwin, Australia; Ms. Lassity Martin, Coordinator, House of Aboriginality Project, Macquarie University, New South Wales, Australia; Ms. Sonia Smallacombe, Manager, Indigenous Cultural and Intellectual Property Task Force, Aboriginal and Torres Strait Islander Commission, Australia (ATSIC), Canberra, Australia; Mr. Maui Solomon, Barrister, Molesworth Chambers, Wellington, New Zealand; Ms. Maria Te Aranga Tini, Trustee, Kimihauora Charitable Trust, Mount Maunganui, New Zealand; Ms. Kesaia Tabunakawai, Wainimate, Suva, Fiji; and, Dr. Jacob Simet, Executive Director, National Cultural Commission, Port Moresby, Papua New Guinea.

FFM to Eastern and Southern Africa: Dr. Donna Kabatesi, Director, "Traditional and Modern Health Practitioners Together Against Aids" (THETA), Kampala, Uganda; Mr. Axel Thoma, Coordinator of the Working Group of Indigenous Minorities in Southern Africa (WIMSA), Windhoek, Namibia; Mr. Cyril Lombard, CRIAA SA-DC, Windhoek, Namibia; Mr. Roger Chennells, Attorney, Chennells and Albertyn, Stellenbosch, South Africa; Mr. Nigel Crawhall, the Indigenous Peoples of Africa Coordinating Committee (IPACC), Cape Town, South Africa; and, Ms. Sibongile Pefile, Member, Research Group for Traditional Medicines, University of Cape Town, Cape Town, South Africa.

¹ The titles and affiliations of the persons listed here are those at the time at which their contributions were received.

FFM to the Caribbean: Mr. Macsood Hoosein, Iwokrama International Centre for Rain Forest Conservation & Development, Georgetown, Guyana; Mr. Bernard Jankee, Director, African Caribbean Institute of Jamaica, Institute of Jamaica, Kingston, Jamaica; Ms. Gladys Alicia L. Young, Legal Unit, Ministry of Foreign Affairs and Foreign Trade, Kingston, Jamaica; and, Ms. Sharon Le Gall, Attorney, Patent and Trade Mark Agent, Champ Fleurs, Trinidad and Tobago.

FFM to South Asia: Dr. D. M. Karunaratna, Director, National Office of Intellectual Property, Ministry of Internal and International Commerce and Food, Colombo, Sri Lanka; Prof. Chandra Wikramagamage, Director General, Academy of Sri Lankan Culture, Colombo, Sri Lanka; Dr. R. V. Vaidyanatha Ayyar, Secretary, Government of India, Ministry of Human Resource Development, Department of Culture, New Delhi, India; Dr. Anil K. Gupta, Coordinator, SRISTI and Honeybee Network, Centre for Management in Agriculture, Indian Institute of Management, Ahmedabad, India; Mrs. P. V. Valsala G. Kutty, Deputy Secretary, Department of Education, Ministry of Human Resource Development, New Delhi, India; Dr. R. A. Mashelkar, Director General, Council of Scientific and Industrial Research, New Delhi, India; Dr. N. L. Mitra, Director, National Law School of India University, Bangalore, India; Dr. P. Usha Sarma, Centre for Biochemical Technology, New Delhi, India; Dr. Darshan Shankar, Director, Foundation for the Revitalization of Local Health Traditions, Bangalore, India; Dr. M. S. Swaminathan, Director, M. S. Swaminathan Research Foundation, Chennai, India; and, Dr. M. A. Kamal, Joint Secretary, International Trade and Organizations, Ministry of Commerce, Dhaka, Bangladesh.

FFM to West Africa: Professor Charles Wambebe, Director General, Nigerian Institute for Pharmaceutical Research and Development (NIPRD), Abuja, Nigeria; Dr. S.O Williams, President, Nigerian Folklore Society, Lagos, Nigeria (now, Director General of the Nigeria Copyright Commission); Professor K. Oppong-Boachie, Director, Centre for Scientific Research into Plant Medicine (CSRPM), Mampong, Ghana; and Professor J.H. Kwabena Nketia, Director, International Center for African Music and Dance (ICAMD), University of Ghana, Legon.

FFM to North America: Prof. Russell Barsh, Associate Professor, The University of Lethbridge, Lethbridge, Canada, and Engelberg Center for Innovation Law, Institute of Law and Society, New York University, New York, USA; Mr. Preston Hardison, Coordinator, Biodiversity Information Network (BIN21), Seattle, Washington, USA; Mr. Allan Morin, Metis Nation of Saskatchewan, Saskatoon, Canada; Mrs. Nita Morven, Researcher, Ayuukhl Nisga'a Department, Nisga'a Tribal Council, New Aiyansh, Canada.

FFM to the Arab Countries: Mr. Ali Hussein Al-Lawati, Director, Department of Plant Production Research, Directorate General of Agricultural Research, Ministry of Agriculture and Fisheries, Muscat, Oman; Ms. Amna Rashid J. Al-Hamdan, Head, Projects and Fieldwork Studies Section, G.C.C. Folklore Center, Doha, Qatar; Dr. Ahmed Aly Morsi, Professor of Egyptian and Arabic Folklore, Cairo University, Cairo, Egypt; Dr. Asaad Nadim, National Art Development Industries of Mashrabeya, Cairo, Egypt; Mr. Mohamed Kheireddine Abdel Ali, Director General, OTPDA (*Organisme Tunisien de Protection des Droits d'Auteurs*), Tunis, Tunisia.

FFM to South America

Peru: Mr. Manuel Ruiz Muller, Programme of International Affairs, Biological Diversity, Peruvian Society of Environmental Law, Lima, Peru.

Bolivia: Ms. Erika Duenas, Intellectual Property Director of the Vice-Ministry of International Economic Relations and Integration (Ministry of Foreign Affairs).

FFM to Central America: Mr. Atencio Lopez, *Asociación Napguana*, Panama City, Panama.

However, any errors are the sole responsibility of WIPO.

In July 2000, this Report was made available in draft form for public comment. The Report was widely distributed in paper form, and was also posted on WIPO's website. The commenting period closed formally on December 15, 2000, but all comments received before the Report went to press in April 2001 were taken into account. A list of the States, organizations and individuals who commented on the draft Report is contained in Annex 6. This revised Report incorporates as far as possible all the comments received. Those comments received electronically are available on WIPO's website at <http://www.wipo.int/traditionalknowledge/comments/index.html>.

The comments were received on the draft Report contributed to and enriched this Report. WIPO greatly appreciates the efforts of those who provided comments.

Unless otherwise indicated, the information contained in this Report is current as at July 2000, when the draft Report was made available. The tables showing membership of treaties at the beginning of the sections on each of the fact-finding missions are current as at March 2001.

List of Abbreviations

CBD	Convention on Biological Diversity, 1992
FAO	Food and Agriculture Organization
FFM	Fact-finding mission
ILO	International Labor Organization
IMR	Interim Mission Report
IUCN	The World Conservation Union
IP	Intellectual Property
IPRs	Intellectual Property Rights
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
PGR	Plant Genetic Resources
PGRFA	Plant Genetic Resources for Food and Agriculture
PIC	Prior Informed Consent
TK	Traditional Knowledge
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994
UNCCD	United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNEP	United Nations Environment Programme
WGIP	Working Group on Indigenous Populations
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WIPO Convention	Convention Establishing the World Intellectual Property Organization
WTO	World Trade Organization
WWF	World Wildlife Fund

Introduction

The World Intellectual Property Organization (WIPO): WIPO is one of the specialized agencies of the United Nations (UN) system of organizations. WIPO's mandate is the promotion of the protection of intellectual property (IP) throughout the world through cooperation among States and, where appropriate, in collaboration with any other international organization.¹ The term "intellectual property" is defined in the WIPO Convention² to include rights relating to:

- literary, artistic and scientific works;
- performances of performing artists, sound recordings, and broadcasts;
- inventions in all fields of human endeavor;
- scientific discoveries;
- industrial designs;
- trademarks, service marks, and commercial names and designations;
- protection against unfair competition; and,
- all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

WIPO has currently 176 Member States, a list of which is contained in Annex 1. WIPO's headquarters are in Geneva, Switzerland. WIPO's main activities include:

- facilitating the conclusion of new international treaties and the modernization of national legislation;
- administration of more than twenty international treaties in the fields of copyright, related rights, patents, industrial designs and marks;
- providing technical advice and assistance to developing countries as part of an extensive development cooperation program;
- the assembly and assimilation of information and advice to a diverse range of parties; and,
- the maintenance of services for facilitating the obtaining of protection of inventions, marks and industrial designs for which protection in several countries is desired, such as the Patent Cooperation Treaty, 1970, the Hague Agreement Concerning the International Deposit of Industrial Designs, 1925, and the Madrid Agreement Concerning the International Registration of Marks, 1891, and the Protocol Relating to that Agreement, 1989.

Many of the international treaties administered by WIPO set out internationally agreed rights and common standards for their protection in the various fields of IP. These treaties have been negotiated and adopted by Member States which constitute "unions" for each treaty. The basic premise of these treaties is the simplification of the international intellectual property administration and enforcement system. Intellectual property rights (IPRs) are limited territorially and can only be exercised within the jurisdiction of a country granting these rights. With the increasing interdependency of countries, membership of the treaties makes it possible for each member country to agree to grant to nationals of other countries in the union the same protection as they grant to their own nationals as well as to follow certain common rules, standards and practices.³

Certain of the treaties (such as the Patent Cooperation Treaty, 1970) establish mechanisms whereby protection can be obtained in several countries (the so-called "global protection treaties"). See further under "Introduction to Intellectual Property" in the chapter on "Framing the Intellectual Property Needs and Expectations of Traditional Knowledge Holders" below.

WIPO's Work on the Protection of Traditional Knowledge: In November 1997, the Global Intellectual Property Issues Division (the Global Issues Division) was established by the then newly elected Director General, Dr. Kamil Idris. The Global Issues Division was created to enable WIPO to remain at the forefront of global IP developments by responding to three challenges facing the IP system in a rapidly changing world. These challenges were identified as:

- accelerating technological advancement;
- integration of the world economical, ecological, cultural, trading and information systems; and
- the growing relevance of IPRs.

The Division's first program of activities was approved by WIPO's Member States as part of the WIPO Program and Budget for the 1998-1999 biennium.⁴ The program's overall objective is to identify key areas where economic, technological, cultural and social change may impact on the IP system and to consider how such impact should be explored and addressed by WIPO and its Member States. The program's findings are expected to provide input and resources for policy formulation and for use in WIPO's other activities, such as in the areas of development cooperation and, possibly, progressive development. As the universality of IPRs calls for the exploration of new ways in which the IP system can serve as an engine for social, cultural, economic and technological progress of the world's diverse populations, one of the areas identified for exploration in the 1998-1999 biennium was the needs and expectations of groups which have until now had little or incomplete exposure to the IP system. The first such group identified were holders of traditional knowledge, innovations and culture (together referred to in this Report as "traditional knowledge" or "TK" - see discussion in the Chapter on "Terminology"). The main objective of the new WIPO activities in respect of traditional knowledge under the WIPO Program and Budget for 1998-1999 was *"to identify and explore the intellectual property needs and expectations of new beneficiaries, including the holders of indigenous knowledge and innovations, in order to promote the contribution of the IP system to their social, cultural and economic development"* (Main Program 11, Program and Budget 1998-1999).

During the 1998-1999 biennium, WIPO took an exploratory approach to its new activities on the IP aspects of TK protection. WIPO's program recognized that basic conceptual groundwork and systematic data collection are required to assess the IP aspects of the protection of TK, and to identify the scope of future work in a way which reflects the interests of all relevant stakeholders. To this end a range of activities was carried out under Main Program 11 of the WIPO Program and Budget, including:

- between June 1998 and November 1999, WIPO conducted 9 fact-finding missions (FFMs) to 28 countries in the South Pacific, Southern and Eastern Africa, South Asia, North America, Central America, West Africa, the Arab countries, South America and the Caribbean;
- in cooperation with the United Nations Educational, Social and Cultural Organization (UNESCO), WIPO organized four regional consultations on the protection of expressions of folklore, which were held for African countries in Pretoria, South Africa (March 1999), for countries of Asia and the Pacific region in Hanoi, Vietnam (April 1999); for Arab countries in Tunis, Tunisia (May 1999); and for Latin America and the Caribbean in Quito, Ecuador (June 1999)⁵;
- in July 1998 and November 1999, WIPO organized two Roundtables to facilitate an exchange of views among policymakers, indigenous peoples and other holders of TK on the more effective application of the IP system for the protection of traditional and indigenous knowledge;⁶
- the interdisciplinary nature of the subject matter involved made it necessary for WIPO to participate in other international fora and meetings such as on food security, agriculture, the environment, indigenous populations, sustainable development, trade, culture and biological diversity. These were mostly orga-

nized by intergovernmental agencies within the UN system and certain national, regional and non-governmental organizations. Several of these fora have recently highlighted the IP aspects of TK and requested technical information from and cooperation with WIPO;

- WIPO also undertook, in cooperation with the United Nations Environment Programme (UNEP), an On-site Documentation Project on the Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Traditional Knowledge, Innovations and Creativity and Associated Biological Resources. This project produced case studies which WIPO and UNEP submitted to the fifth Conference of the Parties to the Convention on Biological Diversity, 1992 (the CBD) in May 2000.

The Objectives of the Fact-finding Missions: The FFMs were designed to enable WIPO to identify, as far as possible, the IP needs and expectations of TK holders. While the needs of TK holders have been referred to in other international fora, there has been to date no systematic global exercise by international organizations to document and assess, first-hand, the IP-related needs of TK holders. As the United Nations specialized agency responsible for the promotion of the protection of IP, WIPO undertook the FFMs as part of its explorative study of current approaches to, and future possibilities for, the protection of the IP rights of holders of TK.

This Report: This Report presents the information compiled from the FFMs and an analysis of the IP needs and expectations of TK holders that were expressed to WIPO. Relevant information from WIPO's other activities in this area, as described above, is also integrated into the Report.

The purpose of the Report is to provide information to WIPO Member States, holders of TK, including indigenous people, the private sector, intergovernmental and non-governmental organizations, academic and research institutions and other interested parties on the IP needs and expectations of TK holders expressed to WIPO during the FFMs.

The main body of the Report is contained in the chapters on “**Framing the Intellectual Property Needs and Expectations of Traditional Knowledge Holders**”, on “**Identifying the Intellectual Property Needs and Expectations of Traditional Knowledge Holders**” and the chapter containing the “**Summary, Reflections and Conclusions**”.

The first part of the chapter on “**Framing the Intellectual Property Needs and Expectations of Traditional Knowledge Holders**” provides a basic and general introduction to the IP system, containing an overview of the different types of protection offered, as well as the management, transfer and enforcement of rights. The second part of the chapter describes briefly other multilateral institutions and initiatives in which TK protection has emerged and is being addressed, while the final section presents information, with examples, of how customary laws and protocols are being applied to the protection of TK.

The chapter on “**Identifying the Intellectual Property Needs and Expectations of Traditional Knowledge Holders**” contains individual, detailed reports on each of the 9 FFMs. The decision to report on each mission separately was informed by the need to preserve the integrity of the information arising from the regions. This also creates a framework for highlighting similarities and differences not only between communities within countries in a region, but also between regions. The information is, however, presented according to a similar format in each section to facilitate comparison between the missions. The format is broadly as follows: Terminology and Subject Matter; Objectives of TK protection; Benefits and Beneficiaries of TK Protection; Documentation; Means of Protecting TK; Management and Enforcement of Rights and Interests in TK; and, General.

The chapters on “**Methodology**” and “**Terminology**” provide information on how the FFMs were conducted and on the use of certain terms in the Report. The Methodology Chapter deals with how the FFMs were planned, conducted and subsequently reported on. It also, importantly, highlights the role of WIPO's Member States and the Governments of the countries visited in planning and conducting of the missions. There is no consistency in the usage of certain terms in the area of TK and the chapter on Terminology

describes certain of the terms as they are used by WIPO in the Report and in its work. The Chapter seeks less to define such terms, than to provide some clarity and a common basis upon which the Report can be understood.

It is expected that the findings of this Report will be discussed with WIPO Member States and others with a view, particularly, to defining and guiding future WIPO activities on the intellectual property protection of traditional knowledge.

Notes

- ¹ Article 3(i), Convention Establishing the World Intellectual Property Organization, 1967. The Convention entered into force in 1970.
- ² Article 2(viii).
- ³ For further information on WIPO, please see WIPO, *Intellectual Property Reading Material* (WIPO Publication Number 476) and the WIPO website at www.wipo.int.
- ⁴ The program of activities of the Global Issues Division is contained in Main Program 11 of the WIPO Program and Budget for 1998-1999. The Program and Budget may be viewed on the WIPO website www.wipo.int.
- ⁵ The Recommendations, Resolutions and other documents from these Consultations are available from the International Bureau of WIPO and the WIPO website www.wipo.int.
- ⁶ The Lists of Participants, Programs, and Papers of these Roundtables are available from the International Bureau of WIPO and the WIPO website www.wipo.int.

Methodology

The variety of cultures, traditions, and beliefs encountered over the course of the FFMs impressed upon WIPO the diverse local contexts within which TK is created and thrives. In developing a plan for each FFM, a basic foundational methodology was adapted to meet the specific requirements of the regions, countries, and communities. What follows is a broad outline of the general methodology used in planning and undertaking each FFM.

The overall objective of the FFMs was to "*identify and explore the intellectual property needs and expectations of new beneficiaries, including the holders of indigenous knowledge and innovations, in order to promote the contribution of the intellectual property system to their social, cultural and economic development.*"

While taking into account the constraints of WIPO's resources, it was considered desirable that as many regions as possible be visited. Nine FFMs were conducted to the South Pacific, Southern and Eastern Africa, South Asia, North America, Central America, West Africa, the Arab Countries, South America and the Caribbean. The advice and interest of WIPO's Member States (through the national IP offices and their Permanent Missions to the United Nations in Geneva), the advice of the WIPO Regional Bureaus and that of the regional and local coordinators, on the one hand, and prevailing political and other conditions of access, on the other, combined to identify which countries were visited. A total of 28 countries were visited, and approximately 3000 persons met with or visited in approximately 60 cities, towns and villages. In so far as the individuals and institutions with whom WIPO met are concerned, these were identified on the basis of suggestions made by academics, non-governmental experts and indigenous and local community organizations from around the world, the personal contacts and knowledge of WIPO staff, as well as the advice of Government officials (see Annex 3 "Table of Countries Visited").

The consultations, meetings, interviews and visits were organized prior to the commencement of each mission. FFM activities were either arranged by WIPO staff directly, or by the national IP office or other Government departments of the relevant member states on behalf of WIPO. A representative of the national IP office or other Government department accompanied WIPO staff on most of the FFM activities. In some cases, a local coordinator within each country was requested by WIPO to assist with the logistical planning required for each mission. This included, *inter alia*, venue selection, participant selection, and general format of the activities.

Where possible, WIPO's "Terms of Reference" for the FFMs were sent to all those with whom WIPO met prior to the commencement of the missions. This was to ensure that the purpose, nature and expected output of the FFMs were clearly understood by informants before they met with WIPO staff. The Terms of Reference are reproduced in Annex 2.

The primary methods of data collection were:

- the gathering of documents;
- semi-structured interviews; and
- participatory observations involving the informants.

These three procedures were chosen to maximize the diversity of information that could be gathered while minimizing researcher bias. This desire was particularly relevant in the decision to use semi-structured interview methods, as opposed to completely structured interviews. A structured interview uses a predetermined set of questions to elicit information from the subjects, while a semi-structured interview develops questions which build from previous answers. Thus, the semi-structured interviews were organized to follow two 'interview threads' in order to provide some common area for comparative analysis across the various geographic regions; however, the precise questions and format of the interview was adapted to the local context of each informant.

The interview threads centered upon the needs, rights, and expectations of holders of TK now and in the future. Specifically, one thread focused upon the existing situation by exploring topics such as the informant's knowledge of the current formal IP system, gaps in the current system with respect to TK, effective protection measures currently in place for TK, and related formal instruments which affect the current state of traditional practices. The second thread involved the exploration of future possibilities for the protection of the IP rights of TK holders. Issues that were raised under this thread concerned, *inter alia*, informants' future expectations for IP protection, existing forms of TK that could be protected by IP regimes, and what new IP rights systems might meet the needs and expectations raised by informants.

The primary output of the FFMs is this Report. However, after each FFM, an Interim Mission Report (IMR) was produced and disseminated to all individuals, organizations, and Government officials with whom WIPO met during the relevant FFM. The IMR's constituted factual accounts of WIPO's activities during each FFM. Copies of the IMRs were also made widely available to Government representatives of WIPO's Member States, indigenous and local communities, organizations and individuals in other regions and are published on WIPO's web site at www.wipo.int. The IMRs are contained in Annex 4.

WIPO recognizes that the persons with whom it consulted and met are not representative of all TK holders and other stakeholders. The availability of resources and the need to plan and complete all nine FFMs within the 1998-1999 biennium, limited the number of countries WIPO could visit, the time it could spend in each country and the extent to which it could travel within countries to consult with people. That said, WIPO hopes that this Report serves, at the very least, as a useful basis for further work by WIPO and others in this area.

Terminology

With any discussion, the importance of establishing a common framework of understanding is vital for productive dialogue. One of the complicating factors of any discussion on TK is not so much the lack of options for appropriate terminology, but rather the diverse meanings and connotations associated with the existing options. As will be discussed below and as was found on the FFMs, many of the words used to describe concepts in this field have different meanings in different regions. There are three general complications which arise when utilizing terminology related to TK:

Context: The inability to translate the linguistic context a word enjoys in one language to another is particularly troublesome. Since the issues involved have had decades, if not centuries, of domestic use, the associated terminology has often developed very specific connotations in specific contexts.

Absence of appropriate translation: For some concepts, the term applied by holders of traditional knowledge in their native language has no correspondence in other languages, because of the unique development of the concept in that tradition. The result is the forced translation of a term to fit the constraints of the target language, like a square peg in a round hole.

Non-standard usage: Even within a single language, the meaning attributed to a certain term by speakers from different regions can have vastly different meanings. These differences may arise from the implied meaning of the term, or the perceived distinction between two terms. Another complication is the scope attributed to certain terms – for example, does “traditional knowledge” subsume “indigenous knowledge”, or are the two terms equivalent?

This chapter claims neither to resolve these linguistic differences, nor offer a standardized formulation for the use of these terms in the future. This chapter seeks only to describe the ways in which certain terms are used in this Report. These terms are: “biological diversity”, “expressions of folklore”, “heritage”, “indigenous knowledge”, “intellectual property”, “*sui generis*”, “traditional knowledge”, and “traditional knowledge holder”. These terms appear frequently in this Report, and thus an understanding of how they are used is key to understanding the Report.

In addition to these terms, certain comments on the Draft Report suggested additional terms whose meanings could be discussed, perhaps in follow-up work. For example, in its comment on the Draft Report, the Government of Canada suggested that the Report may have benefited from a discussion of the meaning of the term “protection”, as the term is used in relation to “the protection of TK”. The comment states: “Protection can have several different meanings, such as preserving, promoting wider use, controlling use, preventing misuse, or channeling a proper share of benefits to TK holders.”¹

In another comment, it is suggested that it would be helpful to investigate the meanings of words such as “property”, “ownership”, “custodianship” and “stewardship”.² A comment also suggested that the term and concept “indigenous intellectual property” should be used more.³ These are all useful suggestions.

As certain comments on the Draft Report point out, it is clear that future discussions on intellectual property and TK will require, at least, shared understandings of what the relevant terms describe and what subject matter is covered by them.⁴

Biological Diversity (also Biodiversity)

The term biological diversity is used by various groups and organizations to refer to the multitude of unique species, and varieties within species, present in various ecosystems throughout the world. The best expression of this term in the international context is probably provided by Article 2 of the Convention on Biological Diversity, 1992 (the CBD), which defines the term as the “*variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.*”

Expressions of Folklore

WIPO uses the term “expressions of folklore” in the sense in which it is used in the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions, 1982 (the “Model Provisions”). Section 2 of the Model Provisions provides that “expressions of folklore” are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community.

Only “artistic” heritage is covered by the Model Provisions. This means that, among other things, traditional beliefs, scientific views (e.g. traditional cosmogony) or merely practical traditions as such, separated from possible traditional artistic forms of their expression, do not fall within the scope of the proposed definition of “expressions of folklore.” On the other hand, “artistic” heritage is understood in the widest sense of the term and covers any traditional heritage appealing to our aesthetic sense. Verbal expressions, musical expressions, expressions by action and tangible expressions may all consist of characteristic elements of the traditional artistic heritage and qualify as protected expressions of folklore.

The Model Provisions also offer an illustrative enumeration of the most typical kinds of expressions of folklore. They are subdivided into four groups according to the forms of the “expressions,” namely expressions by words (“verbal”), expressions by musical sounds (“musical”), expressions of the human body (“by action”) and expressions incorporated in a material object (“tangible expressions”). The first three kinds of expressions need not be “reduced to material form,” that is to say, the words need not be written down, the music need not exist in musical notation and the dance need not exist in choreographic notation. On the other hand, tangible expressions by definition are incorporated in a permanent material, such as stone, wood, textile, gold, etc. The Model Provisions also give examples of each of the four forms of expressions. They are, in the first case, “folk tales, folk poetry and riddles,” in the second case, “folk songs and instrumental music,” in the third case, “folk dances, plays and artistic forms of rituals,” and in the fourth case, “drawings, paintings, carvings, sculptures, pottery, terra-cotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes; musical instruments; architectural forms.”

WIPO is aware that the term “folklore” is believed to have a pejorative meaning by many persons, particularly in certain regions. As this is, however, the term that has been used at the international level for many years, WIPO has retained it for the present.

Heritage

The term “heritage” appears within the context of, for example, the “heritage of indigenous peoples”. WIPO understands “heritage of indigenous peoples” (and other peoples) to refer broadly to the items described in paragraphs 11 and 12 of the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, 1995, elaborated by the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities⁵, Dr. Erica Irene Daes. This document is currently under revision. However, paragraph 12 currently provides that:

“The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultivars, medicines and the rational use of flora and fauna; human remains; immoveable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples’ heritage on film, photographs, videotape or audiotape.”

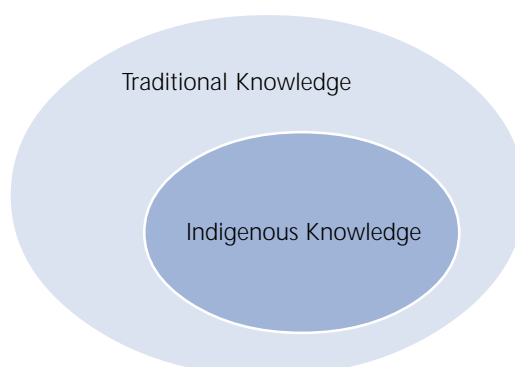
Indigenous Knowledge

“Indigenous knowledge” is understood in at least two different ways. First, it is used to describe knowledge held and used by communities, peoples and nations that are “indigenous”. The notion “indigenous peoples” has been the subject of considerable discussion and study. The description of the concept “indigenous” in the Study of the Problem of Discrimination Against Indigenous Populations⁶, prepared by Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mr. J. Martínez Cobo, is regarded as an acceptable working definition by many indigenous peoples and their representative organizations. The Study understands indigenous communities, peoples and nations as *“those which, having a historical continuity with ‘pre-invasion’ and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those countries, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identities, as the basis of their continued existence as peoples, in accordance with their own cultural pattern, social institutions and legal systems”*.

In referring to this description of “indigenous peoples”, the National Institute for the Defense of Competition and Intellectual Property Protection of Peru (INDECOPI), in its comment on the Draft Report, queries its acceptability: “It would be interesting to know the opinion of the historians and to know if it is acceptable, for example, the definition that is made to the term ‘indigenous’”.⁷ Another comment also queried the limitation of the description to “pre-invasion” societies.⁸

In this sense, “indigenous knowledge” would be the traditional knowledge of indigenous peoples. Indigenous knowledge is therefore part of the traditional knowledge category, but traditional knowledge is not necessarily indigenous. That is to say, indigenous knowledge is traditional knowledge, but not all traditional knowledge is indigenous (see figure 1).⁹

FIGURE 1



On the other hand, “indigenous knowledge” is also used to refer to knowledge that is itself “indigenous”. Dictionaries define “indigenous” as:

“originating or occurring naturally (in a country, region etc.); native; innate (to); inherent (in)”¹⁰; and “(Esp. of flora and fauna) produced naturally in a region; belonging naturally (to soil etc.)”.¹¹

Or, as one of the comments on the Draft Report put it: “‘(I)ndigenous’ means belonging to, or specific to, a particular place.”¹²

In this sense, the terms “traditional knowledge” and “indigenous knowledge” may be interchangeable.¹³

Intellectual Property

Intellectual property (IP) refers to property rights in creations of the mind, such as inventions, industrial designs, literary and artistic works, symbols, and names and images. The notion “intellectual property” is defined in the Convention Establishing the World Intellectual Property Organization (WIPO), 1967¹⁴ to include rights relating to:

- literary, artistic and scientific works;
- performances of performing artists, sound recordings, and broadcasts;
- inventions in all fields of human endeavor;
- scientific discoveries;
- industrial designs;
- trademarks, service marks, and commercial names and designations;
- protection against unfair competition; and,
- all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

IP is generally divided into two main categories:

- The protection of **industrial property** has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, geographical indications (indications of source or appellations of origin), and the repression of unfair competition.¹⁵
- **Copyright** includes literary and artistic works, such as novels, poems and plays, films, musical works, drawings, paintings, photographs and sculptures, computer software, databases, and architectural designs. **Related rights** (also referred to as “neighboring rights”) include the rights of performing artists in their performances, producers of sound recordings in their sound recordings, and those of broadcasters in their radio and television broadcasts.

Additionally, **plant varieties** are protectable under the IP-related system of plant breeders’ rights.

As the definition in the WIPO Convention indicates, “intellectual property” is not confined to the specific examples of intellectual property just mentioned. The phrase at the end of the definition in the WIPO Convention (“all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields” (article 2(viii)) makes it clear that “intellectual property” is a broad concept and can include productions and matter not forming part of the existing categories of intellectual property, provided they result “from intellectual activity in the industrial, scientific, literary or artistic fields.”

Sui Generis

Sui generis is a Latin phrase meaning “of its own kind”. A *sui generis* system, for example, is a system specifically designed to address the needs and concerns of a particular issue. Calls for a “*sui generis* system” for TK protection are sometimes heard. This could mean a system entirely separate from and different from

the current IP system. Some persons, however, also use the term to refer to new IP, or IP-like, rights. There are already several examples of *sui generis* IP rights, such as plant breeders' rights (as reflected in the International Convention on the Protection of New Varieties of Plants, 1991 ("The UPOV Convention")) and the IP protection of integrated circuits (as reflected in the Treaty on Intellectual Property in Respect of Integrated Circuits, 1989 ("The Washington Treaty")). In the field of TK, the 1982 Model Provisions (see above) provide *sui generis* protection for expressions of folklore.

Traditional Knowledge

"Traditional knowledge" is one of several terms used to describe broadly the same subject matter. Other terms in usage include "indigenous cultural and intellectual property", "indigenous heritage" and "customary heritage rights".

WIPO currently uses the term "traditional knowledge" to refer to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. "Tradition-based" refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; "expressions of folklore" in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties. Excluded from this description of TK would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of "heritage" in the broad sense.

Given this highly diverse and dynamic nature of TK it may not be possible to develop a singular and exclusive definition of the term. However, a singular definition may not be necessary in order to delimit the scope of subject matter for which protection is sought. This approach has been taken in a number of international instruments in the field of IP. For example, article 2.1 of the Berne Convention for the Protection of Literary and Artistic Works ("the Berne Convention"), does not include an exclusive definition for the meaning of "literary and artistic works," but rather provides a non-exhaustive enumeration of subject matter in order to demarcate the categories of creations which are protected under the Convention.¹⁶ Certain other international agreements in the field of IP do not define a singular term which describes the totality of protected subject matter.¹⁷

WIPO's description of the subject matter naturally reflects its IP focus. WIPO's activities are concerned with the possible protection of traditional knowledge that is "intellectual property" in the broad sense as described in the definition of "intellectual property". For purposes of the FFMs, WIPO also used the expressions "traditional knowledge, innovations and culture" and "traditional knowledge, innovations and practices," which, for WIPO, had the same meaning as the shorter "traditional knowledge".

"Traditional knowledge" is a working term only. WIPO acknowledges the right of indigenous groups, local communities and other TK holders to decide what constitutes their own knowledge, innovations, cultures and practices, and the ways in which they should be defined.

The Future Harvest Centres supported by the Consultative Group on International Agricultural Research (CGIAR) observed, in their comment on the Draft Report, that the Report "tends to limit the sphere of TK, as being self-contained and isolated."¹⁸

Referring to the diagram at the end of this chapter (Figure 2), the comment suggests that the diagram:

“should have another outmost sphere which is the changing environment: biophysical (e.g. in relation to soil erosion, introduction of germplasm) and socio-economical-political (e.g. market conditions, war and civil unrest). Very few indigenous communities remain isolated. It is often within this gray area in which TK interfaces with modernity (voluntarily or forced by circumstances) and continuously innovates. In short, TK is generated and applied within and outside community boundaries. Most likely, the innovations outside the respective community boundaries are where IP issues are most relevant.”

The findings of the FFMs and other activities of WIPO lend support to these views, as did other comments on the Draft Report.

The description of “traditional knowledge” in the Draft Report stated that “traditional knowledge” is also characterized by being developed “in a non-systematic way.” Following a comment of the Future Harvest Centres that this would depend upon how one defines “systematic” and that it is certainly arguable that indigenous and local communities have “systematically” developed and maintained TK to meet changing local conditions and, amongst other things, provide for food security, we have amended our working definition accordingly. As the Future Harvest Centres correctly note:

“There is an extensive scientific literature attesting to the systematic, if locally specific, nature of traditional biodiversity knowledge. It is precisely these systems of plant use, culture and knowledge that local communities seek to preserve through IP (formal or informal). To deny their systematic nature already places TK at a disadvantage in terms of developing and applying appropriate IP tools.”¹⁹

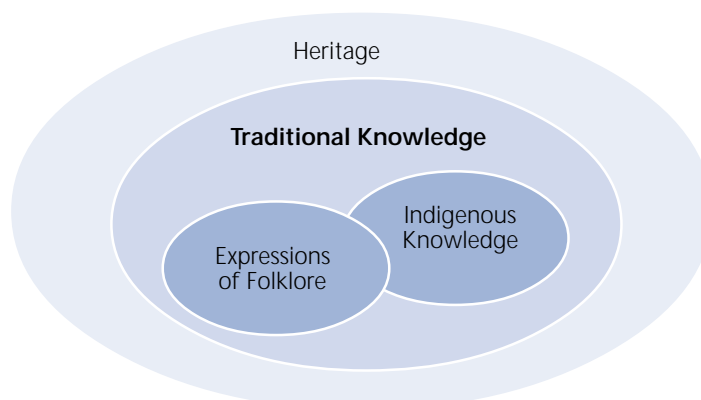
Certain other comments on the Draft Report also referred to the working definition of TK.²⁰

Traditional Knowledge Holder

WIPO uses the term “traditional knowledge holder” to refer to all persons who create, originate, develop and practice traditional knowledge in a traditional setting and context. Indigenous communities, peoples and nations are traditional knowledge holders, but not all traditional knowledge holders are indigenous.

Conclusion: In summation, WIPO’s focus is on **“traditional knowledge”** as described above. Traditional knowledge is created, originated, developed and practiced by **“traditional knowledge holders”**, the intended beneficiaries of WIPO’s work in this field. From WIPO’s perspective, **“expressions of folklore”** are a subset of and included within the notion “traditional knowledge”. “Traditional knowledge” is, in turn, a subset of the broader concept of **“heritage”**. **“Indigenous knowledge”**, being the traditional knowledge of **“indigenous peoples”**, is also a subset of “traditional knowledge”. As some “expressions of folklore” are created by indigenous persons, there is an overlap between “expressions of folklore” and “indigenous knowledge”, both of which are forms of “traditional knowledge”. See figure 2.

FIGURE 2



Notes

- ¹ Comment on the Draft Report by the Government of Canada, dated February 19, 2001.
- ² Comment on the Draft Report by Mr. Graham Dutfield, Researcher, Oxford Centre for the Environment, Ethics and Society, University of Oxford, dated December 12, 2000.
- ³ Comment on the Draft Report by Mr. Bill Morrow, South Australia, Australia, dated December 15, 2000. Mr. Morrow attached to his comment the following two texts: B. Morrow, "Mabo and the Ownership of Dreams" (1993) *Art Monthly Australian*, p.7; and, B. Morrow, "Aspects of Intellectual Property and Textiles" in *Building on Batik – The Globalization of a Craft Community*, (Eds. M. Hitchcock and W. Nuryanti) (University of North London, Ashgate, 2000), p. 10.
- ⁴ For example, comment on the Draft Report by the Government of Canada, dated February 19, 2001.
- ⁵ Now the Sub-Commission on the Promotion and Protection of Human Rights.
- ⁶ E/CN.4/Sub.2/1986/7 and Add. 1-4
- ⁷ Comment on the Draft Report by INDECOPI, dated January 2, 2001.
- ⁸ Comment on the Draft Report by Mr. C. Ray Brassieur, dated September 15, 2000.
- ⁹ J. Mugabe, "Intellectual Property Protection and Traditional Knowledge", *Intellectual Property and Human Rights* (WIPO, 1999), p. 97 at pp. 98-99
- ¹⁰ Collins English Dictionary, Fourth Edition, 1998.
- ¹¹ Concise Oxford Dictionary, Sixth Edition, 1976.
- ¹² Comment on the Draft Report by Mr. Graham Dutfield, Researcher, Oxford Centre for the Environment, Ethics and Society, dated December 12, 2000.
- ¹³ Comment on the Draft Report by Mr. Graham Dutfield, Researcher, Oxford Centre for the Environment, Ethics and Society, dated December 12, 2000.
- ¹⁴ Article 2(viii).
- ¹⁵ Article 1.2, Paris Convention for the Protection of Industrial Property, 1883.
- ¹⁶ Article 2.1 stipulates that "[t]he expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain" (emphasis added). This inclusive characterization is illustrated by the words "such as" and a non-exhaustive enumeration of examples, which illustrate the categories of subject matter falling within the scope of protected subject matter. Over time new categories have been added to the non-exhaustive list (e.g., "choreographic and architectural works" were added in 1908 at the Berlin Revision Conference, "oral works" at the 1928 Rome Revision Conference, etc.).
- ¹⁷ The Paris Convention for the Protection of Industrial Property (1883) ("the Paris Convention") does not provide an exclusive definition of the meaning of terms which describe the subject matter protected by industrial property rights, such as "invention," "industrial design," distinctive signs, etc. The TRIPS Agreement, finally, does not define the terms by which it describes the subject matter covered by the rights for which it establishes international standards.
- ¹⁸ Comment on Draft Report of the Future Harvest Centres supported by the CGIAR, dated November 3, 2000.
- ¹⁹ Comment on Draft Report of the Future Harvest Centres supported by the CGIAR, dated November 3, 2000. See also the Comment on the Draft Report by the Indigenous Peoples' Secretariat, Denmark, dated January 15, 2001.
- ²⁰ See, for example, the comment on the Draft Report by Dr. V.K. Joshi, Faculty of Ayurveda, Institute of Medical Sciences, Banaras Hindu University, Varanasi, India, dated December 11, 2000.

Part I

Framing the Intellectual Property Needs and Expectations of Traditional Knowledge Holders

We live in a 'global village', it is often said, in which increasing complexity makes each actor interdependent with all others. In today's global markets, small farmers in Peru may be affected by import regulations on the other side of the globe. Similarly, TK holders are affected by an increasing number of factors, especially when it comes to their IP needs and expectations. This chapter elaborates some of the factors, processes and conditions which shape their IP needs and expectations.

Some FFM informants indicated that TK holders are situated between their own customary regimes and the formal IP system administered by governments and inter-governmental organizations such as WIPO. It is also suggested that TK holders are situated within their own system, but increasingly have contact and interactions with the formal IP system.* Either way, their IP needs and expectations are shaped by the contact and interactions between these systems. At the same time, the formal IP system is continuously evolving and its evolution may affect TK holders in such areas as IP protection in the digital environment, protection for biotechnological inventions, expressions of folklore and non-original databases. The IP needs of TK holders receive their complexity, diversity and relevance from the multiple intersections of these factors and processes.

In this chapter, these factors are presented in three sections:

- the first section provides a brief description of the main contours of the formal IP system, including ongoing IP developments, particularly those which are relevant to TK holders and relate to their IP needs and rights;
- the second section provides a synoptic survey of non-IP multilateral institutions and initiatives relevant to the protection of TK; and,
- the final section recognizes that customary laws and protocols shape the IP needs and expectations of TK holders, and provides a few concrete examples of such laws and protocols from some of the FFMs.

* Comment on Draft Report by the Future Harvest Centres supported by the CGIAR, dated November 3, 2000.

Introduction to Intellectual Property

What is Intellectual Property?: Intellectual property (IP) refers to property rights in creations of the mind, such as inventions, industrial designs, literary and artistic works, symbols, and names and images. The notion “intellectual property” is defined in the Convention Establishing the World Intellectual Property Organization, 1967¹ to include rights relating to:

- literary, artistic and scientific works;
- performances of performing artists, sound recordings, and broadcasts;
- inventions in all fields of human endeavor;
- scientific discoveries;
- industrial designs;
- trademarks, service marks, and commercial names and designations;
- protection against unfair competition; and,
- all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

IP is generally divided into two main categories:

- The protection of **industrial property** has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, geographical indications (indications of source or appellations of origin), and the repression of unfair competition.²
- **Copyright** includes literary and artistic works, such as novels, poems and plays, films, musical works, and drawings, paintings, photographs and sculptures, computer software, databases, and architectural designs. **Related rights** (also referred to as “neighboring rights”) include the rights of performing artists in their performances, producers of sound recordings in their sound recordings, and those of broadcasters in their radio and television broadcasts.

Additionally, **plant varieties** are protectable in many countries under the IP-related system of plant breeders’ rights.

As the definition in the WIPO Convention indicates, however, “intellectual property” is not confined to the specific examples of intellectual property just mentioned. The phrase at the end of the definition in the WIPO Convention (“all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields”) makes it clear that “intellectual property” is a broad concept and can include productions and matter not forming part of the existing categories of intellectual property, provided they result “from intellectual activity in the industrial, scientific, literary or artistic fields.”

Intellectual property rights (IPRs) are much like any other property rights – they allow the owner, or creator, of a patent, trademark, or copyright work to benefit from his or her innovation and creativity. These rights are

outlined in Article 27 of the Universal Declaration of Human Rights, which includes, as a human right, the right to benefit from the protection of the moral and material interests resulting from authorship of any scientific, literary, or artistic production.

Objectives of IP Protection: The primary purpose of most branches of the IP system (excluding trademarks and geographical indications) is to promote and protect human intellectual creativity and innovation. IP law and policy does so by striking a careful balance between the rights and interests of innovators and creators, on the one hand, and of the public at large, on the other. Thus, by granting exclusive rights in an invention, for example, the IP system encourages further innovation, rewards creative effort, and protects the (often substantial) investment necessary to make and commercialize the invention. The patent system also encourages people to disclose inventions, rather than retain them as trade secrets, thus enriching the store of publicly-available knowledge and promoting further innovation by other inventors. Thus, public dissemination of information is an important IP objective. Copyright and other IP branches work in a similar way. The progress and well-being of humanity rests on its capacity for new creations in areas of technology and culture. The promotion and protection of IP can also spur economic growth, create new jobs and industries, and enhance the quality and enjoyment of life. However, the IP system also responds to the needs of the public at large. Most IP rights are of limited duration, after which the creations falls into the public domain (only trademarks may be renewed indefinitely, and geographical indications can subsist indefinitely).

The protection of trademarks and geographical indications is aimed at the protection of the goodwill and reputation of tradespersons and their products and to prevent the unauthorized use of such signs which is likely to mislead consumers.

The Nature and Scope of Intellectual Property Rights: Intellectual property rights comprise generally exclusive rights to prevent or authorize the reproduction, adaptation, use, sale, importation and other forms of exploitation of the creation or innovation that is the subject of the rights. In some cases, an intellectual property right may not be an exclusive right, but may rather comprise the right to claim a reasonable remuneration upon the exercise by a third party of any of the acts referred to. A more precise and detailed exposition of the rights granted under each branch of the IP system is contained in the sections on each branch below.

Limitations and Exceptions: All IP rights are subject to various exceptions and limitations, and in some cases compulsory (non-voluntary) licenses, tools which can be used to balance the rights of creators and users. For the purpose of achieving the public policy goals of IP, the possibility of imposing limitations on IPRs can be an important tool in the hands of lawmakers.

Constant Evolution: Another feature of the IP system is that it is in constant evolution. New advances in technology – information technology and biotechnology particularly – and changes in economic, social and cultural conditions, require continuous appraisal of the system and at times adjustment and expansion, accompanied often by controversy. For example, the last few decades have seen the recognition of new forms of IP, such as a *sui generis* form of protection for plant varieties (in the 1950s and 1960s), patent protection for biological material, plants and animals (in the 1970s and 1980s), a *sui generis* form of protection for layout designs (topographies) of integrated circuits (1980s), copyright protection for computer software (1980s) and protection for databases and compilations of data (1980s and 1990s). The possible protection of tradition-based innovations and creations by the IP system, the subject of this Report, is a more recently articulated question.

International Protection of IP: The IP rights granted in a country apply only in the territory of that country (this is the principle of “territoriality”). Consequently, copyright is effective only in the country where the copyright work was created, the country of which the author is a national or the country in which the work was first published. A patent, a mark or an industrial design is only effective in the country in which they were registered. IPRs are thus territorial in scope and not effective in other countries. Therefore, if the owner of,

for example, a patent desires protection in several countries, a patent must be obtained in each of them separately. In order to guarantee the possibility of obtaining protection in foreign states for their own nationals, many states have concluded international IP agreements. International agreements also establish standards and common understandings at the international level. International treaties are interpreted and applied at the national level through national legislation and the courts. The first such agreement, the Paris Convention for the Protection of Industrial Property (the Paris Convention) was concluded as far back as 1883.³

The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) was concluded in 1994 as part of the Marrakesh Agreement Establishing the World Trade Organization (the WTO). The TRIPS Agreement came into force on January 1, 1995. For more information of the TRIPS Agreement, see text box “The TRIPS Agreement”.

International agreements on IP typically include substantive obligations and also regulate relations between parties in accordance with one of two principles: **national treatment** and **reciprocity**. Under the principle of **national treatment**, a foreign national is afforded the same level of protection as a national of that country. Thus, a national of country X would receive the same benefits in country Y as if he or she were a national of country Y. Under the principle of **reciprocity**, a foreign national is given the same rights in a country as the rights that a national of that country has in that foreign country. Thus, a national of country X would receive the same benefits in country Y that a national of country Y would receive in country X. International IP treaties generally operate on the national treatment principle. The TRIPS Agreement adds another principle, the **most-favoured nation treatment** principle. According to this principle, any advantage, favour, privilege or immunity granted by a Member of the WTO to the national of any other country must immediately and unconditionally be accorded to the nationals of all other Members.⁴

THE TRIPS AGREEMENT

The TRIPS Agreement contains provisions on standards concerning the availability, scope and use of IPRs, the enforcement of IPRs, the acquisition and maintenance of IPRs and related procedures, dispute prevention and settlement, and transitional and institutional arrangements. While developed Members of the WTO had to comply fully with the Agreement by January 1, 1996, developing countries and countries in transition to a market-oriented economy had to comply by January 1, 2000. Least-Developed Country Members have until January 1, 2006 to be in full compliance. Some TRIPS obligations were subject to shorter transition periods, such as the implementation of the national treatment and the most-favoured nation treatment principles (one year for all Members, irrespective of their stage of development). Some other obligations were not covered by any transition period (such as the mail-box and the exclusive marketing rights system).

The Agreement is subject to three overlapping review processes that were due to commence in 1999 and 2000: a built-in review of Article 27.3(b) due to take place in 1999; an overall review of the Agreement in 2000 under Article 71.1; and, a next round of multilateral trade negotiations.

Following this introduction, the remainder of this section will provide a brief examination of the various broad categories of IP and certain associated subjects. Where relevant, reference will be made to current and emerging issues and any apposite international agreements. The following categories of IP and subjects will be referred to below:

- Copyright and Related Rights
- Patents
- Trademarks
- Geographical Indications

- ▶ Unfair Competition, including Trade Secrets
- ▶ Industrial Designs
- ▶ Plant Varieties
- ▶ Protection of “Expressions of Folklore”
- ▶ Assignment, Licensing and Technology Transfer
- ▶ Collective Management; and,
- ▶ Enforcement

Copyright and Related Rights

Copyright vests in, amongst others, the following, provided they are original:

- ▶ literary works (such as novels, poems, plays, reference works, and newspapers)
- ▶ artistic works (such as paintings, drawings, photographs, and sculpture)
- ▶ architectural works
- ▶ musical works
- ▶ maps and technical drawings
- ▶ audiovisual works
- ▶ databases; and
- ▶ computer programs.

Copyright normally vests, at least in the first instance, in the work’s “author”. The copyright owner has the exclusive rights to prevent the unauthorized reproduction, performance, broadcasting, translation and adaptation of the work. These are sometimes referred to as “economic rights”. Copyright protection generally subsists for 50 years following the author’s death, although some countries have recently extended this term to 70 years. While a work’s author is, by operation of law, normally the owner of the copyright, national law may provide that when a work is created by an employee in the course and scope of his or her employment, then the employer, and not the employee, is the owner of the copyright. National laws may also provide for an author’s “moral rights”. These are the rights to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author’s honor or reputation. Moral rights cannot be transferred from the author to another person or entity. Hence, even if the economic rights are assigned or licensed, the author always retains the moral rights. For example, if the economic rights to a play are sold to a theater company, the author still has the right to have his or her name featured in the playbill, even if the author does not receive any of the proceeds of the production (for information on licensing, see further under “Assignment, Licensing and Technology Transfer” below).

Copyright protection arises automatically upon the creation of the work, provided it meets the requirements for copyright. There is no need to apply for or register copyright. The requirements for copyright are generally that the work must be original, and, in some countries, expressed in some material form. The latter requirement facilitates part of the existence of copyright and alleged infringement. Copyright protection is not dependent on the literary, artistic or musical quality of the work. Copyright law protects the owner of the rights against those who use the form in which the original work was expressed by the author, or a substantial part of that form.

The exclusive rights of copyright are tempered by certain exceptions, limitations and compulsory licenses, such as “fair use” provisions. In general, a copyright work may be copied for the personal and private use of the person who makes the reproduction. Another example is the making of quotations from a protected work, provided the source of the quotation, including the name of the author, is mentioned and the extent of the quotation is compatible with fair practice.

So-called “related rights” or “neighboring rights” protect performing artists in their performances, producers of sound recordings, and those of broadcasters in their radio and television broadcasts.

Main International Agreements in Copyright and Related Rights

- ▶ The Berne Convention for the Protection of Literary and Artistic Works, 1971;
- ▶ The International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the “Rome Convention”);
- ▶ Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971 (the “Phonograms Convention”);
- ▶ The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, 1974 (the “Satellites Convention”).

CURRENT AND EMERGING COPYRIGHT ISSUES

Issues currently under discussion within the copyright and related rights fields include the proposed protection of non-original databases, the protection of audiovisual performances, the enhancement of the rights of broadcasting organizations, and service provider liability for online copyright infringement. In addition, many questions relating to the exercise, management and enforcement of copyright on the Internet remain under discussion.

These are all WIPO-administered treaties. In addition, two new treaties were concluded in December 1996, the so-called “Internet treaties”. They are not yet in force. They are the WIPO Copyright Treaty, 1996 (the WCT) and the WIPO Performances and Phonograms Treaty, 1996 (the WPPT). The WCT (in the field of copyright) and the WPPT (in respect of sound recordings and performances) clarify existing norms and offer new norms in response to the questions raised by digital technology, and particularly the Internet, referred to jointly as the “digital agenda.” The treaties respond directly to the “digital agenda” in their provisions dealing with (1) the application of the reproduction right to the storage of works in digital systems, (2) the limitations and exceptions applicable in the digital environment, (3) technological measures of protection and (4) rights management information. Each treaty will come into force upon being ratified by 30 countries. As at February 1, 2001, 22 countries had ratified the WCT and 20 the WPPT.

The TRIPS Agreement includes provisions on copyright and related rights.⁵

Patents

A patent is an exclusive right granted for an invention, being a product or process that offers a new technical solution to a problem. To be protected by a patent, an invention must:

- ▶ be novel, that is, the invention must show some new characteristic which is not known in the body of existing knowledge. This body of existing knowledge is called the “prior art”;
- ▶ show an inventive step (non-obviousness), which could not have been deduced by a person with average knowledge of the relevant technical field; and,
- ▶ be capable of industrial application (usefulness).

In addition, an invention must be accepted as “patentable” under law. In many countries, scientific theories, discoveries of materials or substances already existing in nature, and methods for the medical treatment of human and animals (as opposed to medical products and devices) are either not regarded as “inventions” or

are considered inventions but are excluded from patent protection. In addition, certain fields of technology may not qualify for patent protection.

In some national laws, prior disclosure by the patent applicant or a third party within a certain period before the filing of the patent application can be excused with the result that such disclosure does not destroy novelty. This is known as a "grace period".

A patent provides the owner with the exclusive right to prevent others from using the patented invention without his or her authorization. The protection is granted for a limited period, generally 20 years from the filing date. After that time, the knowledge becomes part of the public domain for all to use. Patent protection means that the invention cannot be commercially made, used, distributed, offered for sale, imported or sold without the patent owner's consent. These patent rights are usually enforced in court, which, in most systems, has the authority to stop patent infringements. Moreover, a court, or in some countries an administrative agency, can also declare a patent invalid upon the successful challenge of a third party.

Patent applications: The first step in seeking patent protection is the filing of a patent application. The patent application generally contains a request, one or more claims, a description, drawings (if necessary) and an abstract. The request contains information such as the title of the invention and the name and address of the applicant. The description discloses the invention, and generally contains background information on the invention and an explanation of the invention, in clear language and enough detail that an individual with an average understanding of the field could use or reproduce the invention. Such descriptions are usually accompanied by visual materials such as drawings, plans, or diagrams, to better describe the invention. The application also contains various "claims", that is, a concise definition of the extent of protection being sought.

The examination of a patent application by a patent office includes an examination as to form (a formalities check), and may include (see below) a search and an examination as to substance. The objective of the search is to determine the prior art in the specific field to which the invention relates. In conducting the search, the patent office checks its documentation holdings that are arranged for search purposes according to specific areas of technology. The search may also include articles from technical and other journals. The search does not usually extend to disclosures other than publications, and in particular does often not include an examination of whether disclosure has taken place by public use. In some cases, an examiner may be personally aware of cases of prior use, or examiners may become aware of prior use through the intervention of a third party. While completeness is the ideal of the search, practical and economic considerations limit the scope of what is searched. However, the scope of the materials and information searched has given rise to controversy, particularly following cases in which patents have been granted in respect of products, processes or uses commonly known amongst indigenous, local and other communities. After the search, the substance of the application is examined in relation to the requirements for patentability, most notably novelty and inventive step.

It should be noted that national patent offices follow different approaches to patent application examinations. Some offices grant patents directly after the formalities check, that is to say, if the formalities are complied with, a patent is granted. In other countries, the offices conduct a search, and without making a decision on novelty or inventive step, a patent is granted. In other countries, a patent is granted only when the application complies with all the formal and substantive requirements.

In either case, the decisions of a national patent office are challengeable by the applicant or by third parties.

The information contained in a patent application is, in most cases, later published by the patent office, thus making the information publicly available. Patent information is a valuable source of technical information for third parties. Thus, the patent holder enjoys exclusivity in exchange for making publicly available information relating to his or her invention. However, it is only after the 20 year period of exclusivity that third parties

can commercially exploit the invention without authorization by the owner (unless, under exceptional circumstances, a non-voluntary license has been granted).

A patent is a document issued by a national patent office or a regional office that does the work for a number of countries, such as the European Patent Office (EPO), the African Regional Industrial Property Organization (ARIPO), the African Intellectual Property Organization (OAPI) and the Eurasian Patent Organization (EAPO). Broadly speaking, under such regional systems, an applicant can request protection for an invention in more than one country. For example, a European patent granted by the EPO has the same effect as a national patent granted by the designated countries of the European Patent Convention subject to the fulfillment of certain requirements (such as, the filing of a translation in an official language of that country), and each country decides as to whether to offer patent protection within its borders. In the case of OAPI, a patent granted by OAPI has effect in all OAPI countries. Patents issued by ARIPO are only valid in designated countries and provided they are compatible with national laws. The WIPO-administered Patent Cooperation Treaty (PCT) provides for the filing of a single international patent application – see text box on “The Patent Cooperation Treaty” below.

Utility models: In some countries, protection may be obtained for “utility models”, a name given to inventions mainly in the mechanical field. Generally, there is either only the criterion of novelty to be fulfilled or the inventive step required to obtain protection is smaller than that required for a patent, and the term of protection for utility patents is shorter.

THE PATENT COOPERATION TREATY (THE PCT)

The WIPO-administered Patent Cooperation Treaty (PCT) provides for the filing of a single international patent application which has the same effect as national applications filed in the designated countries. An applicant seeking protection may file one international application and request protection in as many signatory countries as needed. As at February 7, 2001, 110 countries were signatories to the PCT.

Patents on plant varieties: In a few countries, notably the United States of America, it is possible to “patent” a plant variety. Most countries, however, which protect plant varieties grant a special title of protection called, for instance, a “plant breeders’ right” or “plant variety protection certificate”. Some, such as the United States, grant a title that is called “patent” or “variety patent”, which should not be confused with a patent for inventions. The International Convention on the Protection of New Varieties of Plants, administered by the Union for the Protection of Plant Varieties (UPOV), 1991, establishes international standards for plant variety protection by plant breeders’ rights (see below).

Main International Agreements on Patents

- The Paris Convention;
- The Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, 1980; and,
- The Patent Cooperation Treaty (the PCT), 1970.

The TRIPS Agreement includes provisions on patents.⁶

CURRENT AND EMERGING PATENT ISSUES

Patent Law Treaty: National and regional patent procedures differ from country to country and region to region, and sometimes require complex formalities, causing problems for patent applicants and owners. In this respect, in 1995 WIPO Member States decided to embark on the negotiation of the Patent Law Treaty (PLT) to simplify and harmonize patent procedures and formalities. The PLT was adopted at a Diplomatic Conference which took place from May 11 to June 2, 2000. Further work following the conclusion of the PLT, may include consideration by the Standing Committee on the Law of Patents (SCP), established under the auspices of WIPO, of the desirability and feasibility of further harmonization of patent law.

Trademarks

Trademarks are signs or combinations of signs used to identify the origin or source of a good or service. Trademarks come in a variety of shapes (two and three dimensional) and forms. A trademark may be a simple word or phrase, a company's name, a number, letters, (combinations of) colors, or an image. In some jurisdictions, sounds and smells are afforded protection as trademarks.

Although in some countries and in some situations a mark may be protected without registration, it is generally necessary for effective protection that a mark be registered in a government office (usually the same office as that which grants patents). Registration is made in respect of specified classes of goods or services. No person or enterprise other than its owner may use a registered mark for goods or services identical with or similar to those for which the mark is registered where such use may lead to confusion in the minds of the public. Well-known marks are provided protection in the same way without registration, or, in certain cases, may enjoy more far-reaching protection against unauthorized use for dissimilar goods or services.

The protection of a mark is generally not limited in time, provided its registration is periodically renewed (typically, every 10 years) and its use continues.

With the movement towards service industries, protection has been extended to **service marks**. As opposed to distinguishing between manufacturers of similar goods, service marks distinguish between providers of similar services. Otherwise, service marks and trademarks are virtually identical with respect to registration, use, and ownership rights.

Certification marks are trademarks used to identify a product which meets certain standards established, managed and enforced by an organization "competent to certify" the products concerned. The organization applies for the registration of the mark and, if successful, becomes the trademark owner. The WOOLMARK® mark is one of the best known examples of a certification mark. Only manufacturers who offer for sale products made in accordance with the standards established by the relevant organization are licensed by the organization to use the mark. Consumers thus benefit from knowing that the products concerned meet the required standards.

Collective marks are signs which serve not to distinguish the goods or services of one enterprise from those of others, but to distinguish the origin or other common characteristics of goods or services of different enterprises which use the collective mark under the control of the owner. Collective marks are usually owned by associations of enterprises which offer the goods or services offered under the mark. The regulations governing the use of the collective mark have to be included in the application for registration of the mark. In general terms, the difference between collective marks and certification marks is that the latter may only be used by members of the organization, while certification marks may be used by anyone who complies with the relevant standards. Thus, the use of a collective mark may not in and of itself be considered as a guarantee of quality, but merely an indication of association.

Main International Agreements on Trademarks

- ▶ The Paris Convention;
- ▶ Madrid Agreement Concerning the International Registration of Marks, 1891 and the Protocol Relating to that Agreement, 1989; and,
- ▶ The Trademark Law Treaty, 1994.

The TRIPS Agreement includes provisions on trademarks.⁷

CURRENT AND EMERGING TRADEMARK ISSUES

In September 1999, the Assembly of the Paris Union for the Protection of Industrial Property and the General Assembly of WIPO adopted a joint **Recommendation Concerning Provisions on the Protection of Well-Known Marks**, which aims at clarifying and consolidating the international protection of well-known marks.

Other issues currently under discussion include the question of how trademarks and other rights in distinctive signs can be protected on the Internet without unduly limiting the further development of electronic commerce, and the protection of “new trademarks” such as sound marks, smell marks and three-dimensional marks.

Geographical Indications

The term “**geographical indications**” is defined in Article 22.1 of the TRIPS Agreement⁸ as an indication which identifies a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. In this sense, “geographical indication” encompasses the term “**appellation of origin**” as defined by the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1979 and as referred to in the Paris Convention. Another subject of IP protection is an “**indication of source**”, which is also referred to in the Paris Convention, and which refers to any expression or sign used to indicate that a product or service originates in a country, region, or specific place. The difference, it follows, between “geographical indication” as used in the TRIPS Agreement and “appellation of origin” as used in the Paris Convention, on the one hand, and “indication of source”, is that the former require a quality link between the product and its area of production, the latter not.

Unfortunately, this topic is subject to some terminological confusion. The term “geographical indication” is often used to refer to both appellations of origin and indications of source. In order to take into account all existing forms of protection, this Report will use the term “geographical indication” in its widest possible meaning.

Well-known examples of geographical indications include “Champagne”, “Cognac”, “Sheffield”, “Tequila”, “Roquefort” and “Darjeeling”.

Main International Agreements on Geographical Indications

- ▶ The Paris Convention;
- ▶ The Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods, 1891;
- ▶ The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1979.

The TRIPS Agreement contains provisions relevant to geographical indications.⁹

Unfair Competition, including Trade Secrets

The repression of unfair competition is directed against acts or practices, in the course of trade or business, that are contrary to honest practices, including, in particular:

- ▶ acts which may cause confusion with the products or services, or the industrial or commercial activities, of an enterprise;
- ▶ false allegations which may discredit the products or services, or the industrial or commercial activities, of an enterprise;
- ▶ indications or allegations which may mislead the public, in particular as to the manufacturing process of a product or as to the quality, quantity or other characteristics of products or services;
- ▶ acts in respect of unlawful acquisition, disclosure or use of trade secrets;
- ▶ acts causing a dilution or other damage to the distinctive power of another's mark or taking undue advantage of the goodwill or reputation of another's enterprise.

Trade secrets can be an effective way of protecting IP (for example, the formula for Coca-Cola® has never been patented but guarded as trade secret and thus may never be made known to the public). Trade secrets work by allowing individuals or companies to prevent information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices. It may be said that, by definition, trade secret protection contrasts with the public disclosure principle that generally underlies the patent system. However, in today's global marketplace, the competitiveness of companies can be dependent upon their ability to prevent the untimely and unauthorized disclosure of their strategies, business methods, techniques and discoveries.

CURRENT AND EMERGING ISSUES IN UNFAIR COMPETITION AND TRADE SECRETS

Commerce means competition. Where there is competition, acts of unfair competition are liable to occur. Electronic commerce is no exception. However, since electronic commerce easily and freely transcends national borders, it tends to involve several jurisdictions at the same time. This poses several challenges for the IP system, including in the field of unfair competition. For companies active in electronic commerce it creates problems if their marketing activities are subjected to a greater number of, often contradictory, regulations.

Main International Agreements on Unfair Competition and Trade Secrets

While the Paris Convention contains provisions on unfair competition in general,¹⁰ the TRIPS Agreement refers explicitly to undisclosed information.¹¹

The TRIPS Agreement provides that protectable undisclosed information is that which:

- ▶ has been kept secret, in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within circles that normally deal with the kind of information in question;
- ▶ has commercial value because it is secret; and,
- ▶ has been subject to reasonable steps, under the circumstances, to keep it secret, by the person lawfully in control of the information.¹²

Industrial Designs

An industrial design is the ornamental aspect of a useful article. This ornamental aspect may be constituted by elements which are three-dimensional (the shape of the article) or two-dimensional (lines, designs, colors) but must not be dictated solely or essentially by technical or functional considerations. Industrial designs are applied to a wide variety of products of industry and handicrafts: from technical and medical instruments to watches, jewelry and other luxury items; from housewares and electrical appliances to vehicles and architectural structures; from textile designs to leisure goods. To be eligible for industrial property protection in a country, industrial designs must be original or novel and must be registered in a government office (usually the same office as that which grants patents and trademarks). However, certain countries provide also for the protection of unregistered industrial designs.

CURRENT AND EMERGING ISSUES ON INDUSTRIAL DESIGNS

What form of protection for your design? Industrial designs are usually protected under specific design laws, but protection may also be possible under copyright law or as three-dimensional trademarks. Current debates are concerned *inter alia* with the relationship between these three branches of the IP system in relation to designs.

Protection of an industrial design means that third parties not having the consent of the owner of the protected industrial design may not make, sell or import articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes. Protection is given for a limited period of time (generally, 10 to 15 years).

In some countries, some kinds of industrial designs are (also) protected as works of art (works of art being objects of copyright protection). In certain countries, there may be an overlap between industrial design and copyright protection. Under certain circumstances, a design can also be protected by unfair competition law.

Main International Agreements on Industrial Designs

- The Paris Convention;
- The Hague Agreement Concerning the International Registration of Industrial Designs, 1925. This Convention was most recently revised in 1999. See text box on “The Hague Agreement Concerning the International Deposit of Industrial Designs, 1925”.

These are both WIPO administered treaties. In addition, the TRIPS Agreement also contains provisions on industrial designs.¹³

THE HAGUE AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF INDUSTRIAL DESIGNS, 1925

Generally, industrial design protection is limited to the country in which protection is granted. Under the Hague Agreement Concerning the International Registration of Industrial Designs, 1925, a WIPO-administered treaty, a procedure for an international registration is offered. An applicant can file a single international application either with WIPO or the national office of a country which is a party to the Treaty. The design will then be protected in as many member countries as the applicant wishes. This Convention was most recently revised in 1999. The aim of the revision was to increase the number of Contracting Parties, while at the same time retaining the present simplicity and economy of the Hague system, thereby making it even more attractive for actual and potential users.

Plant Breeders' Rights

Breeding new varieties of plants requires a substantial investment in terms of skill, labor, material resources, money and time. Thus, protection is afforded to new varieties by means of IPRs (which may be referred to as plant breeders' rights), both as an incentive to the development of agriculture, horticulture and forestry and to safeguard the interests of plant breeders. The opportunity to obtain certain exclusive rights in respect of his or her new variety provides the successful breeder with a better chance of recovering costs and accumulating the funds necessary for further investment. It also enables him to organize the productivity of and trade in seeds and propagating material (such as cuttings) in such a way that his or her variety is made available to farmers in an effective manner. In some cases (for example, cut flowers) the breeder can also contribute to the organization of the productivity and trade in the product sold to consumers.

In order to gain protection, a plant variety must be:

- ▶ new;
- ▶ distinct;
- ▶ uniform, and
- ▶ stable.

A "distinct" plant variety is sufficiently different from existing plant varieties such that there is no confusion in identifying members of the new variety as separate from members of the old variety. A plant variety is "uniform" when the plants that make it up are sufficiently similar. The uniformity criterion respects the biological, technical and economic features of the variety's mode of propagation. Uniformity is, for example, very high in clones (varieties that are vegetatively propagated), since all plants are genetically identical, and relative in seed-reproduced cross-pollinating varieties. A variety is "stable" if it remains unchanged through successive generations of reproduction or propagation.

International Agreements on Plant Varieties

The International Convention on the Protection of New Varieties of Plants, 1991, administered by the International Union for the Protection of Plant Varieties (UPOV), establishes international standards for plant variety protection by plant breeders' rights.

The TRIPS Agreement contains one reference to plant varieties in Article 27.3(b). The relevant portion states:

"...Members (of the WTO) shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof..."

As mentioned above, Article 27.3(b) was subject to a review four years after the date of entry into force of the WTO Agreement, that is, in 1999. The review was commenced at the first meeting of the TRIPS Council in 1999, and is still ongoing.

Protection of "Expressions of Folklore"

In the early 1980's, model provisions for the protection of folklore at the national level were adopted under the auspices of WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO). These model provisions are the "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions" (the "Model Provisions"). Several countries have enacted legislation based, at least in part, on the Model Provisions, generally as part of their copyright law. The following are the main elements of the Model Provisions:¹⁴

Expressions of folklore to be protected

The Model Provisions do not offer any definition of folklore. However, Section 2 provides that “expressions of folklore” are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community. The Model Provisions use the words “expressions” and “productions” rather than “works” to underline the fact that the provisions are *sui generis*, rather than part of copyright. It is another matter that expressions of folklore may, and often do, have the same artistic forms as “works.”

Only “artistic” heritage is covered by the Model Provisions. This means that, among other things, traditional beliefs, scientific views (e.g. traditional cosmogony) or merely practical traditions as such, separated from possible traditional artistic forms of their expression, do not fall within the scope of the proposed definition of “expressions of folklore.” On the other hand, “artistic” heritage is understood in the widest sense of the term and covers any traditional heritage appealing to our aesthetic sense. Verbal expressions, musical expressions, expressions by action and tangible expressions may all consist of characteristic elements of the traditional artistic heritage and qualify as protected expressions of folklore.

The Model Provisions also offer an illustrative enumeration of the most typical kinds of expressions of folklore. They are subdivided into four groups according to the forms of the “expressions,” namely expressions by words (“verbal”), expressions by musical sounds (“musical”), expressions “by action” (of the human body) and expressions incorporated in a material object (“tangible expressions”). The first three kinds of expressions need not be “reduced to material form,” that is to say, the words need not be written down, the music need not exist in musical notation and the dance need not exist in choreographic notation. On the other hand, tangible expressions by definition are incorporated in a permanent material, such as stone, wood, textile, gold, etc. The Model Provisions also give examples of each of the four forms of expressions. They are, in the first case, “folk tales, folk poetry and riddles,” in the second case, “folk songs and instrumental music,” in the third case, “folk dances, plays and artistic forms of rituals,” and in the fourth case, “drawings, paintings, carvings, sculptures, pottery, terra-cotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes; musical instruments; architectural forms.”

Acts against which expressions of folklore should be protected

There are two main categories of acts against which, under the Model Provisions, expressions of folklore are protected; namely, “illicit exploitation” and “other prejudicial actions” (Section 1).

“*Illicit exploitation*” of an expression of folklore is understood in the Model Provisions, (Section 3) as any utilization made both with gainful intent and outside the traditional or customary context of folklore, without authorization by a competent authority or the community concerned. This means that a utilization - even with gainful intent - within the traditional or customary context should not be subject to authorization. On the other hand, a utilization, even by members of the community where the expression has been developed and maintained, requires authorization if it is made outside such a context and with gainful intent.

Section 1 of the Model Provisions specifies the acts of utilization which require authorization where the circumstances described above exist. It distinguishes between cases where copies of expressions are involved and cases where copies of expressions are not necessarily involved. In the first category of cases, the acts requiring authorization are publication, reproduction and distribution; in the second category of cases, the acts requiring authorization are public recitation, public performance, transmission by wireless means or by wire and “any other form of communication to the public.”

Section 4 of the Model Provisions determines four special cases regarding the acts restricted under Section 3. In those cases, there is no need to obtain authorization, even if the use of an expression of folklore is made against payment and outside its traditional or customary context. The first of these cases is used for educa-

tional purposes. The second case is used “by way of illustration” in an original work, provided that such use is compatible with fair practice. The third case is where an expression of folklore is “borrowed” for creating an original work by an author. This important exception serves the purpose of allowing free development of individual creativity inspired by folklore. The Model Provisions do not want to hinder in any way the creation of original works based on expressions of folklore. The fourth case in which no authorization is required is that of “incidental utilization.” In order to elucidate the meaning of “incidental utilization,” paragraph 2 mentions (not in an exhaustive manner) the most typical cases considered as incidental utilizations: utilization in connection with reporting on current events and utilization where the expression of folklore is an object permanently located in a public place.

“Other prejudicial actions” detrimental to interests related to the use of expressions of folklore are identified by the Model Provisions, as four cases of offenses subject to penal sanctions (Section 6):

- ▶ Firstly, the Model Provisions provide for the protection of the “appellation of origin” of expressions of folklore. Section 5 requires that, in all printed publications, and in connection with any communication to the public, of any *identifiable* expression of folklore, its source be indicated in an appropriate manner by mentioning the community and/or geographic place from where the expression utilized has been derived. Reference to “the community and/or geographic place” takes into account that the same folkloric expressions may be found in more than one territory.¹⁵ Under Section 6, non-compliance with the requirement of acknowledgment of the source is a punishable offense.
- ▶ Secondly, any unauthorized utilization of an expression of folklore where authorization is required constitutes an offense. It is understood that such an offense may also be committed by using expressions of folklore beyond the limits, or contrary to the conditions of an authorization obtained.
- ▶ Thirdly, misleading the public by creating the impression that what is involved is an expression of folklore derived from a given community when, in fact, such is not the case is also punishable. This is essentially a form of “passing off.”
- ▶ Fourthly, it is an offense if, in the case of public uses, expressions of folklore are distorted in any direct or indirect manner “prejudicial to the cultural interests of the community concerned.” The term “distorting” covers any act of distortion or mutilation or other derogatory action in relation to the expression of folklore.
- ▶ Authorization of utilizations of expressions of folklore

When the Model Provisions determine the *entity entitled to authorize the utilization* of expressions of folklore, they alternatively refer to “competent authority” and “community concerned,” avoiding the term “owner.” They do not deal with the question of the ownership of expressions of folklore since this may be regulated in different ways from one country to another.

The tasks of the competent authority (provided such an authority has been designated) are to grant authorizations for certain kinds of utilizations of expressions of folklore (Section 3), to receive applications for authorization of such utilizations, to decide on such applications and, where authorization is granted, to fix and collect a fee—if required by law—(Section 10, paragraphs (1) and (2)).

The Model Provisions offer the possibility of providing in the law that a supervisory authority shall establish tariffs payable for authorizations of utilizations or shall approve such tariffs (without indication in the Model Provisions as to who will, in such a case, propose the tariffs, although it was understood by the experts adopting the Model Provisions that the competent authority would propose the tariffs) (Section 10), and that the supervisory authority’s decision may be appealed to a court (Section 11, paragraph (1)).

Where the community as such is entitled to permit or prevent utilizations of its expressions of folklore subject to authorization, the community would act in its capacity of owner of the expressions concerned and would be free to decide how to proceed. There would be no supervisory authority to control how the community exercises its relevant rights. However, the Committee of Governmental Experts that adopted the Provisions

was of the opinion that, if it was not the community as such, but a designated representative body thereof, which was entitled by legislation to give the necessary authorization, such a body would qualify as a competent authority, subject to the relevant procedural rules laid down in the Model Provisions.

The Model Provisions (Section 10, paragraph (2)) allow, but do not make mandatory, collecting *fees for authorizations*. Presumably, where a fee is fixed, the authorization will be effective only when the fee is paid. Authorizations may be granted free of the obligation to pay a fee. Even in such cases, the system of authorization may be justified since it may prevent utilizations that would distort expressions of folklore.

The Model Provisions also determine the purpose for which the collected fees must be used. They offer a choice between promoting or safeguarding national folklore or promoting national culture, in general. Where there is no competent authority and the community concerned authorizes the use of its expressions of folklore and collects fees, it seems obvious that the purpose of the use of the collected fees should also be decided upon by the community.

Sanctions

The Model Provisions state that sanctions should be provided for each type of offense determined by the Provisions in accordance with the penal law of each country concerned.

Assignment, Licensing and Technology Transfer

One means for accomplishing economic development is the commercial transfer and acquisition of technology. The sale, purchase and transfer of exclusive IPRs takes place through legal relationships between the owner of the exclusive rights and the person or legal entity which acquires those rights. Those legal relationships are essentially contractual in nature, which means that the transferor of the technology consents to the transfer and the transferee consents to acquire the rights in question. There are two principal legal methods that can be used to bring about a commercial transfer and acquisition of technology:

- ▶ Assignment
- ▶ License

Assignment: The first legal method is the transfer by the owner of all his, her or its exclusive IPRs and the purchase of those rights by another person or legal entity. When all the exclusive rights are transferred, without any restriction in time or other condition, by the owner of the IPRs to another person or legal entity, it is said that an "assignment" of such rights has taken place. The concept of assignment has been recognized in the laws of many countries. It applies to exclusive rights in patents, utility models, industrial designs, trademarks, copyright and related rights. The legal act whereby the owner of the IPRs transfers the rights to another is evidenced in writing in the form of a legal document generally referred to as "instrument of assignment" or simply an "assignment". The transfer law is called the "assignor" and the other person or entity, the transferee, is called the "assignee." When an assignment takes place, the assignor no longer has any rights in respect of the IPRs concerned, except for the moral rights under copyright law. The assignee becomes the new owner of the rights and is entitled to exercise all the rights exclusively.

License: The second legal method is through a license, that is, the grant of a permission by the owner of the IPRs to another person or legal entity to perform one or more of the acts which are covered by the exclusive rights. Licenses are often limited to a certain geographical territory and a certain period of time. The concept of "license" is recognized in the laws of many countries, and it applies to all forms of intellectual property. The legal document evidencing the permission given by the owner of the IPRs is usually referred to as a "license contract" or, more simply, as a "license." The owner who gives the permission is referred to as the "licensor." The person or legal entity who or which receives that permission is referred to as the "licensee."

The license is usually granted subject to certain conditions which will be set out in the written document by which the license is granted to the licensee. One of the conditions will obviously be related to the payment by the licensee of money in return for the license that is granted. The money concerned can be paid in a variety of forms, such as a lump sum payment or monthly or less frequent payments. The monies to be paid are often linked to the amount of income or profit accruing to the licensee pursuant to his or her exploitation of the licensed IPRs. Such monies are often referred to as “royalties.”

Apart from assignment and licensing, there are other methods for the transfer of technology, including **franchising** and **distributorship**, **know-how contracts**, **consultancy arrangements**, **turn-key projects** and **joint venture arrangements**.

Collective Management

As pointed out in the section on copyright and related rights above, the protection granted by these rights is based on the premise that the author or owner of a work has the exclusive right to exploit his or her work or to authorize others to do so. This right seeks to guarantee that the right owner not only prevents others from using the work but is able to ensure that where permission is granted, the work is exploited in a way that is consistent with the owner's intentions and interests.

To exercise the rights to the utmost, the owner would have to be in a position to control the reproduction, performance and broadcasting of the work. The difficulty in exercising these rights individually was recognized very early on in the establishment of the international system of copyright protection. An author, for example, would have to set up systems for authorizing or preventing the use of his works. This would include, *inter alia*, negotiating contracts with each potential user, taking decisions on the economic conditions of the exploitation, monitoring the nature of the use to ensure that it is consistent with the permission and collecting remuneration from users.

The notion of collective management of rights (or “collective administration of rights”) arose out of the recognition of the impracticality and incapacity of owners of rights to exercise their rights individually with the ever-increasing numbers of users of their works.

The international collective management system enables owners of rights to authorize collective management organizations (“collecting societies”) to manage their rights. The term “collective” is used here to signify the centralization of all the elements involved in the exercise of rights in one organization for a large number of individual rights owners. This way, the organization performs the same functions for all the individuals using the same resources and develops economies of scale. Generally, this takes the form of owners of rights assigning some or all of their rights to this organization. This does not affect the exclusive nature of the rights but only means it becomes an indirect, and, it can be argued, more effective way of managing the rights. The benefits of collective management are not only limited to the owner of rights. Advantages also accrue to the users who have easier access to the works and at less cost as collective management decreases the cost of negotiating with users, monitoring use and collecting fees.

The types of rights currently managed by collecting societies are diverse and include:

- performing rights in musical works (rights of public performance, broadcasting and communication to the public);
- mechanical rights (right to authorize sound recording), mainly in musical works; and,
- certain rights in audiovisual works, works of fine art, dramatic works and reprographic reproduction of literary and graphic works.

Given that different rights can derive from one work, an owner of rights can therefore belong to several societies, each managing different rights in the same work.

Collecting societies can be private or public organizations or *quasi* - governmental in nature. This depends on the legal, economic, socio-political, and cultural circumstances in each country. Although set up as entities within national territories, the societies operate in an elaborate international cooperation system. They do so by entering into agreements (usually reciprocal) with other societies controlling similar rights in other territories ("sister" societies) to ensure collection and distribution of the royalties of their members is done world-wide.

Collecting societies have four primary functions:

- ▶ **Acquisition of rights from members:** The society acquires the rights in a work from the copyright owner (or from a "sister society") by assignment.
- ▶ **Licensing:** The society licenses the works to people or corporations wishing to exploit them on the basis of agreed fees developed by the society.
- ▶ **Collection of fees:** Timely collection of fees due to the owner of rights from the users.
- ▶ **Distribution:** Timely and correct distribution of royalties due to the owners of rights. This function is dependent on an efficient monitoring of the uses made of works.

Integral to these functions is the need for each society to be in a position to manage these rights internationally and to take legal steps to enforce them in the law courts.

Enforcement

In order for an IP holder to ensure the proper and lawful protection of his or her rights, the law must have provisions which allow an IP holder to investigate and prosecute violators. In some cases, the enforcement mechanisms of a specific country's legislation, and their proper application, can make the difference between significant support for genuine innovation, or the permitting of piracy. As geographical distance becomes less and less important for world trade, countries with strong enforcement measures serve as havens for concerted and effective technical innovation. Innovators are encouraged to invest money and conduct research in these countries, knowing that their future IP rights will be protected. Conversely, regions with less strict enforcement measures are sometimes exploited by individuals to make illicit copies and circumvent the rights of others.

There are several general forms of enforcement measures an IP holder can appeal to in order to protect his or her rights.

- ▶ First, there are *conservatory* or *provisional measures*. These measures are designed to prevent infringing works from reaching the marketplace. If an IP holder has sufficient reason to believe that copies of the protected works are being illegally produced, he or she can request that an authorized judicial authority approve a request to search the suspected location of the infringing items, and seize them if present. These actions serve the dual purpose of preventing entry of infringing items into the marketplace, and also preserving the evidence of such infringement.
- ▶ Once the evidence of infringement has been obtained, an IP holder can file a *civil action* or a *criminal complaint* as allowed for in the national jurisdiction. In cases where infringement was done accidentally (e.g. mistakenly assuming a work was in the public domain when it was actually copyrighted), a civil applicant or plaintiff may result in, *inter alia*, the destruction of the infringing works, any items used to produce those works, and compensation for any lost profits. In cases where an individual repeatedly and/or willfully infringes works, a criminal complaint may be filed. Depending upon the severity of the violation, any prior similar violations, and other relevant factors, a court may choose to impose hefty fines, imprisonment, and other measures to sufficiently deter future violations. In both civil actions and criminal complaints, a court may choose to place an injunction against future copying upon the individual charged. The injunction serves as an added deterrent by specifically warning against future infringement, and threatening a fine for non-compliance.

- ▶ An alternative to formal civil and criminal complaints are *arbitration* and *mediation*. Sometimes, parties involved in a dispute may not feel that a public court is the proper forum for settling their differences. In cases such as these, arbitration and mediation provide an attractive option for allowing a third party to facilitate discussion in a more flexible format. In both systems, a neutral third party (from now on “neutral”) will be called on to help resolve the dispute. In mediation, the neutral will serve as a facilitator. The neutral will encourage discussion and assist both parties to reach a common ground of understanding; however, under mediation, either party may choose to terminate the contact at any time, and the neutral’s observations/decisions have no binding affect upon either party. In arbitration, a neutral is once again engaged to help resolve the dispute; however, each party agrees to abide by whatever decision the neutral concludes. Thus, arbitration may be more adversarial than mediation, but arbitration guarantees a resolution to the conflict. Depending on the nature of the dispute, arbitration and mediation can sometimes generate mutually satisfactory outcomes more efficiently and quickly than submitting the dispute to the courts.
- ▶ Finally, there are *border measures*. These allow for customs officers to stop and check for infringement among items being imported. Although an IP holder does not have to prove that the items being imported definitively infringe, the IP holder must provide *prima facie* evidence that the goods are infringing. Essentially, border measures serve a similar function as conservatory or provisional measures; goods suspected of infringement are prevented from entering the marketplace and are preserved as evidence. Depending on national legislation, the IP holder may have to provide security to compensate the owner of the goods in case it is determined that the items were not infringing.

National laws determine the precise application and nature of enforcement measures.

The TRIPS Agreement, in Part III (Articles 41 to 61), contains detailed provisions on the enforcement of IP rights.

Notes

¹ Article 2(viii).

² Article 1.2, Paris Convention for the Protection of Industrial Property, 1883.

³ The Paris Convention has been updated and amended several times since then, most recently in 1967.

⁴ Article 4, the TRIPS Agreement.

⁵ Section 1, Articles 9 to 14.

⁶ Section 5, Articles 27 to 34.

⁷ Section 2, Articles 15 to 21.

⁸ Part II, Section 3, the TRIPS Agreement.

⁹ Part II, Section 3, Articles 22 to 24 of the TRIPS Agreement.

¹⁰ Article 10*bis*

¹¹ Article 39.

¹² The TRIPS Agreement, Article 39.2 . See also Nuno Pires de Carvalho, “From the Shaman’s Hut to the Patent Office: How Long and Winding is the Road?”, (1999) 40 *Revista da ABPI*, pp. 3-28 and (1999) 41 *Revista da ABPI*, pp. 3-17. See also Article 39.3 of the TRIPS Agreement.

¹³ Part II, Section 4, Article 25 of the TRIPS Agreement.

¹⁴ For a fuller account of the origins and provisions of the Model Provisions, see M. Ficsor, “Attempts to Provide International Protection for Folklore by Intellectual Property Rights”, paper presented at UNESCO-WIPO World Forum on the Protection of Folklore, held in Phuket, Thailand, April 8-10, 1997.

¹⁵ S. Le Gall, “Preserving One’s Narrative: Implications of Intellectual Property Protection of Folklore and the Steel Pan in Trinidad and Tobago”, Master of Law Thesis, York University, Canada, 1994, p. 155.

Other Relevant Multilateral Institutions and Initiatives

Introduction

The need for the protection of TK can be described as a horizontal concern, as different multilateral institutions are involved in discussing it from different perspectives and in different contexts. This section does not set out to review those discussions in depth, but rather it highlights the progress made by other relevant institutions and in other multilateral initiatives in identifying TK and proposing mechanisms for its protection. The section also neither attempts to include information on all institutions and processes, nor describe all their work on TK. It rather limits itself to the institutions and processes which have a particular relevance for TK within an intellectual property (IP) context. The order of the institutions mentioned herein does not reflect any particular hierarchy as to the relevance of their work. WIPO considers all initiatives being undertaken in other fora that touch upon IP equally relevant and valuable.

The United Nations Environment Programme (UNEP)

UNEP is the overall co-ordinating environmental organisation of the United Nations system. Its mission is to provide leadership and encourage partnerships in caring for the environment by inspiring, informing and enabling nations and peoples to improve their quality of life without compromising that of future generations. In recent years, several multilateral environmental agreements relevant to TK have been concluded under the auspices of UNEP. These include:

The Convention on Biological Diversity

One of the areas of policy and legislation development in the Convention on Biological Diversity, 1992 (the CBD) regards the implementation of Article 8(j) and related provisions, which mandates Contracting Parties, as far as possible and as appropriate, subject to their national legislation, to "*respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.*"

The third Conference of the Parties (COP) to the CBD decided that an intersessional process should be established under the CBD to advance the implementation of Article 8(j) and related provisions.¹ As part of this intersessional process a Workshop on Traditional Knowledge and Biological Diversity was organized in Madrid, Spain, in November 1997, which provided a Report to the COP on the possibility of developing a workplan on Article 8(j) and related provisions. Taking note of that Report, the fourth COP of the CBD, held in Bratislava,

Slovakia, in April 1998, decided that an *Ad hoc* Open-ended Inter-sessional Working Group be established to address the implementation of Article 8(j), with the mandate, *inter alia*, to develop a programme of work for the implementation of Article 8(j) and related provisions and to provide advice on the development of legal and other appropriate forms of protection for subject matter covered by Article 8(j).² This Working Group held its first meeting in Sevilla, Spain, in March 2000, and developed a programme with the objective of a just implementation of Article 8(j) at local, national, regional and international levels and to ensure the full and effective participation of indigenous and local communities at all stages and levels of its implementation. The fifth COP, held in Nairobi, Kenya, in May 2000, in its Decision V/16 endorsed a Programme of Work On the Implementation of Article 8(j) and Related Provisions of the CBD.³

The scope of TK under the CBD may be said to be narrower than the concept on which WIPO has based its work.⁴ Two elements of Article 8(j) contribute to that: the nature of the subject-matter, which is confined to knowledge associated with the conservation and sustainable use of biodiversity, and the identification of the right holders as indigenous and local communities embodying traditional lifestyles.

The language of Article 8(j) of the CBD suggests that its implementation requires three sorts of legislative action:

- ▶ definition of standards concerning the availability, scope and use of rights (which could include IP rights) in knowledge, innovations and practices of indigenous and local communities, as well as the establishment of measures concerning the enforcement of those rights;
- ▶ promotion of wide application of such knowledge, innovations and practices with the approval and involvement of the holders of such knowledge; and
- ▶ encouragement of the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.⁵

The United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa

The United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994 (the UNCCD) promotes a new approach to managing dryland ecosystems and development aid flows. The Convention is implemented through action programs, which address the underlying causes of desertification and drought and identify measures to prevent and reverse it. These action programs are based on a bottom-up approach and originate at the local level. The relevance of TK in this process is reflected in Articles 16, 17, 18 and 19 of the Convention.

The Food and Agriculture Organization of the United Nations (FAO)

The Commission on Genetic Resources for Food and Agriculture, of the Food and Agriculture Organization of the United Nations (FAO), is a permanent forum in which governments are, *inter alia*, renegotiating the International Undertaking on Plant Genetic Resources, 1983. In 1993, the FAO Conference adopted Resolution 7/93 for the adaptation of the International Undertaking in harmony with the CBD, including the issue of the realization of Farmers' Rights. The revision has proceeded in three stages: the first was the integration of the three interpretative annexes into the Undertaking, a legally non-binding document (the interpretative annexes addressed matters of compatibility with national laws of plant variety protection and with the CBD); the second stage was the consideration of access to plant genetic resources (including access to collections acquired outside the framework of the CBD) and the realization of farmers' rights. The third stage concerns legal and institutional options.⁶

At present, it appears that the negotiators of the Undertaking have agreed on a general approach to farmers' rights, according to which the Parties to the future agreement shall "*recognize the enormous contribution*

*that farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world. These contributions form the basis for F/farmers' R/rights as they relate to plant genetic resources for food and agriculture."*⁷

The revised text of the International Undertaking will provide for the protection of TK under a narrow approach. Indeed, the subject matter of farmers' rights is confined to plant genetic resources for food and agriculture. Animal genetic resources, for the time being, are outside of the Undertaking's scope. Plant genetic resources that are used in other economic activities, such as the chemical and the pharmaceutical industries, are also beyond the scope of the Undertaking. Furthermore, the holders of rights are limited to farmers.⁸

The United Nations Working Group on Indigenous Populations

The Working Group on Indigenous Populations (the WGIP) was established by the Economic and Social Council of the United Nations in 1982. The WGIP is a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights (formerly the Sub-Commission on the Prevention of Discrimination and Protection of Minorities).

Its five members are independent experts and are members of the Sub-Commission. Apart from facilitating and encouraging dialogue between Governments and indigenous peoples, the Working Group has two formal tasks:

- ▶ To review national developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous peoples; and
- ▶ To develop international standards concerning the rights of indigenous peoples, taking account of both the similarities and the differences in their situations and aspirations throughout the world.

In furtherance of the second task, the WGIP has developed *inter alia* the Draft United Nations Declaration on the Rights of Indigenous Peoples, adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in 1994, Article 29 of the Draft Declaration states: "*Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and Intellectual Property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.*"

The WGIP has also developed Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, and is engaged in several other indigenous peoples-related initiatives and issues touching upon the protection of the TK of indigenous peoples. Since the launch of the International Decade of the World's Indigenous People in 1995, numerous other United Nations human-rights bodies (such as the Human Rights Committee, the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights) have addressed indigenous peoples' concerns.

The United Nations Educational, Scientific and Cultural Organization (UNESCO)

UNESCO, in coordination with WIPO, has long been involved in the protection of one of the main components of TK: folklore. The international community has recognized the need to protect expressions of folklore since the 1970s. In 1982, a set of model provisions were developed under the UNESCO/WIPO auspices which could be incorporated into national legislation to help protect expressions of folklore, namely

the UNESCO/WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions, 1982. (See summary of the Model Provisions in the section "Introduction to IP" .) In 1989, the UNESCO General Conference adopted a "Recommendation on the Safeguarding of Traditional Culture and Folklore". Given that an effective international regime for the protection of expressions of folklore has not been developed since the preparation of the model provisions, WIPO and UNESCO were asked at the UNESCO/WIPO World Forum on the Protection of Folklore held in Phuket, Thailand, in April 1997, to convene regional consultations on these issues. Four regional consultations were convened for developing countries as follows: for African countries in Pretoria, South Africa (March 1999); for countries of Asia and the Pacific region in Hanoi, Viet Nam (April 1999); for Arab countries in Tunis, Tunisia (May 1999); and for Latin America and the Caribbean in Quito, Ecuador (June 1999).⁹

UNESCO is also engaged in several other activities relating to the protection of cultural heritage and diversity. Certain UNESCO conventions and other instruments are particularly relevant. These include: the Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Diversity of Cultural Property, 1970; the Convention Concerning the Protection of the World Cultural and National Heritage, 1972; and, the Declaration on the Principles of International Cultural Cooperation, 1966.

The International Labour Office (ILO)

The ILO has analyzed the labour conditions of indigenous and tribal workers. In this context, the General Conference of the ILO, which meets annually to discuss social and labour questions, adopted, in 1989, the Convention Concerning Indigenous Peoples in Independent Countries (Convention No. 169). Convention No. 169 sets a general policy of respect for the human rights of indigenous and tribal peoples, asserts their rights to land, and provides for some rules as regards labour, social security and health-related matters. Convention No. 169 may have relevance for the protection of TK of indigenous peoples to the extent that it identifies the rights of those peoples to "*the full realisation of the social, economic and cultural rights [...] with respect for their social and cultural identity, their customs and traditions and their institutions.*" (Article 2.2(b)).¹⁰

Inspired by Convention No. 169, the ILO launched the Interregional Program to Support Self-reliance of Indigenous Tribal Communities through Cooperatives and other Self-Help Organizations (INDISCO) and the strengthening of the capacities of indigenous and tribal peoples, helping them to design and implement their own development plans and initiatives and ensuring that their traditional values and culture are safeguarded.

The World Bank

The World Bank's Policy on Indigenous Peoples dates back to 1982. In 1991, the Bank issued a revised policy, which extended the definition of indigenous peoples to include a much wider array of peoples who maintain social and cultural identities distinct from those of the national societies where they live, have close attachments to their ancestral lands and are often susceptible to being disadvantaged in the development process. This policy is currently under revision. The World Bank has indicated that since its revised policy became effective in 1991, more than 150 Bank-financed projects worldwide have been identified, many of which have indigenous peoples development plans or strategies for ensuring that they receive culturally appropriate benefits. The Bank also undertakes a growing amount of research and sector work, which applies to indigenous peoples and other ethnic and minority groups.

The World Health Organization (WHO)

The focus of the WHO on health needs of indigenous peoples has increased since the beginning of the United Nations Decade of the World's Indigenous People in 1995. A number of departments and clusters have been

involved in past and current activities of the organization related to the health of indigenous people, such as the Substance Abuse Department, the Non-communicable Diseases Cluster and the Traditional Medicine Team. During 1998, WHO co-sponsored and participated in the organization of the third "Healing our Spirit", in New Zealand which focused on indigenous peoples and substance misuse. At the 51st World Health Assembly, in May 1998, a resolution on the health of indigenous peoples was passed, requiring the Organization, as a contribution to the Decade, to increase its attention to the health needs of indigenous populations in a comprehensive and systematic way. WHO has established a partnership with the Committee on Indigenous Health, which was established by the indigenous caucus during the preparatory conference for the 15th session of the Working Group of Indigenous Populations. In partnership with the Committee, two forums on the health of indigenous peoples were organized during the 1998 and 1999 sessions of the Working Group of Indigenous Populations. In November 1999, WHO organized an international consultation on the health of indigenous peoples in Geneva.

The United Nations Conference on Trade and Development (UNCTAD)

UNCTAD launched the BIOTRADE Initiative at the third Conference of the Parties of the CBD, in November 1996, with the mission of stimulating trade and investment in biological resources to further sustainable development.¹¹ As a matter of course, the knowledge on how to use those resources is a fundamentally important component of trade in biological resources. Therefore, the BIOTRADE initiative may have a relevant role in promoting awareness as to the need for developing new mechanisms to protect biodiversity-associated TK. The BIOTRADE Initiative is currently being revised and will be re-launched soon.¹²

At the Tenth session of UNCTAD, held in Bangkok, on February 12-19, 2000, UNCTAD Member States approved an extensive Plan of Action, including specific work on the protection of TK. The relevant part of paragraph 147 of the Plan of Action reads: "*UNCTAD should also, in full cooperation with other relevant organizations, in particular and where appropriate WIPO and WHO, promote analysis and consensus building with a view to identifying issues that could yield potential benefits to developing countries, including the link between public health and development. This should focus on: [...] Taking into account the objectives and provisions of the Convention on Biological Diversity and the TRIPS Agreement, studying ways to protect traditional knowledge, innovations and practices of local and indigenous communities and enhance cooperation on research and development on technologies associated with the sustainable use of biological resources.*" It appears, therefore, that UNCTAD will be fully involved in assisting the Contracting Parties of the CBD in finding appropriate mechanisms to protect biodiversity-associated TK.

The World Trade Organization (WTO)

The WTO has also carried out relevant work in the field of TK. WTO Members, conscious of the influence of the TRIPS Agreement as a factor of improvement of IP protection, have asked various bodies of that organization, such as the Committee on Trade and Environment (CTE), the Council for TRIPS and the General Council, to address the issue.¹³ In the lead to the Third Ministerial Conference of WTO Members in Seattle on November 30 to December 3, 1999, a number of WTO Members submitted proposals, both in the context of the review of Article 27.3(b) of the TRIPS Agreement and of an eventual new round of negotiations, that the TRIPS Agreement should contain provisions on the protection of TK. The rationale that underlies such a proposal seems to be straightforward: the same principle of non-discrimination in international trade that underlies the TRIPS Agreement should also apply in the context of TK. It is possible that WTO Members may at some point be engaged in negotiating the introduction of provisions aimed at protecting TK in the TRIPS Agreement.

The United Nations Development Program (UNDP)

Within the framework of the policy of sustainable human development adopted by the UNDP, issues related to indigenous people have gained considerable attention.

Supporting and strengthening indigenous communities and organizations is a task that cuts through UNDP's main thematic areas - poverty eradication, employment and sustainable livelihoods, gender equity, good governance and the sustainable management of the environment. Over the course of 1999, UNDP was taking stock of its work and its engagement with indigenous peoples and mapping out how best to move forward strategically over the next four years of the decade and beyond.

The Open-ended Ad Hoc Intergovernmental Panel on Forests

This panel was established as a subsidiary organ of the Commission on Sustainable Development (the CSD) by the Economic and Social Council to pursue consensus and formulate co-ordinated proposals for action to support the management, conservation and sustainable development of forests. Its Programme of work encourages countries to consider ways and means for the effective protection of traditional forest-related knowledge, innovations and practices of forest-dwellers.

Other international organizations involved in TK-related issues, include the **United Nations Population Fund (UNFPA)**, the **World Food Program (WFP)**, the **United Nations Children's Fund (UNICEF)**, and the **International Fund for Agricultural Development (IFAD)**.

Final remarks

Given that TK is a horizontal, cross-cutting issue, the approach adopted by the different organizations mentioned above takes a specific character, which is naturally a reflection of each organization's particular mandate and objectives. Differences in perspective have helped enrich the debate and, more importantly, have stressed the need for collaborative and cooperative approaches – respecting each institutions respective mandate and areas of expertise – to finding operative and efficient ways of protecting TK, by using existing IP mechanisms, or by developing a new, *sui generis* one, or by adopting a combination of both.

Notes

¹ See Decision III/14, paragraph 9.

² See Decision IV/9, paragraphs 1(a) and (b).

³ See the Annex of Decision V/16.

⁴ See WIPO's working definition of traditional knowledge in the chapter on "Terminology."

⁵ See further "Intellectual Property and Genetic Resources", document prepared by the International Bureau of WIPO for the WIPO Meeting on Intellectual Property and Genetic Resources, held in Geneva on April 17 and 18, 2000 (document number WIPO/IP/GR/00/2)

⁶ *Revision of the International Undertaking on Plant Genetic Resources – Consolidated Negotiating Text Resulting from the Deliberations during the Fifth Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture*, CGRFA/IUND/CNT/Rev.1 (Article 12). An alternative provision is also under consideration: instead of saying that farmers' contributions "form the basis for F/farmers' R/rights", it says that those contributions "form the basis for the concept of F/farmers' R/rights." (emphasis added). Apparently, the difference between the two options lies in the fact that the reference to the concept of farmers' rights will give Parties total freedom to establish their own legal systems. In contrast, if those contributions form the basis for the rights, then the relevant language of the Undertaking should be seen as a basic framework with which national laws should conform

⁷ *Revision of the International Undertaking on Plant Genetic Resources – Consolidated Negotiating Text Resulting from the Deliberations during the Fifth Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture*, CGRFA/IUND/CNT/Rev.1 (Article 12). An alternative provision is also under consideration: instead of saying that farmers' contributions "form the basis for F/farmers' R/rights", it says that those contributions "form the basis for the concept of F/farmers' R/rights." (emphasis added). Apparently, the difference between the two options lies in the fact that the reference to the concept of farmers' rights will give Parties total freedom to establish their own legal systems. In contrast, if those contributions form the basis for the rights, then the relevant language of the Undertaking should be seen as a basic framework with which national laws should conform

- ⁸ A footnote to Draft Article 12 clarifies that negotiating parties still need to agree on definitions of farmers' rights, farmers and farming communities (which may indicate that the most difficult aspects of farmers' rights are still to be negotiated). Another footnote informs that the European Region proposed that, for the purpose of the Undertaking, farmers and farming communities include indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of plant genetic resources for food and agriculture.
- ⁹ The Recommendations produced by the four regional consultations are reproduced in Annex 5.
- ¹⁰ *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169*, by Manuela Tomei and Lee Swepston, published by the ILO with the financial support of the International Centre for Human Rights and Democratic Development, in July 1996, provides a complete introduction to the text and the spirit of the Convention.
- ¹¹ Since the BIOTRADE Initiative cannot take place without taking into account the transfer of the knowledge associated with the biological resources being traded, it becomes relevant in the area of TK protection. Actually, once fully implemented, the BIOTRADE Initiative will constitute UNCTAD's essential contribution to the role of biodiversity in international trade. Indeed it can be asserted that "biodiversity, and the knowledge associated with using it in a sustainable manner, are a comparative advantage of those least developed countries that are biodiversity-rich, enabling them to participate more effectively in global markets and thus rise above current levels of poverty and deprivation." (see *Protection of Traditional Knowledge: A Global IP Issue*, document WIPO/RT/LDC/14 prepared by the International Bureau of WIPO for the High Level Interregional Roundtable on IP for the Least Developed Countries (LDCs), Geneva, September 30, 1999).
- ¹² Further information available at <http://www.biotrade.org>.
- ¹³ In the context of the activities of the CTE, the WTO Secretariat has prepared several documents reflecting how WTO Members' obligations concerning non-discrimination in international trade interact with the protection of traditional knowledge: *Environment and TRIPS* (WT/CTE/W/8 and W/8/Corr.1), *The Convention on Biological Diversity and the Agreement on Trade-Related Aspects of IP Rights* (WT/CTE/W/50), *The Relationship Between the Convention on Biological Diversity (CBD) and the Agreement on Trade-Related Aspects of IP Rights (TRIPS): with a Focus on Article 27.3(b)* (WT/CTE/W/125). The thrust of these documents is that the TRIPS Agreement does not impair the protection of traditional knowledge by IP regimes, or by non-IP regimes, such as contract law. These documents point out that several areas of IP protection (including patents and protection of undisclosed information) included in the TRIPS Agreement could be useful tools for the protection of environmentally-sound technologies. As far as technology that may cause serious prejudice to the environment is concerned, Article 27.2 of the TRIPS Agreement allows that WTO Members exclude it from patentability, provided some conditions are met. Document WT/CTE/W/125 comments on legislation implementing the CBD, including the Andean Community's Common System on Access to Genetic Resources and the Biodiversity Law of Costa Rica.

Customary Laws and Protocols

Introduction

TK holders often live in the “traditional” and the “modern” world at the same time. With respect to IP this means living by the rules of customary laws and modern IP systems at the same time. Several participants at the meetings conducted during the FFM indicated that the IP needs of TK holders are shaped by their contact with the formal IP systems on the one hand and informal IP regimes that prevail in their societies and communities on the other. As one informant observed, “[t]his is a cross-cultural problem”.¹ Some IP organizations, such as the Australian Copyright Council, have presented the recognition of informal regimes and customary law as “a third approach” to addressing the IP needs of TK holders: “*What is now advocated by Indigenous communities is protection of traditional cultural expression by the application of customary intellectual property law on its own terms, as of right*”.² In recognition of the cross-cultural dimensions of intellectual property, numerous FFM participants distinguished between the formal IP system and informal IP regimes. They maintained that the IP needs, rights and expectations of TK holders are shaped by their contact with *both* these regimes.

One of the biggest problems that was expressed during the FFM was the inaccessibility of the formal IP system for TK holders. This system is based on document-intensive, codified and governmentally administered structures and procedures. Most modern intellectual property debates therefore presuppose the existence of formal government and written records. FFM counterparts pointed out that these are conditions which many TK holders in indigenous and local communities cannot rely upon in practice, because indigenous and local communities often lack formal government and oral traditions lack written records.

Box 1. CREATION AND PROTECTION OF TRADITIONAL SONGS AMONG FIRST NATIONS IN NORTH AMERICA

Counterparts in Canada pointed out that there was wide-ranging trade in traditional songs among First Nations which was governed by IP-like protocols. “For instance, somebody is fasting and sees a vision about a song that they are to sing ... They complement the song and define under what terms that song may be used, for example only in spiritual situations. Now, it is possible to acquire a song from another individual: songs can be traded just like any other material. If you have a song that I like, I can make an offer to you that I can trade a song for something else. You may give me the song and the right to sing that song. ... Only the person to whom the song has been passed on has the right to use it. Sometimes this could be a whole drummer group. But they don’t have the right to hand it over to others. The recipient would first have to ask: do you give us the right to share this song with others?” While these protocols differed among the different nations, general codes of conduct were also observed in the trade of songs between nations. (Saskatoon, Canada, 12.11.98)

Some parties with whom the WIPO delegations met pointed out that the application of modern intellectual property systems to the specific needs of TK holders therefore requires a sensitivity to the cultures of TK holders as well as an awareness of the cultural and legal assumptions underlying the formal IP system. An understanding of the cultural differences and similarities between formal and informal IP regimes can begin with the following premise: at the origin of all intellectual property regimes lies the problem that information has economic value in certain circumstances. This is a problem common to all cultures and societies. Participants in the FFM meetings argued that different cultures have resolved this basic problem in different ways through systems of rights and obligations which regulate the dissemination and transmission of TK.

TK holders indicated that local and indigenous communities have evolved diverse but stable societal structures which regulate the flow of knowledge and innovations. They considered these informal regimes to be different from the formal IP-systems administered by WIPO, but just as effective in protecting the local innovator in his or her local context.

As one of the persons consulted on the FFMs put it:

*“We have had songs, traditional knowledge and so on for hundreds of years. There was no doubt as to who originally owned them – they were originally owned by one person, who later passed them on to his or her clan. There were clear customary laws regarding the right to use the songs and the knowledge. There was no problem in the past. Why are there problems now? We should begin with communities, and see how they protected their cultural expressions and knowledge. Then we should use the same customary tools or tools adapted from them”.*³

Using findings from three different FFMs, this section exemplifies three such informal regimes and protocols, each covering a different area of TK subject matter: (1) trade regimes over traditional designs, as identified in the North America FFM; (2) ritual regimes over traditional medicinal knowledge, as identified in the South Asia FFM; and, (3) customary law provisions over traditional images, symbols and artistic works, as identified in the South Pacific FFM.

Customary protocols for traditional designs, songs and dances (North America)

Participants at meetings of the FFM to North America highlighted that in the past trade and cultural relations between Aboriginal First Nations were governed by IP-like protocols which applied to traditional designs, songs and dances. Elders of First Nations stated that, *“We had laws that protected this knowledge”*.⁴ While these customary laws varied from nation to nation, IP-related protocols were referenced by numerous First Nations in respect of songs, dances, designs and names (see Box 4). The local counterparts during the FFMs pointed out that they see such customary practices as linked to their collective cultural identity: *“As first nations, we have our own IPRs and that’s mainly coming from who we are and what we believe”*.⁵

Elders of the Bloodtribe in Canada explained to the FFM a complex set of rules, rights and obligations governed the creation of certain traditional designs and the rights to their subsequent reproduction, adaptation and public display in the Bloodtribe nation. Customary regimes also governed the transfer, licensing and enforcement of these rights as well as the settlement of disputes arising from the infringement of such rights. The right holders could be individuals, families, “houses” or entire nations. The possible subject matter of exclusive rights could include a wide range of designs, including designs for traditional dresses (e.g. the Wieseltail dresses, Inuit parkas, etc.), head dresses, moccasins, basket designs, and tipi designs. The scope of exclusive rights over the designs differed, depending on whether they covered sacred or secular subject matter. In the latter case, it may include exclusive rights to reproduce the design, to make articles in which the design is embodied, and to publicly display such articles or the design. For a description of a customary law regime applicable to tipi designs, see Box 2.

Box 2. TRADITIONAL TIPI DESIGNS

Elders of the Bloodtribe explicated IP-like provisions that apply to traditional tipi designs under their customary laws. "The tipi designs can only be created through a vision, a spiritual dreaming or as the results of a vision quest. The designs are very limited and they were handed down from years and years ago. We know the original owners of the tipi designs, they transferred the ownership to family friends, who then transferred them to the current owners. Anything we have now was transferred and the design cannot be replicated unless it is transferred through a ceremony. Those designs are ancient and sacred". According to the TK holders, the transfer ceremony is crucial since it symbolizes the assignment of exclusive rights over the design. "In the ceremony, I give my rights over to her [the transferee]. Once I do that, I transfer to her the right to use it. I can't even use that design: I cannot make a replica. It's not mine anymore, it's hers. She is only allowed to make a replica if the first one is destroyed, but she can't pitch two or ten tipis with the same design. There is only one, there cannot be a mass production of the design." The transfer ceremony appears to function as an assignment of the rights, since only the transferee can use it, and the transferee can prevent the transferor from using the design.

While certain details were confidential to the Bloodtribe, the Elders gave an example, "If I have a tipi design through vision quest, and Dorothy wants my design: she can send a messenger and ask for it to be transferred. If I agree she has to transfer it through a ceremony. Otherwise you have no right to use, depict or even talk about it." The Elders confirmed that such transfers of rights "can go inside or outside the family". At times exclusive rights to designs were transferred between different families and even nations. (Genbow Museum, Calgary, 24.11.98)

Counterparts at the FFM meetings reported frequent infringements of customary rights over traditional designs. Designs are commercially exploited by persons who have not acquired the rights through the necessary transfer procedures/ceremonies. For example, modern tents were being developed on the basis of traditional tipi designs, and scientists have conducted research and reproduced the designs for anthologies without having acquired the rights to do so. FFM participants also provided cases of illicit commercial exploitation of traditional designs in dresses, moccasins, baskets, carvings and other traditional objects.⁶

At the same time, FFM participants emphasized that they are not opposed in principle to traditional designs being commercialized. On the contrary, "it would be to our benefit to assist individuals and communities on our territories who wish to engage in commercialization and tourism." One caveat was however that sacred objects should never be reproduced. But, for example, "*...moccasins, beaded vests, etc. are traded and there's nothing wrong with that.*"⁷ One participant pointed out that IPRs over TK could provide an incentive measure for development of small-and-medium sized enterprises in native territories along the 'nation-building model' of Native American development.⁸

Traditional medicine and ritual regimes (South Asia)

Further informal IP-like regimes protecting certain subject matter in the field of traditional medicine, were referenced by counterparts of the South Asia FFM. Experts distinguished between the *codified* systems of traditional medicine (which include indigenous and tribal medicine⁹) on the one hand and *non-codified* systems on the other. The codified systems include the Ayurvedic system of medicine, which is codified in the 54 authoritative books of the Ayurvedic System, the Siddha system, as codified in 29 authoritative books, and the Unani Tibb tradition, as codified in 13 authoritative books.¹⁰ As shown in Box 5, each of these knowledge systems relates differently to formal and informal systems of protection. While the codified Ayurvedic, Siddha, and Unani Tibb systems are unique to South Asia, traditional medicine experts compared the indigenous medicinal traditions and the informal IP regimes which regulate them to similar regimes in other regions. They provided examples of informal IP-like protocols regulating the use of *uncodified* indigenous medicine.

Box 3. EXCHANGE OF PROPRIETARY SONGS BETWEEN FIRST NATIONS

Counterparts on the North American FFM pointed out that songs were often exchanged and licensed between different tribes. "Often songs were given as gifts to other tribes who listened to our songs. But, this does not give them the right to appropriate songs. Today there is so much violation of these protocols." (Saskatoon, Canada, 24.11.98)

"Licensing of songs happens a lot through intermarriage. Because there is a tie between songs, names and resource allocation, there can be great competition and sometimes the conflicts are never resolved. Thus, tribes often seek to get new songs through intermarriage, for example through intermarriage between the Tulalip tribe and a tribe on Vancouver Island. But normally it's not a big problem, because tribes are very respectful of names and songs, whereas conflicts arise mostly over fish. Sometimes individuals get together and compromise, and sometimes the whole tribes get together and compromise". (Seattle, 22.11.98)

It was further suggested that informal IP regimes pervade South Asian indigenous medicinal traditions in the complex of rituals, magic and spiritual beliefs that surround indigenous medicine. They added that informal regimes are not directly analogous to their "formal" counterparts, but they perform an equally crucial function in the conception, promotion and diffusion of medical innovations in local and indigenous communities. They pointed out that informal innovators and traditional healers have to defend their innovations without the collective support of the formal IP systems, because local and indigenous communities mostly lack the administrative structures which are associated with the formal IPR-systems.¹¹

Box 4. ENFORCEMENT OF CUSTOMARY LAW

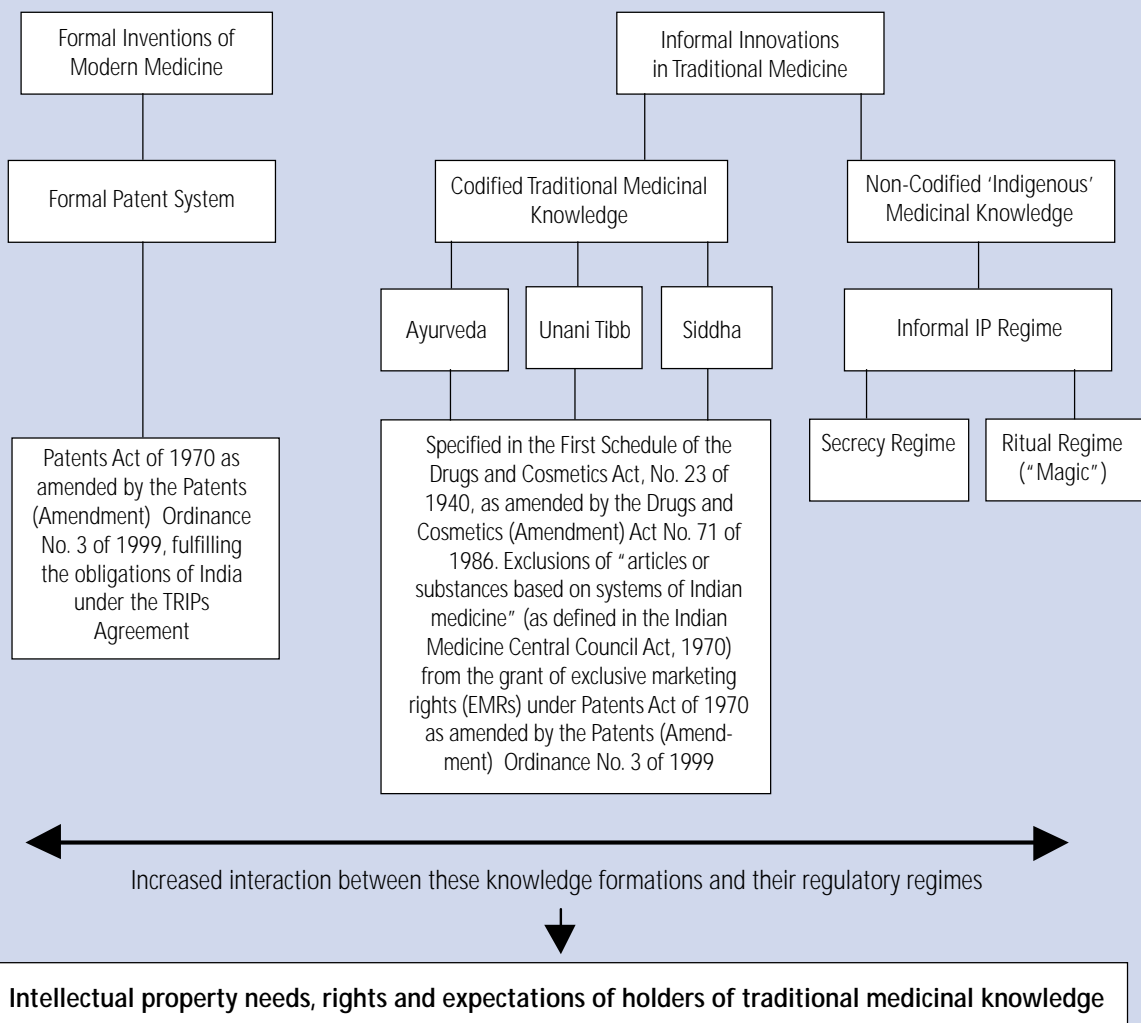
IP-related rights provided under customary law were enforced in First Nations through similar mechanisms as other rights granted under customary law (such as family rights, hunting rights, etc). A study on the traditional justice system among the Dene, which participants at the meetings provided, identified the following components:

- ▶ There was a clear set of rules that were designed to maintain harmony within the society and between the natural, animal and human worlds.
- ▶ The rules were carefully taught by one generation to the next and enforced by daily instruction, observation, and expectations of proper behavior.
- ▶ The senior members of the group dealt with offences; they judged the offence and determined what remedial actions had to be taken.
- ▶ In serious offences, there had to be public admission of guilt. The collective group was involved in speaking "harsh words" to the offender.
- ▶ Once guilt was admitted and appropriate remedial actions were defined by the group the individual had to restore harmony.
- ▶ Failure to comply resulted in shunning and, on occasion, banishment [equivalent to the death penalty].¹²

The first type of informal regimes which they identified are *secrecy regimes*. These operate independently of governmental regulation or even community support. The secrecy regime rests on the innovator's ability to prevent the public disclosure of his or her innovation. Under a secrecy regime, innovative healers employ their inventions by themselves only, and benefits arise for the healer only as long as the medicinal knowledge remains hidden.

It was pointed out by TK holders, however, that it is difficult to maintain secrecy within small communities, where close-range interaction and collaboration constrains the informal innovator's ability to conceal his innovation. Informal innovators often rely on modifications of traditional techniques, which have been passed down in the community. Therefore, would-be infringers may be able to imitate the innovation even after minimal observation. In contrast to secrecy, most formal IP-systems rely on collective intervention to maintain a comparative advantage on the marketplace for the original innovator. Modern patent law extends legal protection to precisely those ideas which are revealed in their entirety to the public and therefore lie beyond the limits of secrecy. By granting time-limited exclusive rights to the inventors once they have disclosed their ideas, patents ensure benefits for innovators while at the same time ensuring that the public gets access to the ideas.

Box 5. SOUTH ASIAN SYSTEMS OF MEDICINE*



* References to applicable laws based on the Indian context as of April 1999.

It was further pointed out during the meetings that in the absence of governmentally granted formal protection, ritual or magical components which form part of traditional medicine often allow traditional healers to control the use of their innovations in spite of full disclosure of their techniques within the local context. Because the value of ritual and magic relies primarily on social construction, the inclusion of ritual components in a medical innovation does not raise the research and practicing costs of a traditional healer. But the use by third parties of ritualized practices may be easier to control than the use of the phytochemical processes that accompany them within a traditional medicinal practice. For an example of ritualized protection for traditional medicinal practices, see Box 6.

Box 6. RITUALIZED PROTECTION OF TK IN TRADITIONAL MEDICINE

The case of a traditional healer who practices in the Tumkur district of Karnataka was elaborated during the FFM to South Asia¹³. For more than 20 years, this healer has treated 50 to 60 patients a day and has developed a specialization on skin diseases, especially *psoriasis-type diseases*. He uses about 40 medicinal plants for oral and external application and produces each application individually for each patient. He only applies his formulations personally and, performs elaborate rituals during the treatment to obtain support from Laxmi, the goddess of wealth. His medicines are effective *only* in association with the appropriate ritual components. The only other practitioners who are authorized to use his relationship with Laxmi are his daughter and his son-in-law. The intangible property consisting of the rituals associated with his practices makes the healer's personal involvement mandatory in each use of his medical technology, even though the technology is fully disclosed. FFM findings suggest that in many traditional societies such ritual and magical powers are part of informal regimes of protection which apply to specific fields of technology, such as traditional medicine.

Some people consulted during the FFMs pointed out that, effectively, *ritual functions as a barrier to reverse engineering* – that is, as a mechanism which prevents the use and development of technologies based on imitation. However, in the local context and within supportive cultural frameworks, ritual regimes can create exclusive rights approximating those of modern patents which confer on their owners certain exclusive rights in relation to the products and processes, which constitute the subject matter of the patent: “to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product” or process, respectively.¹⁴

Contrary to a commonly held view, numerous TK holders indicated that exclusive rights and monopoly powers over informal innovations are not uncommon within indigenous and local communities. Innovators and artists in the communities thereby manage to derive a fair and equitable share of the benefits arising from the use of their innovations within the community. These benefits do not normally take the form of royalties in the meaning of modern IP law. Rather, counterparts on the different FFMs named a wide variety of benefits for which traditional healers exchange their services, ranging from monetary payments, to commodities (food, trinkets, etc.), to event- and service-based benefits (improved access to infrastructures, dedicated feasts and celebrations, etc.), to non-monetary benefits (social prestige, political influence, etc.).

Participants in FFM meetings pointed out that rituals may require physical objects which the inventor can easily monopolize or elaborate procedures that are hard to copy without selective initiation. Thus the sale of ritualized medical services often represents an inverted form of the modern patent-exploitation strategy of “tying”. In a tying arrangement, the patent holder makes access to his intangible property dependent on the purchase of tangible commodities that s/he could not otherwise monopolize. TK holders use an inverted strategy in the local context. Under a ritual regime, an informal innovator makes access to his innovation conditional on the purchase or involvement of a tangible object or condition which he can monopolize (since he cannot obtain governmentally granted rights over his intangible possessions).

It was furthermore explained that right holders of informal IPRs often derive benefits from their rights by transferring portions of their intellectual property to secondary practitioners. Thus, the licensing of medicine bundles, ritual talismans, fetishes, spiritual servants and other ritual objects is a common practice (see Box 7). Ritual formulas and incantations often are transferable and have the advantage of allowing extensive licensure (through the training of apprentices) without requiring inventors to give away unique commodities, such as tools or medicine bundles.

Box 7. MEDICINE BUNDLES AND RITUALIZED TMK IN NORTH AMERICA

TK holders consulted during the North American FFM pointed out that the inheritance and transfer of “medicine bundles” within or between families is accompanied by the transmission of traditional medicinal knowledge and certain rights to practice, transmit and apply that knowledge. The ownership of the physical bundle is often attached to exclusive rights to exploit the products and processes associated with the TMK that the bundle signifies. Some TK holders pointed out that under certain circumstances, such bundles can be licensed to apprentices.

TK holders who participated in the FFM meetings explained that, like formal IPRs, the informal rights of traditional healers were not only transferable, but also enforceable. They explained that, on the most basic level, indigenous and local communities protect ritualized technology by creating consumer biases which build up barriers against infringement. A widespread belief in the importance of a technology’s ritualized components will suppress demand for non-ritualized substitutes. Mystified risks often reduce infringements of rituals like the threat of litigation reduces infringements of formal IPRs. For example, through folk tales of great healers and the tragic failures of imitators, some societies depict ritualized technologies as risky and complex with high risks to potential infringers. Beyond belief systems, there are also material deterrents against infringement because authoritative practitioners and healers can summon social sanctions against infringers. Communities which practice rituals and magic also strive hard to eradicate so-called “witches”, i.e. those who abuse ritual techniques and monopolies in ways which disrupt the social order. The meetings also revealed that the right holders of informal intellectual property hold quasi-legal penalties as enforcement measures (see Box 4 for an example of enforcement of customary laws).

In discussions with FFM counterparts it became apparent that the terms ‘ritual’ and ‘magic’ are labels which external observers, (and descriptions such as FFM reports) may apply to consistent and meaningful actions of a culture: for an allopathic practitioner, chanting a Mantra may be a magical ritual but to a local community it may simply be sound medical practice. Thus, local counterparts of the FFMs emphasized two points about ritual regimes as informal IP-like systems:

First, ritualized medicinal practices and technologies do not reflect an instrumental economic manipulation on the part of the traditional healer. The recognition of such regimes presumes no bad faith on the part of traditional practitioners. The healers as well as the communities are grounded in cultural practices and belief systems which instill the rituals with meaning, while they still protect the innovation. Similar shared cultural assumptions underlie the formal IP systems when creators refer to the cultural constructs of “authorship” and “originality” in order to obtain protection. From the intercultural perspective which TK holders considered necessary for an understanding of their IP needs, the reference to the attribute “original” under the formal IP system may function not unlike the attributes “sacred” or “magical” under some informal IP regimes. As one group of TK holders, based in Gujarat, India, submitted, “*the boundaries between formal and informal knowledge systems may often be false. The informal system may have formal rules waiting to be discovered. The formal system may have informal beliefs, accidents, or conjectures providing impetus for further enquiry.*”¹⁵

Second, there is no assumption that because informal IP-like protocols are culturally grounded, they have been collectively planned. They are informal regimes, which function in ways which are culturally consistent, but not “planned” and “rule-bound” in the sense of modern trade policies. The collective function of an intellectual property regime does not necessarily imply conscious policy decisions on the part of the community, just like the individual benefits which derive from it do not imply individual instrumentalism on the part of the traditional healer.

Customary law for traditional symbols and artistic works (Australia)

The FFM to the South Pacific also highlighted the importance and role of customary protection systems in Australia. In referring to Australian Aboriginal art, Golvan notes:

*Under Aboriginal law, the rights in artistic works are owned collectively. Only certain artists are permitted within a tribe to depict certain designs, with such rights being based on statutes within a tribe. The right to depict a design does not mean that the artist may permit the reproduction of a design. This right to reproduce or re-depict would depend on permission being granted by the tribal owners of the rights in the design.*¹⁶

Box 8. CUSTOMARY AND FORMAL IP SYSTEMS - MILPURRURRU V. INDOFURN (PTY) LTD.

The interface between customary and formal IP protection systems arose in respect of the issues of originality and authorship in traditional designs, and in respect of the assessment of damages.

As to originality and authorship, the Court found that *“although the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality”* (at 216). Justice Von Doussa found that customary and statutory approaches to authorship co-existed in the case before him and that the artists were “authors” for purposes of copyright and that each of the carpets reproduced was an original work.

In so far as the assessment of damages is concerned, the Court took account of the personal distress and embarrassment within the applicants’ communities caused by the actions of the respondent. Justice von Doussa accepted anecdotal evidence that Aboriginal law and custom would treat each applicant equally and that the fruits of the action would be shared equally between them. Such treatment would not accord with copyright principles, but his Honor expressed his judgement in terms of the respondent’s aggregate liability to the applicants as a group, and left it to the applicants to distribute the proceeds of the action *“to those traditional owners who have legitimate entitlements according to Aboriginal law to share compensation paid by someone who has without permission reproduced the artwork of an Aboriginal artist”* (at 240).

The Australian situation is made particularly interesting by a number of instances in which Aboriginal artists have sued non-Aboriginal parties for unauthorized use and exploitation of their traditional symbols and artistic works under Australian copyright law. In certain of these cases, the dialectic between customary Aboriginal protection and the formal IP system has been at the center of legal debate and the court’s deliberations.

For example, in *Milpurrruru v. Indofurn (Pty) Ltd.*¹⁷ the respondent had imported approximately 200 carpets from Vietnam over a period of time. These carpets reproduced either all or parts of well-known works, based on creation stories, created by eight indigenous artists. The respondent had neither sought nor received permission to have the carpets made or imported. The indigenous applicants brought their action *inter alia* under the Australian Copyright Act, 1968. The Court, per Von Doussa J., found for the applicants. In the course of its judgement it made certain references to customary Aboriginal protection systems. The Court

found that Aboriginal community mechanisms and indigenous law govern the production of imagery by regulating who has rights or authority in respect of particular designs. “ *Painting techniques and the use of totemic and other images and symbols are in many instances, and almost invariably in the case of important creation stories, strictly controlled by Aboriginal law and custom*” .¹⁸ In addition, the interface between customary and formal IP systems were referred to in respect of originality, authorship and the assessment of damages - see Box 8 “ Customary and Formal IP Systems - *Milpurrurru v. Indofurn (Pty) Ltd.*” .

Notes

- ¹ An informant at the Roundtable Consultation on Intellectual Property and Traditional Knowledge at the Natural Law School of India University, Bangalore, India, 2.10.98.
- ² Australian Copyright Council (ACC). *Protecting Indigenous Intellectual Property. A Discussion Paper*. Redfern: ACC (September 1998): 11. The recognition of customary IP law is recommended as a third way, besides the “ preservationist approach” and the “ nationalist approach” to TK protection, which are both considered “ problematic” (p.11).
- ³ Meeting with Dr. Jacob Simet, Executive Director, National Culture Commission, Port Moresby, Papua New Guinea, June 26, 1998.
- ⁴ Cree Elder at the Roundtable discussion at the Grand Council of the Cree, Montreal, 30.11.98
- ⁵ Participant at the Roundtable at the Arctic Institute, University of Calgary, Calgary, 24.11.98
- ⁶ For example, basket and weaving designs of the Tulalip nation in the USA are being reproduced by non-native commercial enterprises (Participants at the meeting at the Ethnic Cultural Center of the University of Washington, Seattle, 20.11.98); traditional moccasins designs of the Bloodtribe are being reproduced abroad (Meeting with members of the Bloodtribe at Glenbow Museum, Calgary, 24.11.98); Cree headgear is being exploited abroad without authorization (Calgary, 24.11.98), designs of Inuit parkas and *Amauti* (women’s baby carrier/coat) are being commercialized in Canada and abroad (Iqaluit, 28.11.98).
- ⁷ Meeting with Elders of the Bloodtribe, discussion at Glenbow Museum, Calgary, 24.11.98
- ⁸ Participant at the Sixth Annual Tribal Environmental Protection Agency Conference, San Francisco, 8.11.98
- ⁹ “ The status of the Ayurveda system is quite distinct. Whereas Ayurvedic medicine is preventive and linked to astrology, indigenous medicine has no link to cosmological theory and is underpinned only by a hot-cold theory” . Dr. U. Pilapituya, Director, One informant at the Bandaranaike Memorial Ayurveda Research Institute, Colombo, Sri Lanka, 29.9.98.
- ¹⁰ In India the First Schedule of the Drugs and Cosmetics Act, No. 23 of 1940, as amended by the Drugs and Cosmetics (Amendment) Act No. 71 of 1986, specifies the authoritative books of the Ayurvedic, Siddha and Unani Tibb Systems.
- ¹¹ Meeting with officials of the Foundation for the Revitalization of Local Health Traditions (FRLHT), Bangalore, India, 1.10.98.
- ¹² Articles 28.1(a) and (b), TRIPS Agreement.
- ¹³ Chand, V. S., et. al. “ Farmers’ Innovations for Sustainable Resource Management and Conservation of Biological Diversity” . In, Fadani, Andrea and Heidhues, Franz, eds. *Food Security and Innovations. Successes and Lessons Learned*. Frankfurt: Peter Lang; 1997: 105.
- ¹⁴ Golvan, C., “ Aboriginal Art and the Protection of Indigenous Cultural Rights” , 7 [1992] E.I.P.R.,p. 227-232.
- ¹⁵ *Milpurrurru v. Indofurn (Pty) Ltd.* (1995) 30 IPR 209. Information and quotations concerning this case obtained from I. McDonald, *Protecting Indigenous Intellectual Property: A Copyright Perspective*, (Australian Copyright Council, Sydney, 1998) pp. 28-30 and 40-42.
- ¹⁶ At p. 214.

Part II

Identifying the Intellectual Property Needs and Expectations of Traditional Knowledge Holders: Results of the Nine Fact-finding Missions

This chapter reports on each of the FFM's undertaken. As the objective of the missions was to explore the "intellectual property needs and expectations" of TK holders, the information is presented in such a way as to make such needs and expectations as visible as possible.

As each mission was distinct, and reflected the diversity of contexts within which TK is created and of perspectives between communities, countries and regions, each FFM is reported on separately. (The only exception in this regard is the South American FFM, which comprised visits to Peru and Bolivia. As these took place at different times and were undertaken by different WIPO staff members, the Peruvian and Bolivian visits are reported on separately). At the same time, however, the information from each mission is arranged according to roughly the same organizational framework, to assist in ordering the information and to facilitate comparison between the missions. The sections on each of the missions present the information under more or less the following headings: Terminology and Subject Matter; Objectives of TK Protection; Benefits and Beneficiaries of TK Protection; Documentation; Means of Protecting TK; Management and Enforcement of Rights and Interests in TK; and, General.

At the beginning of each section, there appears a table showing the membership of the countries concerned of the main IP treaties and of other treaties and processes related to the protection of TK. The sections above on "Introduction to Intellectual Property" and "Other Relevant Multilateral Policy Areas and Initiatives" provide information on these treaties and processes. The treaties referred to in the tables are as follows:

International intellectual property treaties

- Paris Convention for the Protection of Industrial Property, 1883;
- Berne Convention for the Protection of Literary and Artistic Works, 1971;
- The International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the "Rome Convention");
- Madrid Agreement Concerning the International Registration of Marks, 1891 and the Protocol Relating to that Agreement, 1989;
- The Hague Agreement Concerning the International Registration of Industrial Designs, 1925;
- Patent Cooperation Treaty, 1970;
- The International Convention on the Protection of New Varieties of Plants, 1991 (UPOV Convention); and,
- The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), 1994. In the case of the TRIPS Agreement, the date indicated against each country in the tables is the date by when the country concerned was obliged, or will be obliged, to comply fully with its obligations under the Agreement.

International TK-related treaties and processes

- The Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972 (UNESCO Heritage Conv.);
- The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970 (UNESCO Cul.Property);
- Convention Concerning Indigenous Peoples in Independent Countries, 1986 (ILO Convention 169);
- Negotiations concerning the FAO's International Undertaking on Plant Genetic Resources (the IUPGR-FAO). The tables indicate whether the countries are participating in the negotiations or not;
- The Convention on Biological Diversity, 1992 (the CBD); and,
- United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994 (the UNCCD).

The Interim Mission Reports in respect of each of the FFM's (see Chapter on "Methodology" above) are contained in Annex 4.