International Seminar on Intellectual Property & Development

**Topic 2: Biodiversity & Traditional Knowledge**

“traditional knowledge & biodiversity, traditional creativity & cultural expressions: what role for IP?”
Outline

- One way of looking at the challenge
- Finding the way: reconciling preservation, protection and appropriate development
- What role for WIPO activities?
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One way of looking at the challenge

- The need for a holistic approach to the development, legal & policy aspects of genetic resources, traditional knowledge and folklore
  - at the community level - don’t atomize, alienate or trivialize what is holistic, integral and vital to the cultural identity of communities
  - nationally - no one regulatory or policy process operating in isolation; how to integrate all interests, all stakeholders, all claims for equity?
  - internationally - a common task for many international agencies, in fulfilling their mandates and respecting and supporting those of their partners in the UN system
One way of looking at the challenge:

- The paradox: is there an *international* approach that can be at once:
  - *holistic* and respectful of diversity
  - *universal* and accommodating
  - international and yet *true to the local*
- One thing that distinguishes *traditional* knowledge is that it is inherently, irreducibly *local* in character - community-based, integral to the identity of a traditional community
thinking locally, acting globally?

- TK is already defined, preserved, transmitted and governed by Indigenous and local communities -- including through customary law systems and traditional practices – which are only fully meaningful within the *traditional community context*

- Yet TK now has a global context - cultural, ecological, technological and commercial interests

  - Concerns voiced about misappropriation of TK and misuse of TK that span national boundaries – calls for *international* action
thinking locally, acting globally?

• One way of phrasing the challenge; how to:
  • recognize, preserve, promote and respect
  • characteristics that are intrinsically local and specific, forming part of an holistic whole
  • through concerted *international* action
  • in a manner that is appropriate, meaningful, accessible to the *Indigenous or local community itself*?
Sustaining an holistic approach internationally...

- WIPO (TK & patent issues; positive protection)
- WHO (Traditional medical knowledge; alternative pathways to medical innovation)
- WTO (TRIPS and TK)
- UNCTAD (TK in trade & development)
- FAO – International Treaty, farmers’ rights
- CBD (Articles 8(j), 10(c), 17.2)

TRADITIONAL KNOWLEDGE
Sustaining an holistic approach internationally...

**UNESCO**
(intangible cultural heritage; cultural diversity)

**WIPO**
(Work on folklore/traditional cultural expressions - IGC, WPPT, Berne)

**WTO**
(TRIPS and folklore)

**UNCTAD**
(TCEs in trade & development)

**ITC**
(craft industries)

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**TRADITIONAL CULTURAL EXPRESSIONS**
Sustaining an holistic approach internationally...

- **WIPO** (TK & patent issues positive protection)
- **WTO** (TRIPS and CBD)
- **UNCTAD** (GR/TK in trade & development)
- **FAO** – International Treaty Work of CGRFA
- **CBD** conservation, sustainable use, equitable benefit-sharing

**GENETIC RESOURCES**
Sustaining an holistic approach internationally…

UN Permanent Forum on Indigenous Issues

Other UN partners e.g. ILO

CBD participation of Indigenous and local communities (Article 8(j))

INDIGENOUS ISSUES

WIPO (substantive issues and questions of effective participation)

OHCHR Draft Declaration on the Rights of Indigenous Peoples
Outline

- One way of looking at the challenge
- Finding the way: reconciling preservation, protection and appropriate development
- What role for WIPO activities?
reconciling preservation, protection & appropriate development

- Consider an example arising from the preservation of traditional cultural expressions – expressions of folklore
- Field recordings of Fateleku & Baegu music from Northern Malaita, Solomon Islands, first published in the 1970s, issued on a CD in 1990
- Includes *Rorogwela Lullaby*, sung by Afunakwa
  - Sleeve notes: “The rorogwela lullabies are often sung not by the mother but by the child’s elder sister. The words refer to such a situation: the elder sister asks the baby not to cry because its parents are dead and there is no one else there to hear it.”
reconciling preservation, protection & appropriate development

- In 1990s, Deep Forest produce the track “Sweet Lullaby” – described as ‘a rare & unusual mix of modern music and the songs of the Pygmies of the Central African Rain Forest’
- This example illuminates some legal questions:
  - rights associated with Rorogwela as a *musical work*
    - economic rights
    - moral rights (rights of attribution and integrity)
  - rights associated with its *performance* by Afunakwa
    - economic rights
    - moral rights (rights of attribution and integrity)
But the example also illustrates underlying policy questions:

- **How to protect** traditional cultural expressions against unauthorized or illegitimate use while **preserving** against their loss, yet appropriately **sharing** with a wider audience

- **Improved capacity** for members of remote communities to identify & enforce existing legal rights, if they choose to

- Legal recognition of traditional cultural expressions (expressions of folklore) and traditional performances as **eligible objects of protection** (Berne 15(4), WPPT – performances of expressions of folklore)

- Recognizing **collective or communal** ownership or custodial interests

- Recognition of any **customary law**, and interests and obligations created by customary law
reconciling preservation, protection & appropriate development

Similar examples concerning TK raise question of how to:

- **preserve** TK against loss and dissipation (sustaining knowledge systems and community practices),
- while **sharing it appropriately**, consistent with prior informed consent,
- while **protecting it against misappropriation** and misuse,
- so that it contributes to a traditional community’s own choices for their pathways to economic & social development.

Main choices for protection against misappropriation & misuse:

- *sui generis* (tailored or stand alone) protection
- adapting or extending the use of IP systems
- better, more equitable use of the existing IP system
Outline

- One way of looking at the challenge
- Finding the way: reconciling preservation, protection and appropriate development
- Where do WIPO activities fit in?
Where do – or should - WIPO activities fit in?

- What does WIPO have to do with TK?
  Some have expressed deep concerns:
  - Imposing IP straitjacket on traditional cultures, overriding collective values of indigenous and other traditional communities
  - IP concerns ‘mainstream’ technology. It commodifies knowledge and culture, facilitates misappropriation of TK and cultural expressions
  - IP rights are atomistic, private, individual - at odds with values and laws of traditional communities
Consultative basis of WIPO activities

- From 1998-99, visited some 60 locations for dialogue with around 3,000 representatives of TK holder communities
  - Idea was to base the new program on a direct learning of the needs and expectations of TK holders themselves
  - These insights still central to our work
- Intergovernmental Committee established in 2001 - building on practical experience and legal measures developed worldwide
IGC mandate for 2004-05

- IGC to continue its work on questions included in its previous mandate
- New work to focus on consideration of international dimension, without prejudice to work in other fora,
- No outcome is excluded, including possible development of an international instrument(s)
- The ICG urged to accelerate its work and to present a progress report
- International Bureau to continue to assist by providing necessary expertise and documentation.
Some key elements

**Legal essence of protection** against misuse & misappropriation, through defining policy objectives and core principles of protection

- Draft provisions on TCEs (WIPO/GRTKF/IC/8/4)
- Draft provisions on TK (WIPO/GRTKF/IC/8/5)

**Policy guidance on options** for specific legal mechanisms to give effect to these objectives and principles

- WIPO/GRTKF/IC/7/4 and WIPO/GRTKF/IC/7/6

Enhanced participation of *Indigenous and local communities*

- 110 NGOs specially accredited for the IGC, many representing indigenous and local communities
- Proposal for voluntary fund
- Array of practical steps to enhance input: consultations, publication and circulation of positions, Indigenous consultative forum, cooperation with United Nations Permanent Forum on Indigenous issues, Indigenous-chaired panel session during IGC
Some key elements

**Defensive protection:** especially the greater legal and practical recognition of TK in patent procedures
- An array of prior art measures (e.g. PCT, IPC, India’s TKDL)
- Studies on disclosure of origin (continuing CBD dialogue)
- Draft guidelines for examination of TK-related applications (based on Member State case studies)

**Capacity building** materials and community tools
- Toolkit to deal with IP implications when TK is documented
- Database and draft guidelines to assist in weighing IP implications and IP options when concluding mutually agreed terms in line with prior informed consent
- Practical guide on the protection of TCEs/EoF
- Overview leaflets, consolidated analyses, case studies, detailed background studies (joint UNEP-WIPO study on role of IP in equitable benefit-sharing), distance learning course
Some key substantive issues

- **misappropriation** - what is it to misappropriate TK/TCEs, what is the cause of action and the nature of the damage?
- **retroactivity** - is the existing public domain legitimate & inviolable?
- **localisation** - how to recognize and defer to a community’s customary law?
- **collectivity** - what legal status or legal personality for traditional communities?
- **ownership/custodial interests** - what is the nature of custodianship? Who benefits?
- **subject matter** - what makes knowledge and cultural expressions ‘traditional’?
Some key legal issues

- **holistic coordination** - already an active area of national and regional legislation - what is the international layer? What relationship with other international legal instruments?

- **interface with IP law** - what is the sui generis element of protection of TK and TCEs; how should this interact with conventional IP systems?

- **interface with other law** – law of indigenous peoples, access regimes for genetic resources, laws concerning cultural policy, etc.; what is the (adapted, expanded or sui generis) IP element?