

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

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GLOSSARY OF KEY TERMS RELATED TO INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS

Document prepared by the Secretariat

INTRODUCTION

1. At its Sixteenth and Seventeenth Sessions, held from May 3 to 7, 2010 and from December 6 to 10, 2010, respectively, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (“the IGC”) requested the Secretariat to prepare, as information documents, three glossaries of key terms related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions¹ and to make them available to the IGC.

2. At its Nineteenth Session, held from July 18 to 22, 2011, the IGC “invited the Secretariat to update the glossaries available in documents WIPO/GRTKF/IC/19/INF/7 (‘Glossary of Key Terms Related to Intellectual Property and Traditional Cultural Expressions’), WIPO/GRTKF/IC/19/INF/8 (‘Glossary of Key Terms Related to Intellectual Property and Traditional Knowledge’) and WIPO/GRTKF/IC/19/INF/9 (‘Glossary of Key Terms Related to Intellectual Property and Genetic Resources’), to combine them in a single document and to publish that glossary as an information document for the next session of the IGC.”²

¹ Report of the Sixteenth Session of the Committee (WIPO/GRTKF/IC/16/8) and Report of the Seventeenth Session of the Committee (WIPO/GRTKF/IC/17/12).

² Report of the Nineteenth Session of the Committee (WIPO/GRTKF/IC/19/12).

3. Pursuant to that decision, and given that some terms contained in the glossaries are related to all three themes, the Secretariat consolidated the three glossaries into one, and updated some of the definitions included therein, taking into account instruments and other materials that had come into existence after the publication of the previous, individual versions of the glossaries. In that respect, new terms were added and defined, while other terms were eliminated for the sake of conciseness. Some definitions were redrafted.

4. The updated, consolidated glossary was made available as an information document for the Twentieth, Twenty-First and Twenty-Second Sessions of the IGC, held from February 14 to 22, 2012, from April 16 to 20, 2012, and from July 9 to 13, 2012, respectively, as documents WIPO/GRTKF/IC/20/INF/13, WIPO/GRTKF/IC/21/INF/8, and WIPO/GRTKF/IC/22/INF/8, respectively. The revised version of the glossary was made available as information documents for the Twenty-Third, Twenty-Fourth, Twenty-Fifth, Twenty-Sixth, Twenty-Seventh and Twenty-Eighth Sessions of the IGC. The revised version no longer contains any references to the texts being negotiated in the IGC, to prevent the glossary becoming outdated after each IGC session. The same version of the glossary is contained in the Annex to the present document.

5. The glossary draws, as far as possible, from previous glossaries of the IGC and from existing United Nations and other international instruments. The document also takes into account definitions and glossaries which can be found in national and regional laws and draft laws, multilateral instruments, other organizations and processes and in dictionaries. Further, definitions are based on working documents of the IGC, other WIPO documents and documents of other work programs of WIPO. That said, the proposed definitions are not exhaustive. Other terms may also be relevant to intellectual property and genetic resources, traditional knowledge, and traditional cultural expressions and the terms selected may also be defined in other ways.

6. The selection of key terms is based on the terms used most frequently in the draft IGC texts and other related documents. The selection and proposed definitions contained in the Annex are without prejudice to any other glossary or definitions of key terms contained in previous documents of this IGC or in any other international, regional or national instrument or fora. The selection and proposed definitions of key terms are not intended to suggest that the selection of terms or their proposed definitions are necessarily agreed upon by participants in the IGC. This is an information document and the IGC is not requested to endorse or adopt either the selection of terms or their proposed definitions.

7. The IGC is invited to take note of this document and the Annex to it.

[Annex follows]

GLOSSARY OF KEY TERMS RELATED TO INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS

Access and Benefit-sharing

The *Convention on Biological Diversity* (1992) prescribes “the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.” (Article 1).

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (2010) aims to “the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.” According to Article 3, the Protocol “shall also apply to traditional knowledge associated with genetic resources within the scope of the Convention and to the benefits arising from the utilization of such knowledge.”

For plant genetic resources for food and agriculture, the *International Treaty on Plant Genetic Resources for Food and Agriculture* of the Food and Agriculture Organization (FAO) requires in Article 1 the “fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity for sustainable agriculture and food security.”

“Access” is defined in Article 1 of the *Decision 391 on Access to Genetic Resources of Andean Community* (1996) as “the obtaining and use of genetic resources conserved *in situ* and *ex situ*, of their by-products and, if applicable, of their intangible components, for purposes of research, biological prospecting, conservation, industrial application and commercial use, among other things.”

Benefits may include monetary and non-monetary benefits, including but not limited to those listed in the Annex to the *Nagoya Protocol*.¹ The steps involved in the process of obtaining access to genetic resources and sharing of benefits may include activities prior to access, research, and development conducted on the genetic resources, as well as their commercialization and other uses, including benefit-sharing.²

Adaptation

Adaptation is the act of altering a pre-existing work (either protected or in the public domain) or a traditional cultural expression, for a purpose other than for which it originally served, in a way that a new work comes into being, in which the elements of the pre-existing work and the new elements—added as a result of the alteration—merge together.³ Article 12 of the *Berne Convention for the Protection of Literary and Artistic Works* (1971) provides that authors of literary and artistic works shall enjoy the exclusive right of authorizing adaptations,

¹ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Art. 5(4).

² Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their utilization, para. 23.

³ WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, WIPO, p. 264.

arrangements and other alterations of their works. Black's Law Dictionary⁴ provides that copyright holders have the exclusive right to prepare derivative works, or adaptations, based on the protected work.

Approval and Involvement

There is no universally accepted definition of the term. It has been suggested in one context that, although Article 8(j) of the *Convention on Biological Diversity* (1992), uses the phrase "approval and involvement," various decisions on Article 8(j) have consistently interpreted this term to mean "prior and informed consent."⁵

Associated Traditional Knowledge

The "Like-Minded Countries Contribution to the Objectives and Principles on the Protection of Genetic Resources and Preliminary Draft Articles on the Protection of Genetic Resources" (document WIPO/GRTKF/IC/19/11) provides the following definition of "associated traditional knowledge" at Article 1(2)(a): "knowledge which is dynamic and evolving, generated in a traditional context, collectively preserved and transmitted from generation to generation including but is not limited to know-how, skills, innovations, practices and learning, that subsist in genetic resources."

Beneficiaries

There is no universally accepted definition of the term. However, it has been argued by many stakeholders that traditional knowledge and traditional cultural expressions are generally regarded as collectively originated and held, so that any rights and interests in this material should vest in communities rather than individuals. In some cases, however, individuals, such as traditional healers, might be regarded as the holders of traditional knowledge or traditional cultural expressions and as beneficiaries of protection.⁶

Some national and regional laws for the protection of traditional knowledge and traditional cultural expressions provide rights directly to concerned peoples and communities. Many rather vest rights in a governmental authority, often providing that proceeds from the granting of rights to use the traditional knowledge or cultural expressions shall be applied towards educational, sustainable development, national heritage, social welfare or culture related programs.

Discussions on the issue have noted that the term could include indigenous peoples, indigenous communities, local communities, traditional communities, cultural communities, nations, individuals, groups, families, and minorities.

Biological Diversity

Article 2 of the *Convention on Biological Diversity* (1992) defines the term "biological diversity," often shortened to "biodiversity," as meaning 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."

⁴ The edition used for this document is the 8th edition, by Bryan A. Garner.

⁵ Recommendations for African Negotiators from the 2nd Preparatory Meeting of African Indigenous Peoples and Local Communities, UNEP/CBD/COP/10/INF/37, 14 October 2010.

⁶ Report of the Seventeenth Session of the Committee (WIPO/GRTKF/IC/17/12).

Biological Material

The term is defined in the *European Union Directive on the Legal Protection of Biotechnological Inventions* as “material containing genetic information and capable of reproducing itself or being reproduced in a biological system.”⁷ According to the *United States Code of Federal Regulations*, this term shall include “material that is capable of self-replication either directly or indirectly.”⁸ The *Convention on Biological Diversity* (1992) uses the terms biological resources, genetic material and genetic resources.

Biological Resources

As defined in Article 2 of the *Convention on Biological Diversity* (1992), this term “includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.” Genetic resources form, therefore, one category of biological resources.

Article 1 of the *Decision 391 on Access to Genetic Resources of Andean Community* (1996) defines the term as “individuals, organisms or parts of them, populations or any biotic component of value or of real or potential use that contains a genetic resource or its by-products.”

Biotechnological Inventions

This term is defined in the *European Union Directive on the Legal Protection of Biotechnological Inventions* as “inventions which concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used.”⁹ Biotechnological inventions fall into three categories: processes of the creation and modification of living organisms and biological material, the results of such processes, and the use of such results.¹⁰

Biotechnology

Article 2 of the *Convention on Biological Diversity* (1992) defines the term as “any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.” The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (2010) uses the same definition in its Article 2.

According to the statement of the Food and Agriculture Organization (FAO) on biotechnology of 2000: “Interpreted in this broad sense, the definition of biotechnology covers many of the tools and techniques that are commonplace in agriculture and food production. Interpreted in a narrow sense, which considers only the new DNA techniques, molecular biology and reproductive technological applications, the definition covers a range of different technologies such as gene manipulation and gene transfer, DNA typing and cloning of plants and animals.”¹¹

⁷ Article 2.1(a) of the Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.

⁸ Section 1.801 of Chapter 37 of the Code of Federal Regulations (CFR) and USPTO Manual of Patent Examining Procedure (MPEP): 2403.01.

⁹ Article 3.1 of the Directive 98/44/EC of the European Parliament and of the Council of 6 July, 1998 on the legal protection of biotechnological inventions.

¹⁰ See document WIPO/GRTKF/IC/1/3, para. 16.

¹¹ FAO Statement on Biotechnology, available at: <http://www.fao.org/biotech/stat.asp>.

The term “modern biotechnology” is also defined in Article 3 of the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, adopted in 2000, as “the application of: a) *in vitro* nucleic acid techniques, including recombinant deoxyribonucleic acid (DNA) and direct injection of nucleic acid into cells or organelles, or b) fusion of cells beyond the taxonomic family, that overcome natural physiological reproductive or recombination barriers and that are not techniques used in traditional breeding and selection.”

The Organization for Economic Cooperation and Development (OECD) uses a deliberately broad definition, covering all modern biotechnology but also many traditional or borderline activities. Biotechnology is “the application of science and technology to living organisms, as well as parts, products and models thereof, to alter living or non-living materials for the production of knowledge, goods and services” combined with a list of biotechnology techniques including *inter alia* the terms “genetic engineering”, “fermentation using bioreactor”, “gene therapy”, “bioinformatics” and “nanobiotechnology”.¹²

Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization

The *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* were adopted in 2002 by the Conference of the Parties of the *Convention on Biological Diversity* in order to provide guidance in respect of implementation of relevant provisions under Articles 8(j), 10(c), 15, 16 and 19 of the Convention related to access to genetic resources and benefit-sharing. The Guidelines are voluntary in nature and are addressed to a range of stakeholders.¹³ They cover procedural and regulatory aspects, in particular, of prior informed consent, and identify monetary and non-monetary forms of benefit-sharing.¹⁴

Clearing House Mechanism

According to a glossary used by the United Nations Environment Program (UNEP), a Clearing House Mechanism (CHM) is a mechanism which facilitates and simplifies exchange of information or transactions among multiple Parties.¹⁵ The CHM of the *Convention on Biological Diversity* (1992) was established further to Article 18.3 of the Convention. Its mission is to contribute significantly to the implementation of the Convention through the promotion and facilitation of technical and scientific cooperation, among Parties, other Governments and stakeholders.¹⁶

Codified Traditional Knowledge

Codified traditional knowledge is “traditional knowledge which is in some systematic and structured form, in which the knowledge is ordered, organized, classified and categorized in some manner.”¹⁷

¹² See definition and full list-based definition, available at: <http://www.oecd.org/sti/biotechnology/policies/statisticaldefinitionofbiotechnology.htm>.

¹³ See Bonn Guidelines, Articles 1, 7(a) and 17 to 21.

¹⁴ See Bonn Guidelines, Articles 24 to 50 and Appendix II.

¹⁵ UNEP Glossary of Terms for Negotiators of Multilateral Environmental Agreements, page 49, available at http://www.unep.org/delc/portals/119/Glossary_terms%20_for_Negotiators_MEAs.pdf.

¹⁶ Further information available at: <http://www.cbd.int/chm/>.

¹⁷ List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found (WIPO/GRTKF/IC/17/INF/9), para. 16 of Annex.

In the field of traditional medicine, for example, the Traditional Medicine Team of the World Health Organization (WHO) distinguishes between (a) codified systems of traditional medicine, which have been disclosed in writing in ancient scriptures and are fully in the public domain, e.g. Ayurveda disclosed in ancient Sanskrit scriptures¹⁸ or Traditional Chinese Medicine (TCM) disclosed in ancient Chinese medical texts¹⁹; and (b) non-codified traditional medicinal knowledge which has not been fixed in writing, often remains undisclosed by traditional knowledge holders, and is passed on in oral traditions from generation to generation. In South Asia, for instance, the codified knowledge 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.²⁰

Another distinction has been made, namely between (i) traditional knowledge which has been codified, i.e., traditional knowledge which appears in written form, and which is in the public domain; and (ii) traditional knowledge which is not codified and which forms part of the oral traditions of indigenous communities.²¹ The “List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found” (WIPO/GRTKF/IC/17/INF/9) discusses codified traditional knowledge and non-codified traditional knowledge further.

Consultation

According to Black’s Law Dictionary, consultation is the act of asking the advice or opinion of someone.

One source indicates that consultation refers to the process whereby people exchange views and information. It is not just a one-way process, but a process of sharing knowledge and opinions. Consultation means working together, listening to what the other party has to say and acting upon it. According to some, consultation and consent in indigenous communities are interrelated. Through consultation, a third party user can come to understand what requires consent and the correct people to whom to give it, and the people giving consent can more fully understand what they are consenting to.²²

The International Labour Organization (ILO) *Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries* (1989) states that consultations should be undertaken “in good faith and in a form appropriate to the circumstances, with the objective of achieving the agreement or consent to the proposed measures” (Article 6(2)).

¹⁸ Ayurveda is a codified system of traditional medicine which was disclosed in writing in the Vedic period when the Aryans compiled the four Vedas (1500-1800 B.C.) with maximum references in the *Rigveda* and the *Atharvaveda*.

¹⁹ Traditional Chinese Medicine was initially codified and disclosed in writing in the *Yellow Emperor’s Canon of Medicine*, the first monumental classic establishing TCM. The Canon was compiled over several hundred years and appeared between 300 and 100 B.C.

²⁰ 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. See Inventory of Existing Online Databases Containing Traditional Knowledge Documentation Data (WIPO/GRTKF/IC/3/6), para. 8. Also see Karin Timmermans and Togi Hutadjulu, *The TRIPs Agreement and Pharmaceuticals: Report of an ASEAN Workshop on the TRIPs Agreement and its Impact on Pharmaceuticals*, p. 45.

²¹ Intervention of the Delegation of Canada, Report of the Second Session (WIPO/GRTKF/IC/2/16), para. 131.

²² Terri JANKE, *Pathways & Protocols – A Filmmaker’s guide to Working with Indigenous People, Culture and Concepts*, p. 51.

Convention on Biological Diversity

The *Convention on Biological Diversity* (CBD) is an international convention adopted in June 1992 during the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil. According to Article 1, the Convention aims at “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.” It entered into force on December 29, 1993.

Country of Origin of Genetic Resources

According to Article 2 of the *Convention on Biological Diversity* (1992), “country of origin of genetic resources” means “the country which possesses those genetic resources in *in-situ* conditions.” Other definitions include genetic resources in *ex-situ* conditions. For instance, country of origin is defined by Article 1 of the *Decision 391 on Access to Genetic Resources of Andean Community* (1996) as a “country that possesses genetic resources in *in-situ* conditions, including those which, having been in *in-situ* conditions, are now in *ex-situ* conditions.”

Country providing Genetic Resources

According to Article 2 of the *Convention on Biological Diversity* (1992), “country providing genetic resources” means “the country supplying resources collected from *in-situ* sources, including populations of both wild and domesticated species, or taken from *ex-situ* sources, which may or may not have originated in that country.”

Cultural Community

“Cultural community” has been defined as a tightly knit social unit whose members experience strong feelings of unity and solidarity and which is distinguished from other communities by its own culture or cultural design, or by a variant of the generic culture.²³

Cultural Diversity

According to the United Nations Education, Science and Culture Organization (UNESCO) *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005), cultural diversity refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.²⁴

Cultural Expressions

The United Nations Education, Science and Culture Organization (UNESCO) *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* (2005) defines cultural expressions as “those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.”²⁵

²³ Draft Glossary proposed by a group of Dutch experts convened by the bureau of the Netherlands National Commission for UNESCO, TER/CH/2002/WD/4, 2002.

²⁴ Art.4(1), UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005.

²⁵ Art.4(3), UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005.

Cultural Heritage

For purposes of the United Nations Education, Science and Culture Organization (UNESCO) *Convention concerning the Protection of the World Cultural and Natural Heritage* (1972), the following is considered as cultural heritage, as outlined in Article 1:

- (a) *monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;*
- (b) *groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;*
- (c) *sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view.*

Cultural Identity

Cultural identity denotes the correspondence which exists between a community—national, ethnic, linguistic, etc.—and its cultural life, as well as the right of each community to its own culture.²⁶ The International Labour Organization (ILO) *Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries* (1989) stipulates that governments should promote the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions.²⁷

Cultural Property

Cultural property is defined in the United Nations Education, Science and Culture Organization (UNESCO) *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (1970) as property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: (a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections; (j) archives,

²⁶ UNESCO Thesaurus, available at <http://www.vocabularyserver.com/unesco/en/index.php?setLang=en&tema=2822>.

²⁷ ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989, Art. 2(2)(b).

including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.

Custodian

Black's Law Dictionary defines "custodian" as a "person or institution that has charge or custody (of a child, property, papers, or other valuables)". According to the same source, "custody" refers to the care and control of a thing or person for inspection, preservation, or security. A "custodian" is defined in the Oxford English Dictionary as "one who has the custody of a thing or person; a guardian, keeper." The Merriam-Webster dictionary provides "one that guards and protects or maintains." The term "custodian" in the context of traditional knowledge and cultural expressions refers to those communities, peoples, individuals and other entities which, according to customary laws and other practices, maintain, use and develop the traditional knowledge and cultural expressions. It expresses a notion that is different from "ownership", since it conveys a sense of responsibility to ensure that the traditional knowledge or cultural expressions are used in a way that is consistent with community values and customary law.

Customary Context

"Customary context" refers to the utilization of traditional knowledge or cultural expressions in accordance with the practices of everyday life of the community, such as, for instance, usual ways of selling copies of tangible expressions of folklore by local craftsmen.²⁸

Customary Law and Protocols

Black's Law Dictionary defines "customary law" as law "consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws." Customary law has also been defined as "locally recognized principles, and more specific norms or rules, which are orally held and transmitted, and applied by community institutions to internally govern or guide all aspects of life."²⁹ The ways in which customary laws are embodied differ from one another. For instance, the laws can be codified, written or oral, expressly articulated or implemented in traditional practices. Another important element is whether these laws are actually "formally" recognized by and/or linked to the national legal systems of the country in which a community resides. A decisive factor in determining whether certain customs have status as law is whether they have been and are being viewed by the community as having binding effect, or whether they simply describe actual practices.

Customary laws concern many aspects of communities' lives. They define rights and responsibilities of community members on important aspects of their life, culture and world view: customary law can relate to use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage and knowledge systems, and many other matters.³⁰ It has been argued that customary law consists of indigenous customs practiced by traditional communities, and carrying along with them local sanctions for their breach. Most of customary law rules are unwritten and not uniform across ethnic groups. Differences in the customary laws of ethnic groups can be traced to various factors such as language, proximity, origin, history, social structure and economy.

²⁸ Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982, Part III, para. 42.

²⁹ Protection Rights over Traditional Knowledge: Implications of Customary Laws and Practices, Research Planning Workshop, Cusco, Peru, 20-25 May, 2005.

³⁰ Draft Customary Law and Intellectual Property Issues Paper – version 3.0 (December 2006) www.wipo.int/tk/en/consultations/customary_law/index.html.

Customary law is not static, but dynamic; its rules change from time to time to reflect changing social and economic conditions.³¹

Some of the working documents of the IGC make reference to customary laws and protocols and some note that these should be taken into account in devising a new system of protection for traditional knowledge or traditional cultural expressions.

Customary Practices

Customary practices may be described as the acts and uses governing and guiding aspects of a community's life. Customary practices are engrained within the community and embedded in the way it lives and works. They cannot be perceived as stand-alone, codified "laws" as such.³²

Database of Biodiversity-related Access and Benefit-sharing Agreements

The WIPO Database of Biodiversity-related Access and Benefit-sharing Agreements is an electronic online collection of "guide contractual practices, guidelines, and model intellectual property clauses for contractual agreements on access to genetic resources and benefit-sharing, taking into account the specific nature and needs of different stakeholders, different genetic resources, and different transfers within different sectors of genetic resource policy."³³ As a capacity building tool, it aims to provide information resources for those seeking assistance on current practices relating to intellectual property, access and benefit-sharing and genetic resources and, as an empirical basis, it aims to contribute to the development by WIPO of intellectual property guidelines on access to genetic resources and benefit-sharing.³⁴

Derivative

Article 2(e) of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (2010) provides the following definition: "a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity."

The "Like-Minded Countries Contribution to the Objectives and Principles on the Protection of Genetic Resources and Preliminary Draft Articles on the Protection of Genetic Resources" (document WIPO/GRTKF/IC/19/11) provides the following definition of "derivative" at Article 1(2)(b): "a biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity."

Derivative Work

In copyright law, the term "derivative works" refers to the translations, adaptations, arrangements and similar alterations of preexisting works which are protected under Article 2(3) of the *Berne Convention for the Protection of Literary and Artistic Works* (1971) as

³¹ Paul Kuruk, "African Customary Law and the Protection of Folklore", Copyright Bulletin, XXXVI, No.2, 2002, p. 6, quoting, in part, Paris, 15 June 1982, Gazette du Palais, 1982.2, Summary, p. 378, or Paris, 25 April 1978, Gazette du Palais, 1978.2, p. 448.

³² WIPO, Customary Law & the Intellectual Property System in the Protection of Traditional Cultural Expressions and Traditional Knowledge—Issues Paper – version 3.0 (December 2006), available online at http://www.wipo.int/export/sites/www/tk/en/consultations/customary_law/issues-revised.pdf

³³ See document WIPO/GRTKF/IC/2/3 p. 4 para. 2; the online database is available at: <http://www.wipo.int/tk/en/databases/contracts/index.html>

³⁴ See document WIPO/GRTKF/IC/17/INF/11.

such without prejudice to the copyright in the preexisting works.³⁵ Sometimes, the term is used with a broader meaning, extending to the compilations/collections of works protected under Article 2(5) of the Convention, (as well as under Article 10.2 of the World Trade Organization (WTO) *Agreement on Trade Related Aspects of Intellectual Property Rights*, 1994 (the TRIPS Agreement), and Article 5 of the *WIPO Copyright Treaty*, 1996 (WCT)).³⁶

In this sense, a “derivative work” includes compilations of data or other material, whether in machine-readable or other form, which, by reason of the selection or arrangement of their contents, constitute intellectual creations.³⁷ Works of compilation and collection have been protected under the *Berne Convention* along with other derivative works.³⁸

The author’s moral right may limit the right of third parties to make a derivative work. Therefore, even when a person is contractually or statutorily entitled to modify the work or to use it to create a derivative work, the author may object to any distortion of the work that is prejudicial to his or her reputation.

Some jurisdictions have adapted the definition of derivative works in the field of traditional cultural expressions. According to the *Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture* (2002), the term refers to any intellectual creation or innovation based upon or derived from traditional knowledge or expressions of culture.³⁹

Derogatory Action

The adjective “derogatory” refers to a prejudice to the honor or reputation in line with Article 6bis of the *Berne Convention for the Protection of Literary and Artistic Works* (1971). The term “action” refers to something other than an actual change or interference with the work itself. It is an action “in relation to” the work. The term “derogatory action” was added to the Convention at the Brussels Revision in order to cover uses of the work that were prejudicial to the author. It refers to situations where communication of a work is done in such a manner as to cause the author harm.⁴⁰

Disclosed Traditional Knowledge

“Disclosed traditional knowledge” refers to “[traditional knowledge which is accessible to persons beyond the indigenous or local community which is regarded as the ‘holder’ of the [traditional knowledge]. Such [traditional knowledge] might be widely accessible to the public and might be accessed through physical documentation, the internet and other kinds of telecommunication or recording. [Traditional knowledge] might be disclosed to third parties or to non-members of the indigenous and local communities from which [traditional knowledge] originates, with or without the authorization of the indigenous and local communities.”⁴¹

³⁵ Art. 2(3) Berne Convention. “Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.”

³⁶ WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, WIPO.

³⁷ Art. 2(5) Berne Convention, Art. 10(2) TRIPS Agreement, Art. 6 World Copyright Treaty.

³⁸ See Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighboring Rights—The Berne Convention and Beyond*, Oxford, Vol. I., p. 485.

³⁹ *Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture*, 2002, Part I. 4.

⁴⁰ Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighboring Rights—The Berne Convention and Beyond*, Oxford, Vol. I., p. 603.

⁴¹ List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found (WIPO/GRTKF/IC/17/INF/9), para. 4 of Annex.

The “List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found” (WIPO/GRTKF/IC/17/INF/9) discusses disclosed traditional knowledge and undisclosed traditional knowledge further.

Disclosure

According to Black’s Law Dictionary, a “disclosure” is a revelation of facts or act or process of making known something that was previously unknown. In the field of copyright, “disclosure” may mean making a work accessible to the public for the first time. First publication of works is one—but not the only possible—form of disclosure, since works may also be disclosed through non-copy related acts, such as public performance, and broadcasting to the public by cable (wire).⁴² Recognition of such a right is not an obligation under international copyright norms. The *Berne Convention for the Protection of Literary and Artistic Works* (1971) refers to the use of publicly disclosed works in the context of exceptions, and the author has the right to disclose his work to the world.⁴³ Under certain national laws, the “right of disclosure” is a moral right.

Disclosure Requirements

Disclosure is part of the core rationale of patent law.⁴⁴ Patent law imposes a general obligation on patent applicants, as referred to in Article 5 of the *Patent Cooperation Treaty* (PCT), “to disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art”. However, “disclosure requirements” is also used as a general term for reforms made to patent law at the regional or national level, and proposals to reform international patent law, which would specifically require patent applicants to disclose several categories of information concerning traditional knowledge and/or genetic resources when these are used in developing the invention claimed in a patent or patent application.⁴⁵

Three broad functions have been considered for disclosure methods relating to genetic resources and traditional knowledge:

- to disclose any genetic resources/traditional knowledge actually used in the course of developing the invention (a descriptive or transparency function, pertaining to the genetic resources/traditional knowledge itself and its relationship with the invention);
- to disclose the actual source of the genetic resources/traditional knowledge (a disclosure function, relating to where the genetic resources/traditional knowledge was obtained) – this may concern the country of origin (to clarify under which jurisdiction the source material was obtained), or a more specific location (for instance, to ensure that genetic resources can be accessed, so as to ensure the invention can be duplicated or reproduced); and
- to provide an undertaking or evidence of prior informed consent (a compliance function, relating to the legitimacy of the acts of access to genetic resources/traditional knowledge source material) - this may entail showing that genetic resources/traditional knowledge used in the invention was obtained and used in compliance with applicable

⁴² WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, p.282.

⁴³ Art. 10*bis* and 11. See also Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighboring Rights—The Berne Convention and Beyond*, Oxford, Vol. I., p. 614.

⁴⁴ See document WIPO/GA/32/8, Annex, p. 32.

⁴⁵ For further information see document WIPO/GRTKF/IC/16/6, Annex I, pages 7 to 11 and WIPO, TK Division, database on national and regional legislative measures in patent law, available at: <http://www.wipo.int/tk/en/laws/genetic.html>

laws in the country of origin or in compliance with the terms of any specific agreement recording prior informed consent; or showing that the act of applying for a patent was in itself undertaken in accordance with prior informed consent.⁴⁶

At the invitation of the Conference of the Parties of the *Convention on Biological Diversity* (1992), the IGC prepared a technical study on this issue, as well as an examination of issues regarding the interrelation of access to genetic resources and disclosure requirements in intellectual property rights applications, which have been made available to the Convention.⁴⁷

Several proposals have been made to the IGC. The Swiss proposal aims to introduce a disclosure requirement in the *Patent Cooperation Treaty* (PCT) applying to both international and national applications and requiring the patent applicants to disclose the source of genetic resources and/or traditional knowledge.⁴⁸ The proposal made by the European Union and its Member States includes an obligation to implement a mandatory requirement to disclose the country of origin or source of genetic resources for all international, regional and national patent applications.⁴⁹ The proposal made by the African Group builds on the proposals made by Switzerland and the European Union and also includes incorporation of the internationally recognized certificate of compliance as stipulated in the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (2010).⁵⁰ The Like-Minded Countries' proposal concerns the mandatory disclosure of information in the intellectual property application, which involves genetic resources, their derivatives and associated traditional knowledge. Such information should include the country of origin and source, evidence of prior informed consent, evidence of benefit-sharing under mutually agreed terms, and written and oral information for enabling search and examination of the intellectual property application.⁵¹

Alternative mechanisms to disclosure requirements have been proposed.⁵² Another current international initiative for a disclosure requirement is the proposed Article 29*bis* of the World Trade Organization (WTO) *Agreement on Trade-Related Aspects of Intellectual Property* (1994) (TRIPS Agreement) propounded by a number of countries.⁵³

Documentation

The Oxford English Dictionary defines “documentation” as the accumulation, classification and dissemination of information; the material as collected. Documenting traditional knowledge and traditional cultural expressions may include recording them, writing them down, taking pictures of them or filming them—anything that involves recording them in a way that preserves them and could make them available for others. It is different from the traditional ways of preserving and passing on traditional knowledge and traditional cultural expressions within the community.⁵⁴

⁴⁶ WIPO Technical Study on Patent Disclosure Requirements related to Genetic Resources and Traditional Knowledge, WIPO Publication No. 786(E), p. 65.

⁴⁷ WIPO Technical Study on Patent Disclosure Requirements related to Genetic Resources and Traditional Knowledge, WIPO Publication No. 786(E); WIPO/GA/32/8 (“Examination of Issues regarding the Interrelation of Access to Genetic Resources and Disclosure Requirements in Intellectual Property Rights Applications”), 2005.

⁴⁸ Document WIPO/GRTKF/IC/11/10 (Swiss Proposal) and document WIPO/GRTKF/IC/16/6 Annex, p. 13.

⁴⁹ Document WIPO/GRTKF/IC/8/11 (EU Proposal) and document WIPO/GRTKF/IC/16/6 Annex, p. 14.

⁵⁰ Document WIPO/GRTKF/IC/17/10, p. 2 of the Annex.

⁵¹ Document WIPO/GRTKF/IC/19/11, Article 3.

⁵² Document WIPO/GRTKF/IC/9/13 (Alternative Proposal).

⁵³ Document TNC/W/52.

⁵⁴ Summary and Introduction to the Toolkit for Managing Intellectual Property when Documenting Traditional Knowledge and Genetic Resources, document WIPO/GRTKF/IC/5/5.

Documentation is especially important because it is often the way people beyond the traditional circle get access to traditional knowledge.⁵⁵ The “List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found” (WIPO/GRTKF/IC/17/INF/9) discusses documented traditional knowledge and non-documented traditional knowledge further.

Equitable Remuneration

Equitable remuneration refers to the remuneration of certain acts carried out in respect of a work or an object of related rights in an amount and in a manner consistent with what may be regarded as normal commercial standards in case of authorization of the same act by the owner of a copyright or related rights. Such remuneration is usually payable when economic rights are reduced to a right to remuneration (and, in general, applied on the basis of a non-voluntary license).⁵⁶ The *WIPO Performances and Phonograms Treaty*, 1996 (WPPT), provides that performers and producers of phonograms enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms, published for commercial purposes, for broadcasting or for communication to the public (Article 15(1)). However, any Contracting Party may restrict or – provided that it makes a reservation to the Treaty – deny this right (Article 15(3)).

Exceptions

The term “exceptions” sets the limits of the use of a copyrighted work. Exceptions are closely concerned with the acts that relate to the protected elements. Sometimes the word “exception” covers legislative decisions which remove certain original creations from the owner’s monopoly (the text of laws or judicial decisions, for example) but, on the whole, it is a question of determining what uses of protected elements are neither subject to authorization nor remuneration.⁵⁷ The *Berne Convention for the Protection of Literary and Artistic Works* (1971), provides for the application of a three-step test to determine the permissibility of exceptions: (i) the exception may only cover certain special cases; (ii) the exception must not conflict with a normal exploitation of the work and (iii) must not unreasonably prejudice the legitimate interests of the rights of right owners.⁵⁸

Expression by Action

“Expressions by action” refer to expressions of the human body.⁵⁹ They can include folk dances, plays and artistic forms of rituals, and need not be reduced to material form, e.g., be written down in choreographic notation.⁶⁰

⁵⁵ Report on the Toolkit for Managing Intellectual Property when Documenting Traditional Knowledge and Genetic Resources (WIPO/GRTKF/IC/5/5), p. 4 of Annex.

⁵⁶ WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms.

⁵⁷ Exceptions and Limits to Copyright and Neighboring Rights, study prepared by Pierre Sirinelli, WCT-WPPT/IMP/1, 1999, p.2.

⁵⁸ Art. 9(2).

⁵⁹ Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982, para. 37.

⁶⁰ Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, para. 37.

Expressions of Folklore

In the *WIPO-UNESCO Model Provisions*, 1982, “expressions of folklore” are productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of a country or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (i) Verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) Musical expressions, such as folk songs and instrumental music;
- (iii) Expressions by action, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and
- (iv) Tangible expressions.⁶¹

In the context of the IGC, the terms “traditional cultural expressions” and “expressions of folklore” are synonyms and used alternatively.

Ex-situ

Referring to the definition of “*ex situ* conservation” in Article 2 of the *Convention on Biological Diversity* (1992), “*ex situ*” may be understood as “components of biological diversity outside their natural habitats.”

Fair Practice

The *Berne Convention for the Protection of Literary and Artistic Works* (1971) uses the expression “fair practice” in certain provisions on exceptions to copyright protection (see Article 10(1) concerning quotations, and Article 10(2) on free utilization of works—to the extent justified by the purpose—by way of illustration for teaching). For determining what kind of practice may be regarded as “fair,” the criteria of the three-step test should be taken into account.⁶²

Farmers’ Rights

Article 9.1 of the Food and Agriculture Organization (FAO) *International Treaty on Plant Genetic Resources for Food and Agriculture* recognizes “the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centers 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.” Article 9.2 defines “farmers’ rights” as “(a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture; (b) the right to equitably participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture; and (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.” Article 2 of the Food and Agriculture Organization (FAO) *International Code of Conduct for Plant Germplasm Collecting and Transfer* defines the term as “the rights arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources, particularly those in the centres of origin/diversity.

⁶¹ Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, Section 2.

⁶² WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, p. 289.

These rights are vested in the International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers, and supporting the continuation of their contributions, as well as the attainment of the overall purposes of the FAO International Undertaking on Plant Genetic Resources.”

Fixation

Fixation is the process or result of recording a work of authorship in tangible form (Black’s Law Dictionary). Fixation of a work or object of related rights in material form (including storage in an electronic (computer) memory), must be done in a sufficiently stable form, in a way that on this basis the work or object of related rights may be perceived, reproduced or communicated to the public.⁶³ Fixation in material form is not always a necessary pre-requisite of protectability, but the *Berne Convention for the Protection of Literary and Artistic Works* (1971) allows national copyright laws to make fixation such a condition.⁶⁴ The fixation of traditional cultural expressions in a material form may establish new intellectual property rights in the fixation and these rights may be used indirectly to protect the traditional cultural expressions themselves—such a strategy has been used to protect ancient rock art.⁶⁵ It has been argued that the use of the term “expression” could give the impression of a fixation requirement for protection of traditional cultural expressions.⁶⁶

Folklore

As defined in the United Nations Education, Science And Culture Organization (UNESCO) *Recommendation on the Safeguarding of Traditional Culture and Folklore* (1989), “folklore (or traditional and popular culture) is the totality of tradition-based creations, of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.”

The first attempts to explicitly regulate the use of creations of folklore were made in the framework of several copyright laws (Tunisia, 1967; Bolivia, 1968 (in respect of musical folklore only); Chile, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975; Mali, 1977; Burundi, 1978; Ivory Coast, 1978; Guinea, 1980; Tunis Model Law on Copyright for Developing Countries, 1976) and in an international Treaty (the Bangui text of 1977 of the Convention concerning the African Intellectual Property Organization, hereinafter referred to as “the OAPI Convention”). All these texts consider works of folklore as part of the cultural heritage of the nation (“traditional heritage,” “cultural patrimony”; in Chile, “cultural public domain” the use of which is subject to payment). The meaning of folklore as covered by those texts is understood, however, in different ways. An important copyright-type common element in the definition according to the said laws (except the *Tunis Model Law* that contains no definition) is that folklore must have been created by authors of unknown identity but presumably being or having been nationals of the country. The *OAPI Convention* mentions creation by “communities” rather than authors, which delimitates creations of folklore from works protected by conventional copyright. The *Tunis Model Law* defines folklore using both of these alternatives, and considers it as meaning creations “by authors presumed to be nationals of the

⁶³ WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, p. 290.

⁶⁴ Art.2(2).

⁶⁵ Terri Janke, “Unauthorized Reproduction of Rock Art”, in *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, WIPO, 2003.

⁶⁶ Report of the Seventeenth Session of the Committee (WIPO/GRTKF/IC/17/12), para. 50.

country concerned, or by ethnic communities.” According to the Law of Morocco, folklore comprises “all unpublished works of the kind”, whereas the Laws of Algeria and Tunisia do not restrict the scope of folklore to unpublished works. The Law of Senegal explicitly understands the notion of folklore as comprising both literary and artistic works. The *OAPI Convention* and the *Tunis Model Law* provide that folklore comprises scientific works too. Most of the statutes in question recognize “works inspired by folklore” as a distinct category of works whose use for commercial purposes requires the approval of a competent body.⁶⁷

Formality

Black’s Law Dictionary defines a formality as a small point of practice that, though seemingly unimportant, must usually be observed to achieve a particular legal result. In the copyright context, the term “formality” refers to a procedural or administrative requirement, such as placing a copyright notice, depositing copies or registration, to be fulfilled as condition for the acquisition, enjoyment and exercise (including the enforceability) of copyright or related rights.⁶⁸ Under the *Berne Convention for the Protection of Literary and Artistic Works* (1971), the World Trade Organization (WTO) *Agreement on Trade-Related Aspects of Intellectual Property* (TRIPS Agreement), the *WIPO Copyright Treaty* and the *WIPO Performances and Phonograms Treaty*, the enjoyment and exercise of the rights may not be subject to any formality.⁶⁹

Genetic Material

Article 2 of the *Convention on Biological Diversity* (1992) defines “genetic material” as “any material of plant, animal, microbial or other origin containing functional units of heredity.” It has also been suggested that genetic material can be understood “as material from any biological source where units of heredity are operating or having a function.”⁷⁰

Genetic Resources

Article 2 of the *Convention on Biological Diversity* (1992) defines “genetic resources” as “genetic material of actual or potential value.”

Article 1 of the *Decision 391 on Access to Genetic Resources of Andean Community* (1996) defines “genetic resources” broadly as “all biological material that contains genetic information of value or of real or potential value.”

The Food and Agriculture Organization (FAO) Glossary for Fisheries defines the term as “germplasm of plants, animals or other organisms containing useful characters of actual or potential value. In a domesticated species it is the sum of all the genetic combinations produced in the process of evolution.”

⁶⁷ Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982, Part I, para. 5-7.

⁶⁸ WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, p. 290.

⁶⁹ Art. 5(2) Berne Convention, Art. 9(1) TRIPS Agreement, Art. 25(10) WIPO Copyright Treaty and Art. 20 WIPO Performances and Phonograms Treaty. See WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, p. 291.

⁷⁰ Document UNEP/CBD/WG-ABS/9/INF/1 (The Concept of “Genetic Resources” in the Convention on Biological Diversity and how it relates to a functional international regime on access and benefit-sharing”), p. 8.

Other legal instruments make reference to genetic resources using different terms:

Article 2 of the FAO *International Treaty on Plant Genetic Resources for Food and Agriculture* (2001) defines “plant genetic resources” as “any material of plant origin, including reproductive and vegetative propagating material, containing functional units of heredity.”

Article 2 of the FAO *International Code of Conduct for Plant Germplasm Collecting and Transfer* (1993) defines plant genetic resources as “the reproductive or vegetative propagating materials of plants.”

Article 2.1 (a) of the FAO *International Undertaking on Plant Genetic Resources* (1983) defines the term as “the reproductive or vegetative propagating material of the following categories of plants: i) cultivated varieties (cultivars) in current use and newly developed varieties; ii) obsolete cultivars; iii) primitive cultivars (land races); iv) wild and weed species, near relatives of cultivated varieties; and v) special genetic stocks (including elite and current breeders’ line and mutants)”. The International Undertaking does not refer to “functional units of heredity.”

Other legal instruments on intellectual property do not use the term and refer to “biological material.” The European Union *Directive on the Legal Protection of Biotechnological Inventions* (1998) defines it as “material containing genetic information and capable of reproducing itself or being reproduced in a biological system.”

According to the United States *Code of Federal Regulations*, biological material shall include “material that is capable of self-replication either directly or indirectly.”

According to Article 2 of the *Convention on Biological Diversity* (1992), biological resources include “genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.”

Heritage (of Indigenous Peoples)

The “heritage of indigenous peoples” (and other peoples) or “indigenous cultural heritage” refers broadly to the items described in the *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People*, 2000, developed by the Chairperson-Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Mrs. Erica-Irene Daes. Paragraphs 12, 13 and 14 of the Guidelines provide definitions.

Paragraph 12 states that: “[t]he heritage of indigenous peoples has a collective character and is comprised of all objects, sites and knowledge including languages, the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory of traditional natural use. The heritage of indigenous peoples also includes objects, sites, knowledge and literary or artistic creation of that people which may be created or rediscovered in the future based upon their heritage”. Paragraph 13 is to the effect that: “[t]he heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic creation such as music, dance, song, ceremonies, symbols and designs, narratives and poetry and all forms of documentation of and by indigenous peoples; all kinds of scientific, agricultural, technical, medicinal, biodiversity-related and ecological knowledge, including innovations based upon that knowledge, cultigens, remedies, medicines and the use of flora and fauna; human remains; immoveable cultural property such as sacred sites of cultural, natural and historical significance and burials.” Paragraph 14 stipulates that: “[e]very element of an indigenous peoples’ heritage has owners, which may be the whole people, a particular family or clan, an association or community, or individuals, who have been specially taught or initiated to be such custodians.

The owners of heritage must be determined in accordance with indigenous peoples' own customs, laws and practices." For the purposes of these Guidelines, "indigenous cultural heritage" means both tangible and intangible creations, manifestations and production consisting of characteristic elements of the culture of an indigenous people, and developed and maintained by that people, or by indigenous individuals if the creation reflects the traditional literary, artistic or scientific expressions of the people. Such creations, manifestations and productions include the practices, representations, expressions – as well as the instruments, objects, artefacts, sites and cultural spaces associated therewith – that indigenous peoples and individuals recognize as part of their cultural heritage. It further includes the knowledge that is the result of intellectual activity and insight in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, as well as knowledge that is embodied in the traditional lifestyle of an indigenous people, or is contained in codified knowledge systems passed between generations. Cultural heritage, transmitted from generation to generation, is constantly recreated by indigenous peoples in response to changes in their environment and their interaction with nature and their history, and provides them with a sense of identity and continuity.⁷¹

Indigenous and Local Communities

The term "indigenous and local communities" has been the subject of considerable discussion and study and there is no universal, standard definition thereof. The term is used in the *Convention on Biological Diversity* (1992). Article 8(j) states that "[e]ach Contracting Party shall, as far as possible and as appropriate: ... (j) Subject to its national legislation, 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 same term is used in the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (2010).

The *Convention on Biological Diversity* (1992) uses the term "indigenous and local communities" in recognition of communities that have a long association with the lands and waters that they have traditionally live on or used.⁷² Local communities may be defined as "the human population in a distinct ecological area who depend directly on its biodiversity and ecosystem goods and services for all or part of their livelihood and who have developed or acquired traditional knowledge as a result of this dependence, including farmers, fisherfolk, pastoralists, forest dwellers and others."⁷³

The term "local communities" is used in the documents "Like-Minded Countries Contribution to the Draft Articles on the Protection of Traditional Cultural Expressions" (document WIPO/GRTKF/IC/19/9) and in "Like-Minded Countries Contribution to the Draft Articles on the Protection of Traditional Knowledge" (document WIPO/GRTKF/IC/19/10). Article 2(2) of both documents stipulates that: "[f]or the purposes of this article, the term 'local communities' shall include any classification of social and cultural identity of a member state as defined by domestic law."

⁷¹ Standard-Setting: Future Priorities for Standard-Setting Activities, Review of the draft principles and guidelines on the heritage of indigenous peoples, Working paper submitted by Yozo Yokota and the Saami Council, E/CN.4/Sub.2/AC.4/2006/5, 16 June 2006.

⁷² "The Concept of Local Communities", Background paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues for the Expert Workshop on the Dissaggregation of Data (PFII/2004/WS.1/3/Add.1). See also UNEP/CBD/WS-CB/LAC/1/INF/5.

⁷³ See CBD, Development of Elements of *Sui Generis* Systems for the Protection of Traditional Knowledge, Innovations and Practices, UNEP/CBD/WG8J/4/INF/18, p.5.

This term is also used in the Food and Agriculture Organization (FAO) *International Treaty on Plant Genetic Resources for Food and Agriculture*. Article 5.1 states that “[e]ach Contracting Party ... shall in particular, as appropriate: ... (d) Promote *in situ* conservation of wild crop relatives and wild plants for food production, including in protected areas, by supporting, *inter alia*, the efforts of indigenous and local communities...”. “Local and indigenous communities” is used in Article 9.1: “[t]he Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world...”. “Local communities” is used in Article 5.1: “[e]ach Contracting Party ... shall in particular, as appropriate: ... (c) [p]romote or support, as appropriate, farmers and local communities’ efforts to manage and conserve on-farm their plant genetic resources for food and agriculture...”.

Other legal instruments use different terms: “Local or traditional community” is used in the African Regional Intellectual Property Organization (ARIPO) *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* (2010). Article 2.1 states that “‘community’, where the context so permits, includes a local or traditional community.”

Article 1 of the *Decision 391 on Access to Genetic Resources of Andean Community* (1996) defines “native, Afro-American or local community” as “a human group whose social, cultural and economic conditions distinguish it from other sectors of the national community, that is governed totally or partially by its own customs or traditions or by special legislation and that, irrespective of its legal status, conserves its own social, economic, cultural and political institutions or a part of them.”

Article 7.III of the Brazilian Provisional Act No. 2,186-16, dated August 23, 2001, defines “local community” as a “human group, including descendants of Quilombo communities, differentiated by its cultural conditions, which is, traditionally, organized along successive generations and with its own customs, and preserves its social and economic institutions.”

Indigenous Knowledge

Indigenous knowledge is knowledge held and used by communities, peoples and nations that are “indigenous”. In this sense, “indigenous knowledge” would be the traditional knowledge of indigenous peoples. Indigenous knowledge is, therefore, a part of the traditional knowledge category, but traditional knowledge is not necessarily indigenous. Yet the term is also used to refer to knowledge that is itself “indigenous”. In this sense, the terms “traditional knowledge” and “indigenous knowledge” may be interchangeable.⁷⁴

Indigenous Peoples

The term “indigenous peoples” has been the subject of considerable discussion and study and there is no universal, standard definition thereof.

The *United Nations Declaration on the Rights of Indigenous Peoples* (2007) acknowledges the equal human rights of indigenous peoples against cultural discrimination and seeks to promote mutual respect and harmonious relations between the indigenous peoples and States. However, it does not provide a definition of “indigenous peoples”.

The description of the concept of “indigenous” in the Study of the Problem of Discrimination Against Indigenous Populations, prepared by Special Rapporteur of the United Nations

⁷⁴ WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) “Intellectual Property Needs and Expectations of Traditional Knowledge”, p.23. See also List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found (WIPO/GRTKF/IC/17/INF/9), para. 41 of Annex.

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.”

Article 1 of the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries states that the Convention applies to:

- “(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”⁷⁵

The United Nations Environment Program (UNEP) List of Acronyms and Glossary Terms provide the following definition of “Indigenous people/s”: “No universal, standard definition. Usually considered to include cultural groups and their descendants who have a historical continuity or association with a given region, or parts of a region, and who currently inhabit or have formerly inhabited the region either before its subsequent colonization or annexation, or alongside other cultural groups during the formation of a nation-state, or independently or largely isolated from the influence of the claimed governance by a nation-state, and who furthermore have maintained, at least in part, their distinct linguistic, cultural and social / organizational characteristics, and in doing so remain differentiated in some degree from the surrounding populations and dominant culture of the nation-state. Also include people who are self-identified as indigenous, and those recognized as such by other groups.”⁷⁶

The World Bank uses the term “indigenous peoples” in a generic sense to refer to distinct groups with the following characteristics in varying degrees:

- (i) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- (ii) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
- (iii) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
- (iv) an indigenous language, often different from the official language of the country or region.⁷⁷

⁷⁵ Article 1, ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries.

⁷⁶ UNEP Glossary of Terms for Negotiators of Multilateral Environmental Agreements, page 49, available at http://www.unep.org/delc/portals/119/Glossary_terms%20_for_Negotiators_MEAs.pdf

⁷⁷ See Operational Policy 4.10 on Indigenous Peoples, World Bank 2005; John Henriksen: Key Principles in Implementing ILO Convention No. 169, 2008.

The IFAD Policy on Engagement with Indigenous Peoples, prepared by the International Fund for Agricultural Development (IFAD), provides that “Consistent with international practice⁷⁸ and for the purposes of this policy, IFAD will use a working definition of indigenous peoples based on the following criteria:

- Priority in time, with respect to occupation and use of a specific territory;
- The voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- Self-identification, as well as recognition by other groups, or by state authorities, as a distinct collectivity; and
- An experience of subjugation, marginalization, dispossession, exclusion or discrimination.”⁷⁹

The UNDP and Indigenous Peoples: A Policy of Engagement,⁸⁰ prepared by the United Nations Development Program (UNDP) provides that: “...(a) indigenous peoples usually live within (or maintain attachments to) geographically distinct ancestral territories; (b) they tend to maintain distinct social, economic, and political institutions within their territories; (c) they typically aspire to remain distinct culturally, geographically and institutionally rather than assimilate fully into national society; and (d) they self-identify as indigenous or tribal.”

Despite common characteristics, there does not exist any single accepted definition of indigenous peoples that captures their diversity as peoples. Self-identification as indigenous or tribal is usually regarded as a fundamental criterion for determining whether groups are indigenous or tribal, sometimes in combination with other variables such as “language spoken,” and “geographic location or concentration.”

The Peruvian Law No. 27811 of 24 July, 2002, *Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources* defines “indigenous peoples” as “aboriginal peoples holding rights that existed prior to the formation of the Peruvian State, maintaining a culture of their own, occupying a specific territorial area and recognizing themselves as such. These include peoples in voluntary isolation or with which contact has not been made, and also rural and native communities. The term ‘indigenous’ shall encompass, and may be used as a synonym of, ‘aboriginal’, ‘traditional’, ‘ethnic’, ‘ancestral’, ‘native’ or other such word form.”

“Aboriginal people” is a related term. The Oxford Dictionary defines “aboriginal” as (1) “[...] of peoples, plants, and animals: inhabiting or existing in a land from earliest times; strictly native, indigenous”; (2) “[...] inhabiting or occupying a country before the arrival of European colonists and those whom they introduced”; and (3) “[...] of, relating to, or characteristic of the Aborigines of Australia or their languages.”

Section 35 of the Constitution of Canada states that “[...] Aboriginal Peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.” The 1996 Canadian Royal Commission on Aboriginal People self-defined their focus group as: “... organic political and cultural entities that stem historically from the original peoples of North America [...].”

⁷⁸ [This footnote is part of the definition] International Labour Organization Convention 169 on Indigenous and Tribal Peoples (1989), United Nations Declaration on the Rights of Indigenous Peoples (2007), UNDG Guidelines on Indigenous Peoples’ Issues (2008); United Nations Permanent Forum on Indigenous Issues (under the Economic and Social Affairs Department), Inter-Agency Support Group on Indigenous Issues, and United Nations Second International Decade of the World’s Indigenous Peoples plan of action (see Annex I). The same criteria are used by the FAO in its policy on indigenous and tribal peoples (Available at <http://www.fao.org/docrep/013/i1857e/i1857e00.pdf>)

⁷⁹ Available at http://www.ifad.org/english/indigenous/documents/ip_policy_e.pdf.

⁸⁰ Available at http://www.hreoc.gov.au/social_justice/conference/engaging_communities/unpan021101.pdf.

Indigenous communities, peoples and nations are 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 territories, 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 identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.⁸¹

Infringement

According to Black's Law Dictionary, an infringement is an act that interferes with one of the exclusive rights of an intellectual property right owner. Specifically, in the field of copyright and related rights, infringement is an act carried out in respect of a work protected by copyright or an object of related rights without authorization of the owner of the copyright or related rights concerned where such authorization is required. The liability for infringement may exist not only on the basis of direct liability (for the performance of the unauthorized act in itself), but also on the basis of "contributory liability" or "vicarious liability."⁸²

In-situ

According to article 2 of the *Convention on Biological Diversity* (1992): "*In-situ* conditions" means "conditions where genetic resources exist within ecosystems and natural habitats, and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties".

Intangible Cultural Heritage

According to Black's Law Dictionary, "intangible" refers to something that lacks a physical form. "Tangible" on the other hand is defined as "having or possessing physical form; corporeal; capable of being touched and seen; perceptible."

"Intangible cultural heritage" is defined in the United Nations Education, Science And Culture Organization (UNESCO) *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003) as "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development."

The Convention also states that "intangible cultural heritage" is manifested *inter alia* in the following domains: a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; b) performing arts; c) social practices, rituals and festive events; d) knowledge and practices concerning nature and the universe; e) traditional craftsmanship.

⁸¹ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities and its Study of the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1986/7/Add.4., para 379 (1986).

⁸² WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, p. 293.

Integrity

The right of integrity is the right to prevent unauthorized alterations and changes to works.⁸³ After the 1949 Brussels Revision of the *Berne Convention for the Protection of Literary and Artistic Works* (1971), the prohibition of other derogatory actions in relation to the said work which would be prejudicial to the author's honor or reputation was added (Article 6*bis*).

Intellectual Property Guidelines for Access and Benefit-sharing

From its first session, the IGC supported a task which would lead to the development by WIPO of Intellectual Property Guidelines for Access and Benefit-sharing. It was proposed that the Guidelines be based on a systemic survey of actual and model contractual agreements in the form of the WIPO Database of Biodiversity-related Access and Benefit-sharing Agreements.⁸⁴

A first draft⁸⁵ was prepared taking into account the operational principles identified by the IGC for the development of such Guidelines.⁸⁶ This draft was later updated for purposes of the seventeenth session of the IGC.⁸⁷

The purpose of the Intellectual Property Guidelines for Access and Benefit-sharing is to serve both providers and recipients of genetic resources when they negotiate, develop and draft the intellectual property elements of mutually agreed terms for access to genetic resources and benefit-sharing. They illustrate the practical intellectual property issues that providers and recipients are likely to face when negotiating an agreement, contract or license. The diversity of national law and of the practical interests of providers and recipients are likely to lead to a wide range of choices when actual provisions are negotiated and drafted. Guidelines may therefore support providers and recipients in ensuring that access and benefit-sharing is on equitable, mutually agreed terms, but does not prescribe one template or set of choices.

Further, nothing in such Guidelines should be interpreted to affect the sovereign rights of States over their natural resources, including their entitlement to set terms and conditions on access and benefit-sharing. Guidelines would be voluntary and illustrative only. They would be no substitute for relevant international, regional or national legislation.⁸⁸

Traditional knowledge is often associated with genetic resources, and this can provide valuable insights into how genetic resources can be preserved, maintained, and used for the benefit of humanity.⁸⁹ The Guidelines also apply to traditional knowledge associated with genetic resources.⁹⁰

International Patent Classification

The International Patent Classification (IPC) is "a hierarchical system in which the whole area of technology is divided into a range of sections, classes, subclasses and groups.

⁸³ Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighboring Rights—The Berne Convention and Beyond*, Oxford, Vol. I., p.602.

⁸⁴ See document WIPO/GRTKF/IC/2/3, para. 133.

⁸⁵ See document WIPO/GRTKF/IC/7/9 (Genetic Resources: Draft Intellectual Property Guidelines for Access and Equitable Benefit-sharing).

⁸⁶ See operational principles in document WIPO/GRTKF/IC/2/3, Section V.B, p. 50.

⁸⁷ See document WIPO/GRTKF/IC/17/INF/12 (Genetic Resources: Draft Intellectual Property Guidelines for Access and Equitable Benefit-sharing: Updated version).

⁸⁸ *Id.*

⁸⁹ *Id.*, page 4 of Annex.

⁹⁰ See document WIPO/GRTKF/IC/17/INF/12.

The Classification is a language independent tool indispensable for the retrieval of patent documents in the search for 'prior art'.⁹¹

The IPC was established by the *Strasbourg Agreement Concerning the International Patent Classification* (1971). Article 2(1)(a) provides that “[t]he Classification comprises: (i) the text which was established pursuant to the provisions of the European Convention on the International Classification of Patents for Invention of December 19, 1954 (hereinafter designated as the “European Convention”), and which came into force and was published by the Secretary General of the Council of Europe on September 1, 1968; (ii) the amendments which have entered into force pursuant to Article 2(2) of the European Convention prior to the entry into force of this Agreement; (iii) the amendments made thereafter in accordance with Article 5 which enter into force pursuant to the provisions of Article 6.”

Inventive Step

Inventive step (also referred to as “non-obviousness”) is one of the criteria of patentability and relates to the question of whether the invention would have been obvious to a person skilled in the art.⁹²

According to article 33 of the PCT, a claimed invention shall be considered to involve an inventive step “if, having regard to the prior art as defined in the Regulations, it is not, at the prescribed relevant date, obvious to a person skilled in the art.”

Article 56 of the *European Patent Convention* and Section 35 U.S.C. 103 provide for similar definitions. Section 35 U.S.C. 103 uses the equivalent term “non-obvious subject matter.”

Licensing Agreements

Licensing agreements are described as agreements setting out certain permitted use of materials or rights that the provider is entitled to grant, such as agreements to license the use of genetic resources as research tools, or to license the use of associated traditional knowledge or other intellectual property rights.⁹³

Limitations

“Limitation”, according to Black’s Law Dictionary, refers to the act of limiting; the state of being limited, a restriction. The word “limits,” in addition to “exceptions,” refers to “boundaries” or “restrictions”.⁹⁴ In order to maintain an appropriate balance between the interests of rights holders and users of protected works, copyright laws allow certain limitations on economic rights, that is, cases in which protected works may be used without the authorization of the right holder and with or without payment of compensation.⁹⁵

The *Berne Convention for the Protection of Literary and Artistic Works* (1971) sets conditions under which authors’ rights could be limited, and free uses therefore permitted.⁹⁶ A three-step-test has been devised to determine the conditions under which an act of limitation may be carried out.⁹⁷ This test has been extended to Article 13 of the World Trade Organization

⁹¹ WIPO PATENTSCOPE Glossary.

⁹² WIPO Intellectual Property Handbook, WIPO Publication No. 489 (E), 2008, p. 20.

⁹³ See document WIPO/GRTKF/IC/17/INF/12.

⁹⁴ “Exceptions and Limits to Copyright and Neighboring Rights,” study prepared by Pierre Sirinelli, WCT-WPPT/IMP/1, p. 2.

⁹⁵ WIPO Copyright and Related Rights website, <http://www.wipo.int/copyright/en/limitations/index.html>.

⁹⁶ Art. 10(1).

⁹⁷ Art. 9(2).

(WTO) *Agreement on Trade-Related Aspects of Intellectual Property* (TRIPS Agreement), Article 10 of the *WIPO Copyright Treaty* (WCT), as a test for exceptions and limitations on all economic rights under copyright. Article 16 of the *WIPO Performances and Phonographs Treaty* (WPPT) extends it to rights of performers and producers of phonograms covered by that treaty.⁹⁸

Material Transfer Agreements

Material Transfer Agreements (MTAs) are agreements in commercial and academic research partnerships involving the transfer of biological materials, such as germplasm, microorganisms and cell cultures to exchange of materials from a provider to a recipient and setting conditions for access to public germplasm collections, seed banks or *in situ* genetic resources.⁹⁹ WIPO has developed the Database of Biodiversity-related Access and Benefit-sharing Agreements containing contractual clauses related to the transfer and use of genetic resources.¹⁰⁰ The Food and Agriculture Organization (FAO) has developed and adopted in 2006 a Standard Material Transfer Agreement (SMTA) as required for the implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture (2001).¹⁰¹ Appendix I of the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* suggests elements for material transfer agreements.

Minimum Documentation PCT

According to the WIPO PCT Glossary, the Minimum Documentation could be described as “the documents in which the International Searching Authority must search for relevant prior art. It also applies to International Preliminary Examining Authorities for examination purposes. The documentation comprises certain published patent documents and non-patent literature contained in a list published by the International Bureau. The Minimum Documentation is set out by the PCT Regulations Rule 34”.¹⁰²

In the PCT International Search Guidelines, the international search minimum documentation is defined as “a document collection that is systematically arranged (or otherwise systematically accessible) for search purposes according to the subject matter content of the documents, which are primarily patent documents supplemented by a number of articles from periodicals and other items of non-patent literature”.¹⁰³

In February of 2003, at the seventh session of the Meeting of International Authorities under the PCT, there was agreement in principle that Traditional Knowledge documentation should be included in the non-patent literature part of the PCT Minimum Documentation.¹⁰⁴ For instance, the Indian Journal of Traditional Knowledge and the Korean Journal of Traditional Knowledge are identified as non-patent literature in the “PCT Minimum Documentation – List of Periodicals: Periodicals to Be Used for Search and Examination.”

Minority

According to Black’s Law Dictionary, “minority” refers to a group that is different in some respect from the majority and that is sometimes treated differently as a result.

⁹⁸ WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, p. 313.

⁹⁹ See document WIPO/GRTKF/IC/17/INF/12.

¹⁰⁰ Available at: <http://www.wipo.int/tk/en/databases/contracts/index.html>

¹⁰¹ Available at: <ftp://ftp.fao.org/ag/cgrfa/gb1/SMTAe.pdf>.

¹⁰² Available at: <http://www.wipo.int/pct/en/texts/glossary.html#M>

¹⁰³ Para IX-2.1, PCT International Search Guidelines (as in force from 18 September 1998).

¹⁰⁴ PCT Minimum Documentation, document PCT/MIA/9/4.

A minority is a group which is numerically inferior to the rest of the population of a State and in a non dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population, and who if only implicitly, maintain a sense of solidarity directed towards preserving their culture, traditions, religion or language.¹⁰⁵

According to the *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities* (1992), minorities have the right to enjoy their own culture, without interference or any form of discrimination.¹⁰⁶ States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.¹⁰⁷

According to the *International Covenant on Civil and Political Rights* (1966), in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.¹⁰⁸

Misappropriation

In the field of intellectual property, Black's Law Dictionary defines "misappropriation" as "the common-law tort of using the noncopyrightable information or ideas that an organization collects and disseminates for a profit to compete unfairly against that organization, or copying a work whose creator has not yet claimed or been granted exclusive rights in the work. [...] The elements of misappropriation are: (1) the plaintiff must have invested time, money, or effort to extract the information, (2) the defendant must have taken the information with no similar investment, and (3) the plaintiff must have suffered a competitive injury because of the taking."

The tort of misappropriation is part of unfair competition law in the common law system. Misappropriation thus entails the wrongful or dishonest use or borrowing of someone's property, and is often used to found action in cases where no property right as such has been infringed. Misappropriation may refer to wrongful borrowing or to the fraudulent appropriation of funds or property entrusted to someone's care but actually owned by someone else.

For example, Article 3 of the draft *Legal Framework for the Protection of Traditional Knowledge in Sri Lanka*, 2009, defines "misappropriation" as "(i) acquisition, appropriation or use of traditional knowledge in violation of the provisions of this Act, (ii) deriving benefits from acquisition, appropriation or use of traditional knowledge where the person who acquires, appropriates or uses traditional knowledge is aware of, or could not have been unaware of, or is negligent to become aware of the fact that the traditional knowledge was acquired, appropriated or used by any unfair means and (iii) any commercial activity contrary to honest practices that results in unfair or inequitable benefits from traditional knowledge."¹⁰⁹

¹⁰⁵ Francesco Capotorti, Former Special Rapporteur of the United Nations, 1979, cited by Dieter Kugelmann, *The Protection of Minorities and Indigenous Peoples Respective Cultural Diversity*, A. Von Bogdandy and R. Wolfrum, (eds), Max Planck Year Book of United Nations Law, Vol. 11, 2007, p. 237.

¹⁰⁶ Art.2 (1) Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly Resolution 47/135 of December 1992.

¹⁰⁷ Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, Art.1(1).

¹⁰⁸ Art. 27 *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976.

¹⁰⁹ "A Legal Framework for the Protection of Traditional Knowledge in Sri Lanka," Working Document-Version 01-January 2009.

Misuse¹¹⁰

In the field of patents, Black's Law Dictionary defines "misuse" as "the use of a patent either to improperly extend the granted monopoly to nonpatented goods or to violate antitrust laws." In general, Black's Law Dictionary states: "improper use, in an unintended or unforeseeable manner." Dictionaries generally define misuse as a wrong, incorrect or improper use, or misapplication. Misuse may also refer to improper or excessive use, or to acts which change the inherent purpose or function of something.

Modification

A modification is a change to something (Black's Law Dictionary). It is a synonym of alteration. Article 6bis of the *Berne Convention for the Protection of Literary and Artistic Works* (1971) provides, *inter alia*, for a right of the author to object to any distortion, mutilation or other modification of his work which would be prejudicial to his honor or reputation.

Musical expression

Musical expressions are expressions by musical sounds.¹¹¹

Mutilation

"Mutilation" refers to the act of cutting out or excising a part of a thing, especially a book or other document; to change or destroy part of the content or meaning, according to the Oxford English Dictionary. The protection against mutilation is one attribute of the author's moral rights, according to Article 6bis of the *Berne Convention for the Protection of Literary and Artistic Works* (1971).

Mutual Respect

The *United Nations Declaration on the Rights of Indigenous Peoples* (2007), in its preamble, considers mutual respect as a standard of achievement to be pursued in a spirit of partnership. "Mutual" relates to two or more people, having the same feelings for each other; standing in reciprocal relation to one another (Oxford English Dictionary).

Mutually Agreed Terms

Besides recognizing the authority of national governments to determine access to genetic resources, Article 15(4) of the *Convention on Biological Diversity* (1992) provides that "access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article". The Executive Secretary of the Convention has noted that contracts are the most common way of recording mutually agreed terms.¹¹² The *Bonn Guidelines on Access to Genetic Resources*

¹¹⁰ It was proposed to add the term "misuse" in the text of "The Protection of Traditional Knowledge: Revised Objectives and Principles" (WIPO/GRTKF/IC/18/5) by some Delegations, such as the Delegation of Indonesia and the Delegation of Mexico. However, the Delegation of Australia noted that misuse was a term that was used in the context of the Convention on Biological Diversity within the draft negotiating text for an international regime on access and benefit sharing of genetic resources and associated traditional knowledge. It was used to refer to acts that were contrary to mutually agreed terms, while misappropriation referred specifically to acquisition without prior informed consent. It called for further discussion as to the meaning of these terms in the context of the Committee and in relation to intellectual property rather than access to traditional knowledge associated with genetic resources.

¹¹¹ Sect. 2, Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982.

¹¹² See document UNEP/CBD/COP/4/22, para. 32

and Fair and Equitable Sharing of the Benefits Arising out of their Utilization indicate some basic requirements for mutually agreed terms in Articles 41 to 44.

Article 18 of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (2010) specifically deals with compliance with mutually agreed terms, providing that “1. In the implementation of Article 6, paragraph 3 (g)(i) and Article 7, each Party shall encourage providers and users of genetic resources and/or traditional knowledge associated with genetic resources to include provisions in mutually agreed terms to cover, where appropriate, dispute resolution including: (a) The jurisdiction to which they will subject any dispute resolution processes; (b) The applicable law; and/or (c) Options for alternative dispute resolution, such as mediation or arbitration. 2. Each Party shall ensure that an opportunity to seek recourse is available under their legal systems, consistent with applicable jurisdictional requirements, in cases of disputes arising from mutually agreed terms. 3. Each Party shall take effective measures, as appropriate, regarding: (a) Access to justice; and (b) The utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards. 4. The effectiveness of this article shall be reviewed by the Conference of the Parties serving as the meeting of the Parties to this Protocol in accordance with Article 31 of this Protocol.”

Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010)

A protocol was adopted in October 2010 during the tenth meeting of the Conference of the Parties (COP 10) held in Nagoya, Japan. According to Article 1, the Protocol aims to “the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.” The Secretary-General of the United Nations is the Depositary of the Protocol and opened it for signature at the United Nations Headquarters in New York from 2 February 2011 to 1 February 2012.

Several articles are specifically related to traditional knowledge associated with genetic resources, such as Article 3 (Access to Traditional Knowledge Associated with Genetic Resources), Article 12 (Traditional Knowledge Associated with Genetic Resources), and Article 16 (Compliance with Domestic Legislation or Regulatory Requirements on Access and Benefit-Sharing for Traditional Knowledge Associated with Genetic Resources).

Nation

Black’s Law Dictionary defines “nation” as a large group of people having a common origin, language, and tradition and usually constituting a political entity. “Nationals” refers to persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in a customs territory.¹¹³ The term “nation” carries connotations of a community shaped by common descent, culture and history and often by a common language as well.¹¹⁴ The term “cultural communities” is intended to be broad enough to include the nationals of an entire country, a “nation”, in cases where traditional cultural expressions are regarded as

¹¹³ Daniel Gervais, *The TRIPS Agreement. Drafting and Analysis*, 3rd Edition, Sweet & Maxwell, p. 161.

¹¹⁴ Dieter Kugelman, *The Protection of Minorities and Indigenous Peoples Respective Cultural Diversity*, A. Von Bogdandy and R. Wolfrum, (eds), *Max Planck Year Book of United Nations Law*, Vol. 11, 2007, p. 235.

“national folklore” and belonging to all of the people of a particular country. This complements and accords with the practice in other policy areas.¹¹⁵

Novelty

Novelty is one of the criteria of patentability in any examination as to substance. An invention is new if it is not anticipated by prior art.¹¹⁶

According to Article 33 of the *Patent Cooperation Treaty* (PCT), novelty is defined as follows: “[f]or the purposes of the international preliminary examination, a claimed invention shall be considered novel if it is not anticipated by the prior art as defined in the Regulations.”

Rule 64.1(a) of the Regulations under the PCT defines “prior art” as “everything made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) shall be considered prior art provided that such making available occurred prior to the relevant date.”

Article 54 of the *European Patent Convention* (EPC) defines “novelty” as follows: “[a]n invention shall be considered to be new if it does not form part of the state of the art. The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing of the European patent application.”

Section 35 of the United States Code 102 [Conditions for patentability; novelty and loss of right to patent] defines the concept of novelty as follows: “[a] person shall be entitled to a patent unless — the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent ...”.

Offensive

“Offensive” refers to the causing of displeasure, anger or resentment; repugnant to the prevailing sense of what is decent or moral (Black’s Law Dictionary).

Patent

A patent is defined as “a document which describes an invention which can be manufactured, used, and sold with the authorization of the owner of the patent. An invention is a solution to a specific technical problem. A patent document normally contains at least one claim, the full text of the description of the invention, and bibliographic information such as the applicant’s name. The protection given by a patent is limited in time (generally 15 to 20 years from filing or grant). It is also limited territorially to the country or countries concerned. A patent is an agreement between an inventor and a country. The agreement permits the owner to exclude others from making, using or selling the claimed invention.”¹¹⁷

Article 27(1) of the World Trade Organization (WTO) *Trade-Related Aspects of Intellectual Property Rights Agreement* (TRIPS Agreement) states that “[...] patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are

¹¹⁵ Glossary on Intangible Cultural Heritage, Netherlands National Commission for UNESCO, 2002 (“... A nation can be a cultural community”), as quoted in “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles”, WIPO/GRTKF/IC/17/4.

¹¹⁶ WIPO Intellectual Property Handbook, WIPO Publication No. 489 (E), 2008, p. 19.

¹¹⁷ WIPO PATENTSCOPE Glossary.

new, involve an inventive step and are capable of industrial application. [...] patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.”

Preservation

Preservation has two broad elements – first, the preservation of the living cultural and social context of traditional knowledge and cultural expressions, so that the customary framework for developing, passing on and governing access to traditional knowledge or cultural expressions is maintained; and second, the preservation of traditional knowledge and cultural expressions in a fixed form, such as when they are documented. Preservation may have the goal of assisting the survival of the traditional knowledge or cultural expressions for future generations of the original community and ensuring their continuity within an essentially traditional or customary framework, or the goal of making them available to a wider public (including scholars and researchers), in recognition of their importance as part of the collective cultural heritage of humanity.¹¹⁸

Non-intellectual property laws and programs dealing with the safeguarding and promotion of living heritage can play a useful role in complementing laws dealing with intellectual property protection. Other international legal systems, such as the *Convention on Biological Diversity* (1992) and the United Nations Education, Science And Culture Organization (UNESCO) deal with aspects of conservation, preservation and safeguarding of traditional knowledge and traditional cultural expressions within their specific policy contexts.¹¹⁹

Prior Informed Consent

A right or principle of “prior informed consent” (PIC) or sometimes “free, prior and informed consent” (FPIC) is referred to or implied in several international instruments, particularly in the environmental field, such as Article 6(4) of the *Basel Convention on the Transboundary Movement of Hazardous Wastes*, 1989, and the *Convention on Biological Diversity* (1992).

In respect to access to genetic resources, the *Convention on Biological Diversity* (1992) states in Article 15(5) that it “shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.”

Article 16(1) of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (2010) provides that “[e]ach Party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities and that mutually agreed terms have been established, as required by domestic access and benefit sharing legislation or regulatory requirements of the other Party where such indigenous and local communities are located.”

The notion was originally derived from medical ethics in which a patient has the right to decide whether or not to undergo a medical treatment after being fully informed about the risks and benefits of that particular treatment. For instance, the *Universal Declaration on the Human Genome and Human Rights* of 1997 states in Article 5 that in all cases of research, treatment or

¹¹⁸ Overview of Activities and Outcomes of the Intergovernmental Committee (WIPO/GRTKF/IC/5/12), para. 37.

¹¹⁹ The Protection of Traditional Knowledge: Draft Gap Analysis: Revision, WIPO/GRTKF/IC/13/5(b) Rev. Annex I, p. 6.

diagnosis affecting an individual's genome the potential risks and benefits should be assessed and "the prior, free and informed consent of the person concerned shall be obtained". Article 6 of the United Nations Education, Science and Culture Organization (UNESCO) *Declaration on Bioethics and Human Rights* of 2005 requires the "prior, free and informed consent of the person concerned" when it comes to "preventive, diagnostic and therapeutic medical intervention" or "scientific research."

The term flows from the implementation of the general principle of participation of indigenous peoples in decision-making, involvement in the formulation, implementation and evaluation of programs affecting them.¹²⁰

The purpose of the use of the adjective "free" is to ensure that no coercion or manipulation is used in the course of negotiations, while inclusion of "prior" acknowledges the importance of allowing time to indigenous to fully review proposals respecting the time required for achieving consensus. It also anticipates the reality that decisions, especially those relating to major investments in development, are often taken in advance with indigenous people. The notion of "informed" consent reflects the growing acceptance that environment and social impact assessment are a pre-requisite for any negotiation process and allow all parties to make balanced decisions.

"Consent" is a process whereby permission is given, based on a relationship of trust. An informed consent implies that clear explanations are provided, along with contract details, possible benefits, impacts and future uses. The process should be transparent, and the language fully understood by indigenous peoples.¹²¹

Prior Art

Prior art is, in general, all the knowledge that existed prior to the relevant filing or priority date of a patent application, whether it existed by way of written and oral disclosure. In some legal instruments there is a differentiation between printed publications, oral disclosures and prior use and where the publications or disclosure occurred.¹²²

For the purposes of the PCT, prior art is defined by Rule 33.1 of the PCT Regulations as "everything which has been made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) and which is capable of being of assistance in determining that the claimed invention is or is not new and that it does or does not involve an inventive step (i.e. that it is or is not obvious), provided that the making available to the public occurred prior to the international filing date."

In Europe, Article 54(2) of the *European Patent Convention* (EPC) defines the equivalent term "the state of the art" as comprising "everything made available to the public by means of a written or oral description, by use, or in any other way, before the filing of the European patent application." With reference to this provision of the EPC, the *Guidelines for Examination in the European Patent Office* (EPO) emphasize that "[t]he width of this definition should be noted. There are no restrictions whatever as to the geographical location where, or the language or manner in which the relevant information was made available to the public; also no age limit is

¹²⁰ Art.32(2), United Nations Declaration on the Rights of Indigenous Peoples; See also United Nations Development Group, *Guidelines Related to Indigenous Peoples*.

¹²¹ Stephen Allen and Alexandra Xanthaki, "Reflections on the UN Declaration on the Rights of Indigenous Peoples", Oxford and Portland, Oregon, p.49. See also "United Nations Economic and Social Council Permanent Forum on Indigenous Issues", Fourth Session, and "Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples", E/C.19/2005/3. p.8.

¹²² WIPO Intellectual Property Handbook, WIPO Publication No. 489 (E), 2008, p. 19.

stipulated for the documents or other sources of the information. However certain specific exclusions exist (see IV, 8).¹²³

Section 35 of the United States Code 102 defines prior art indirectly through the concept of novelty as anything "known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent ...".

Section 29 of Japanese Patent Law indirectly defines "prior art" as "(i) inventions that were publicly known in Japan or a foreign country, prior to the filing of the patent application; (ii) inventions that were publicly worked in Japan or a foreign country, prior to the filing of the patent application; or (iii) inventions that were described in a distributed publication, or inventions that were made publicly available through an electric telecommunication line in Japan or a foreign country, prior to the filing of the patent application."

Protection

"Protection" in the work of the IGC has tended to refer to protection of traditional knowledge and traditional cultural expressions against some form of unauthorized use by third parties.¹²⁴ Two forms of protection have been developed and applied.

Positive Protection

Two aspects of positive protection of traditional knowledge and traditional cultural expressions by intellectual property rights are explored, one concerned with preventing unauthorized use and the other concerned with active exploitation of the traditional knowledge and traditional cultural expressions by the originating community itself. Besides, the use of non-intellectual property approaches for the positive protection of traditional knowledge and traditional cultural expressions can be complementary and used in conjunction with intellectual property protection.¹²⁵ For instance, positive protection of traditional knowledge and traditional cultural expressions may prevent others from gaining illegitimate access to traditional knowledge and traditional cultural expressions or using them for commercial gain without equitably sharing the benefits, but it may also be used by traditional knowledge and traditional cultural expressions holders to build up their own enterprises based on their traditional knowledge and traditional cultural expressions.¹²⁶

Defensive Protection

Defensive protection refers to a set of strategies to ensure that third parties do not gain illegitimate or unfounded intellectual property rights over traditional cultural expressions, traditional knowledge subject matter and related genetic resources.¹²⁷ Defensive protection of traditional knowledge includes measures to preempt or to invalidate patents that illegitimately claim pre-existing traditional knowledge as inventions.

¹²³ See Guidelines for Examination in the European Patent Office, Part C, Chapter IV, para 5.1.

¹²⁴ Overview of Activities and Outcomes of the Intergovernmental Committee (WIPO/GRTKF/IC/5/12), para. 20.

¹²⁵ *Id.*, paras. 21 and 22.

¹²⁶ *Id.*, para. 21.

¹²⁷ *Id.*, para. 28.

Protocol

Protocols are legal agreements, codes of conduct, guidelines or sets of manners that explain how people should behave in certain circumstances. They can be used to set community standards around knowledge circulation and use for outsiders as well as help change attitudes and set new standards. Generally, protocols are flexible and can change over time. They may be used as tools to help achieve certain goals that other areas of law have been unable to fulfill. As formal or informal guidelines for behavior, protocols can help build relationships and make new ones possible.¹²⁸

Providers and Recipients

Providers and recipients of genetic resources may include the government sector (e.g., government ministries, government agencies (national, regional or local), including those responsible for administration of national parks and government land); commerce or industry (e.g., pharmaceutical, food and agriculture, horticulture, and cosmetics enterprises); research institutions (e.g., universities, gene banks, botanic gardens, microbial collections); custodians of genetic resources and traditional knowledge holders (e.g. associations of healers, indigenous peoples or local communities, peoples' organizations, traditional farming communities); and others (e.g., private land owner(s), conservation group(s) etc.)¹²⁹

Public Domain

In general, a work is considered to be in the public domain if there is no legal restriction for its use by the public.¹³⁰

Black's Law Dictionary defines the public domain as "[t]he universe of inventions and creative works that are not protected by intellectual-property rights and are therefore available for anyone to use without charge. When copyright, trademark, patent, or trade-secret rights are lost or expire, the intellectual property they had protected becomes part of the public domain and can be appropriated by anyone without liability for infringement."¹³¹

The public domain has been defined in the field of copyright and related rights as "the scope of those works and objects of related rights that can be used and exploited by everyone without authorization, and without the obligation to pay remuneration to the owners of copyright and related rights concerned – as a rule because of the expiry of their term of protection, or due to the absence of an international treaty ensuring protection for them in the given country."¹³²

In general, the public domain in relation to patent law consists of knowledge, ideas and innovations over which no person or organization has any proprietary rights. Knowledge, ideas and innovations are in the public domain if there are no legal restrictions of use (varying in different legislations and forming, therefore, different public domains), after expiration of patents (regularly 20 years), in consequence of non renewal, after revocation and after invalidation of patents.¹³³

¹²⁸ Jane Anderson, "Indigenous Knowledge/Traditional Knowledge and Intellectual Property," Issues Paper, Centre for the Public Domain, Duke University, 2011, available at <http://www.law.duke.edu/cspd/itkpaper>.

¹²⁹ See document WIPO/GRTKF/17/INF/12.

¹³⁰ See document SCP/13/5.

¹³¹ Black's Law Dictionary, p. 1027 (8th ed., 2005).

¹³² WIPO Guide to the Copyright and Related Rights Treaties by WIPO and Glossary of Copyright and Related Rights Terms.

¹³³ See document SCP/13/5.

The role, contours and boundaries of the “public domain” are under active discussion in several forums, including in WIPO and the IGC. The “Note on Meanings of the Term ‘Public Domain’ in the Intellectual Property System, with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore” (WIPO/GRTK/IC/17/INF/8) discusses the meanings of the term “public domain” in relation to traditional knowledge and traditional cultural expressions further.

Publicly Available

The experts at the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing discussed the terms “public domain” and “publicly available” with special reference to traditional knowledge associated with genetic resources: “The term public domain, which is used to indicate free availability, has been taken out of context and applied to [traditional knowledge] associated with genetic resources that is publicly available. The common understanding of publicly available does not mean available for free. The common understanding of public availability could mean that there is a condition to impose mutually agreed terms such as paying for access. [Traditional knowledge] has often been deemed to be in the public domain and hence freely available once it has been accessed and removed from its particular cultural context and disseminated. But it cannot be assumed that [traditional knowledge] associated with genetic resources that has been made available publicly does not belong to anyone. Within the concept of public availability, prior informed consent from a [traditional knowledge] holder that is identifiable, could still be required, as well as provisions of benefit-sharing made applicable, including when a change in use is discernible from any earlier prior informed consent provided. When a holder is not identifiable, beneficiaries could still be decided for example by the State.”¹³⁴

The “Note on Meanings of the Term ‘Public Domain’ in the Intellectual Property System, with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore” (WIPO/GRTK/IC/17/INF/8) discusses the meanings of the term “public domain” in relation to traditional knowledge and traditional cultural expressions further.

Registers of Traditional Knowledge

Registers can be analyzed from many different perspectives. According to their legal nature, registers can be termed either declarative or constitutive, depending upon the system under which they are established.¹³⁵

A declaratory regime relating to traditional knowledge recognizes that the rights over traditional knowledge do not arise due to any act of government but rather are based upon pre-existing rights, including ancestral, customary, moral and human rights. In the case of declarative registers, although registration does not affect the existence of such rights, it may be used to assist patent officials in analyzing prior art, and to support challenges to patents granted which may have directly or indirectly made use of traditional knowledge. In circumstances where these registers are organized in an electronic form and available through the Internet, it is important to establish a mechanism that ensures that entry dates of traditional knowledge are

¹³⁴ See UNEP/CBD/WG-ABS/8/2, Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge Associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing.

¹³⁵ The Role of Registers & Databases in the Protection of Traditional Knowledge: A Comparative Analysis. UNU-IAS Report, January 2004, p. 32.

valid when carrying out searches related to novelty and inventiveness. A third function that these registers may have is to facilitate benefit-sharing between users and providers.¹³⁶

Constitutive registers form part of a legal regime which seeks to grant rights over traditional knowledge. Constitutive registers will record the granting of rights (i.e. exclusive property rights) to the traditional knowledge holder as a means to ensure their moral, economic and legal interests are protected and recognized. Most model constitutive registers are conceived as public in nature, run by a national entity and under a law or regulation which clearly determines how valid registration of traditional knowledge can take place and be formally recognized and accepted. As such they may be more controversial and difficult to design and face some critical challenges and questions in moving from concept to practice.¹³⁷

As an example of a national law, Article 16 of the *Peruvian Law N° 27811 Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources* provides that “[t]he purposes of the Registers of Collective Knowledge of Indigenous Peoples shall be the following, as the case may be: (a) to preserve and safeguard the collective knowledge of indigenous peoples and their rights therein; (b) to provide INDECOPI with such information as enables it to defend the interests of indigenous peoples where their collective knowledge is concerned.”¹³⁸ Article 15 also provides that “[t]he collective knowledge of indigenous peoples may be entered in three types of register: (a) Public National Register of Collective Knowledge of Indigenous Peoples; (b) Confidential National Register of Collective Knowledge of Indigenous Peoples; (c) Local Registers of Collective Knowledge of Indigenous Peoples.”

Reputation

Reputation, according to Black’s Law Dictionary, refers to the esteem in which a person is held by others. Reputation appears under the umbrella of author’s moral rights protection.¹³⁹ At the Brussels Revision Conference of the *Berne Convention for the Protection of Literary and Artistic Works* (1971), preference was given to “honor” and “reputation,” found to be more objective concepts reflecting personal interests of the author, as opposed to “moral” or “spiritual interests,” which are wider concepts. In the eventuality of harm, there is a difference between harm to the reputation and harm to the author’s moral or spiritual interests. It is not enough that the author does not like what was done to her work; the action taken must also reflect badly on her in the public eye.¹⁴⁰

Sacred

“Sacred” refers to “any expression of traditional knowledge that symbolizes or pertains to religious and spiritual beliefs, practices or customs. It is used as the opposite of profane or secular, the extreme forms of which are commercially exploited forms of traditional knowledge.”¹⁴¹

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Article 16 of Law N° 27811, Law Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources. The law is available at <http://www.wipo.int/wipolex/en/details.jsp?id=3420>.

¹³⁹ Art. 6*bis* of the Berne Convention.

¹⁴⁰ Sam Ricketson and Jane C. Ginsburg, *International Copyright and Neighboring Rights—The Berne Convention and Beyond*, Oxford, Vol. I., p. 606.

¹⁴¹ Daniel J. Gervais, *Spiritual but not Intellectual: the Protection of Sacred Intangible Traditional Knowledge*, 11 *Cardozo J. Int'l & Comp. L.* 467, 469-490 (2003).

Sacred traditional knowledge refers to the traditional knowledge which includes religious and spiritual elements, such as totems, special ceremonies, sacred objects, sacred knowledge, prayers, chants, and performances and also sacred symbols, and also refers to sacred traditional knowledge associated with sacred species of plants, animals, microorganisms, minerals, and refers to sacred sites. Whether traditional knowledge is sacred or not depends on whether it has sacred significance to the relevant community. Much sacred traditional knowledge is by definition not commercialized, but some sacred objects and sites are being commercialized by religious, faith-based and spiritual communities themselves, or by outsiders to these, and for different purposes.

The *WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge* mentions that several subject areas, such as traditional ways of problem-solving and medicinal knowledge, are interrelated in a spiritual way. The spiritual aspects of healing which precede the actual administration of some traditional medicines are considered very important, for instance, in every country in West Africa although it is recognized that they cannot come under scientific scrutiny. In certain traditional knowledge systems, non-material beliefs and cultural codes are supposed to explain or guide the consequences of material transactions.¹⁴² In Peru, some “knowledge was transmitted from generation to generation in a sacred, unwritten ‘book’.”¹⁴³ The core of sacred and secret traditional is considered in indigenous and local communities in different ways, and is stored, transmitted and recorded in diverse ways.

From an intellectual property perspective, and the work of the IGC in particular, the following observations may be made:

- a delegation has enquired whether sacred traditional knowledge would be taken into account when discussing intellectual property protection.¹⁴⁴ In this regard, another delegation raised the question in three aspects: what was “traditional”, what was “knowledge”, and what should be protected? For example, there were views that spirituality or religions should be included in traditional knowledge, on the other hand, there were views that traditional knowledge should be restricted to technical knowledge¹⁴⁵;
- generally, sacred traditional knowledge is non-disclosed or is disclosed in particular contexts and conditions to members of indigenous and local communities, though some may be disclosed to external members of indigenous and local communities in special conditions. As indicated above and in “Protection of Traditional Knowledge: Draft Gap Analysis: Revision” (document WIPO/GRTKF/IC/13/5(b) Rev.), non-disclosed traditional knowledge might be protected by international intellectual property law as undisclosed information in general. However, special considerations might apply to knowledge that has a spiritual and cultural value, but not commercial value, to the community.¹⁴⁶

¹⁴² Gupta, A., “Rewarding Traditional Knowledge and Contemporary Grassroots Creativity: The Role of Intellectual Property Protection”, on file with the Secretariat.

¹⁴³ See WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) “Intellectual Property Needs and Expectations of Traditional Knowledge”, p. 171, available at <http://www.wipo.int/tk/en/tk/ffm/report/index.html>.

¹⁴⁴ Statement by the Delegation of New Zealand during the eleventh session of the Committee. See Adopted Report of the Eleventh Session (WIPO/GRTKF/IC/11/15), paragraph 220.

¹⁴⁵ Statement by the Delegation of Japan during the eleventh session of the Committee. See Adopted Report of the Eleventh Session (WIPO/GRTKF/IC/11/15), paragraph 296.

¹⁴⁶ The Protection of Traditional Knowledge: Draft Gap Analysis: Revision (WIPO/GRTKF/IC/13/5(b) Rev.), p. 23 of Annex I, pages 11 and 16 of Annex II.

Safeguarding

The United Nations Education, Science And Culture Organization (UNESCO) *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003) describes safeguarding measures as: “measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non formal education, as well as the revitalization of the various aspects of such heritage.” Safeguarding refers to the adoption of precautionary measures to shield certain cultural practices and ideas which are considered of value.¹⁴⁷

Secret

Something “secret” is something that is kept from the knowledge of others or shared only with those concerned (Black’s Law Dictionary). “Sacred-secret” traditional knowledge and cultural expressions have a secret or sacred significance according to the customary law and practices of their traditional owners.¹⁴⁸

Source of genetic resources

In its proposal “Declaration of source of genetic resources and traditional knowledge in patent applications” the Delegation of Switzerland proposed to require patent applicants to declare the “source” of genetic resources and traditional knowledge. It stated that “the term ‘source’ should be understood in its broadest sense possible”, since “a multitude of entities may be involved in access and benefit-sharing. In the foreground to be declared as the source is the entity competent (1) to grant access to genetic resources and/or traditional knowledge or (2) to participate in the sharing of the benefits arising out of their utilization. Depending on the genetic resource or traditional knowledge in question, one can distinguish: primary sources, including in particular Contracting Parties providing genetic resources,¹⁴⁹ the Multilateral System of Food and Agriculture Organization (FAO)’s International Treaty,¹⁵⁰ indigenous and local communities¹⁵¹; and secondary sources, including in particular ex situ collections and scientific literature.”¹⁵²

Sui Generis

Black’s Law Dictionary defines “*sui generis*” as “[Latin “of its own kind”] of its own kind or class; unique or peculiar. The term is used in intellectual property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines. For example, a database may not be protected by copyright law if its content is not original, but it could be protected by a *sui generis* statute designed for that purpose.” A *sui generis* system is a system specifically designed to address the needs and concerns of a particular issue. There are already several examples of *sui generis* intellectual property 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 intellectual property protection of integrated circuits—as reflected in the *Treaty on Intellectual Property in respect of Integrated Circuits*, 1989 (“The Washington Treaty”), among others. The *Panama Law No. 20 of 26 June 2000 on the Special Intellectual Property Regime with Respect to the Collective Rights*

¹⁴⁷ Draft Glossary, National Commission for UNESCO.

¹⁴⁸ Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002, Part I (4).

¹⁴⁹ See Articles 15, 16 and 19 of the CBD.

¹⁵⁰ See Articles 10-13 of the ITPGRFA.

¹⁵¹ See Article 8(j) of the CBD.

¹⁵² See document WIPO/GRTKF/IC/11/10.

of Indigenous Peoples to the Protection and Defense of their Cultural Identity and Traditional Knowledge is a *sui generis* regime.

Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore

A protocol was adopted by member states of the African Regional Intellectual Property Organization (ARIPO) in August 2010 during the Diplomatic Conference held in Swakopmund, Namibia. According to Article 1.1, this Protocol aims: “(a) to protect traditional knowledge holders against any infringement of their rights as recognized by this Protocol; and (b) to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context”. The Protocol will enter into force when six Member States of the ARIPO either deposit instruments of ratification or instruments of accession.

Tangible Expressions

“Tangible” refers to an expression capable of being touched and seen; perceptible to the touch; capable of being possessed or realized. It is opposed to “intangible” which refers to something that lacks a physical form, not capable of being touched; impalpable (Black’s Law Dictionary).

Tangible expressions are expressions incorporated in a material object.¹⁵³ They are not necessarily reduced to a material form, but must be incorporated in a permanent material, such as stone, wood, textile, gold, etc. Tangible expressions qualify as protected expressions of folklore. Examples of constitutive elements of tangible expressions are:

- (a) Productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;
- (b) Musical instruments;
- (c) Architectural forms.¹⁵⁴

Traditional Context

“Traditional” means that the traditional knowledge or cultural expressions are developed according to the rules, protocols and customs of a certain community, and not that they are old. In other words, the adjective “traditional” qualifies the method of creating traditional knowledge or cultural expressions and not the knowledge or expressions themselves.¹⁵⁵ The term “traditional” means that the knowledge or cultural expressions derive from or are based upon tradition, identify or are associated with an indigenous or traditional people, and may be practiced in traditional ways.¹⁵⁶ “Traditional context” refers to the way of using traditional knowledge or traditional cultural expressions in their proper artistic framework based on continuous usage by the community. An example could be the use of a ritual dance in its

¹⁵³ Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982., Part III.

¹⁵⁴ Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982, Sect.2(iv).

¹⁵⁵ Nino Pires de Carvalho, From the Shaman’s Hut to the Patent Office: A Road Under Construction, Biodiversity and the Law, p. 244.

¹⁵⁶ Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/5/3, para. 53.

traditional context, as referring to the performance of the said dance in the actual framework of the rite.¹⁵⁷

As indicated in the “Elements of a *Sui Generis* System for the Protection of Traditional Knowledge” (WIPO/GRTKF/IC/4/8), traditional knowledge is “traditional” because it is created in a manner that reflects the traditions of the communities. “Traditional”, therefore, does not necessarily relate to the nature of the knowledge but to the way in which the knowledge is created, preserved and disseminated.¹⁵⁸

Traditional Cultural Expressions

WIPO uses the terms “traditional cultural expressions” and “expressions of folklore” to refer to tangible and intangible forms in which traditional knowledge and cultures are expressed, communicated or manifested. Examples include traditional music, performances, narratives, names and symbols, designs and architectural forms. The terms “traditional cultural expressions” and “expressions of folklore” are used as interchangeable synonyms, and may be referred to simply as “traditional cultural expressions,” often in its abbreviated forms “TCEs.” The use of these terms is not intended to suggest any consensus among WIPO Member States on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

Traditional Cultures

According to Black’s Law Dictionary, traditions refer to past customs and usages that influence or govern present acts or practices. Intellectual property laws draw a distinction between traditional culture (which may be referred to as traditional culture or folklore *stricto sensu*) and, modern, evolving cultural expressions created by current generations of society and based upon or derived from pre-existing traditional culture or folklore.¹⁵⁹

Traditional Ecological Knowledge/Traditional Environmental Knowledge

The Dene Cultural Institute defines “traditional environmental knowledge” (TEK) as “a body of knowledge and beliefs transmitted through oral tradition and first-hand observation. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use. Ecological aspects are closely tied to social and spiritual aspects of the knowledge system. The quantity and quality of TEK varies among community members, depending on gender, age, social status, intellectual capability, and profession (hunter, spiritual leader, healer, etc.). With its roots firmly in the past, TEK is both cumulative and dynamic, building upon the experience of earlier generations and adapting to the new technological and socioeconomic changes of the present.”¹⁶⁰

Traditional ecological knowledge is also defined as “a cumulative body of knowledge and beliefs, handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment. Further, TEK is an

¹⁵⁷ Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982,, , Part III. 42.

¹⁵⁸ Elements of a *Sui Generis* System for the Protection of Traditional Knowledge (WIPO/GRTKF/IC/4/8), para. 27.

¹⁵⁹ Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/5/3, para. 54.

¹⁶⁰ Also see Marc G. Stevenson. “Indigenous Knowledge in Environmental Assessments”, 49 ARCTIC 278 (1996), p. 281.

attribute of societies with historical continuity in resource use practices; by and large, these are non-industrial or less technologically advanced societies, many of them indigenous or tribal.”¹⁶¹

Traditional Knowledge

There is as yet no accepted definition of traditional knowledge (TK) at the international level.

“Traditional knowledge,” as a broad description of subject matter, generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities (traditional knowledge in a general sense or *lato sensu*). In other words, traditional knowledge in a general sense embraces the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with traditional knowledge.

In international debate, “traditional knowledge” in the narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations. Traditional knowledge can be found in a wide variety of contexts, including: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; and biodiversity-related knowledge, etc.¹⁶²

Traditional Knowledge Digital Library

The Traditional Knowledge Digital Library (TKDL) is a collaborative project between the Council of Scientific and Industrial Research (CSIR), Ministry of Science and Technology, and the Department of AYUSH, Ministry of Health and Family Welfare, of India, and is being implemented at CSIR. An inter-disciplinary team of Traditional Medicine (Ayurveda, Unani, Siddha and Yoga) experts, patent examiners, IT experts, scientists and technical officers were involved in the creation of TKDL for Indian Systems of Medicine. The TKDL project involves documentation of the traditional knowledge available in public domain in the form of existing literature related to Ayurveda, Unani, Siddha and Yoga, in digitized format in five international languages which are English, German, French, Japanese and Spanish. The TKDL provides information on traditional knowledge existing in the country, in languages and format understandable by patent examiners at International Patent Offices (IPOs), so as to prevent the grant of wrong patents.¹⁶³

The TKDL has a dual objective. In the first place, it seeks to prevent the granting of patents over products developed utilizing traditional knowledge where there has been little, if any, inventive step. Second, it seeks to act as a bridge between modern science and traditional knowledge, and can be used for catalyzing advanced research based on information on traditional knowledge for developing novel drugs. The TKDL is intended to act as a bridge between ancient Sanskrit Slokas and a patent examiner at a global level, since the database will provide information on modern as well as local names in a language and format understandable to patent examiners. It is expected that the gap on lack of prior art knowledge be minimized. The database will have sufficient details on definitions, principles, and concepts to minimize the possibility of patenting “inventions” for minor/insignificant modifications.¹⁶⁴

¹⁶¹ Fikret Berkes, Traditional Ecological Knowledge in Perspective. Traditional Ecological Knowledge: Concepts and Cases. International Program on Traditional Ecological Knowledge and International Development Research Centre, Ottawa.

¹⁶² See WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) “Intellectual Property Needs and Expectations of Traditional Knowledge”, at p. 25, available at <http://www.wipo.int/tk/en/tk/ffm/report/index.html>.

¹⁶³ More information is available at <http://www.tkdil.res.in/tkdil/langdefault/common/Abouttkdil.asp?GL=Eng>

¹⁶⁴ The Role of Registers & Databases in the Protection of Traditional Knowledge: A Comparative Analysis. UNU-IAS Report, January 2004, p. 18.

Traditional Knowledge Holder

Black's Law Dictionary defines "holder" as "a person who has legal possession of a negotiable instrument and is entitled to receive payment on it." WIPO uses this term to refer to all persons who create, originate, develop and preserve 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.¹⁶⁵ In this context, "traditional knowledge" refers to both traditional knowledge *stricto sensu* and traditional cultural expressions.

As indicated in the "List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found" (WIPO/GRTKF/IC/17/INF/9) "[traditional knowledge] is, in general, developed collectively and/or regarded as belonged collectively to an indigenous or local community or to groups of individuals within such a community. [...] Nonetheless, a particular individual member of a community, such as a certain traditional healer or individual farmer, might hold specific knowledge."¹⁶⁶

Traditional Knowledge Resource Classification

The Traditional Knowledge Resource Classification (TKRC) is an innovative structured classification system for the purpose of systematic arrangement, dissemination and retrieval which identifies about 5,000 sub-groups of traditional knowledge against one group in international patent classification (IPC).¹⁶⁷ The TKRC has been developed for the Indian Systems of medicine (Ayurveda, Unani, Siddha and Yoga). The TKRC has gained international recognition and linked with the IPC. It is likely to facilitate greater awareness on the traditional knowledge systems by leveraging the modern system of dissemination i.e. Information Technology, in particular, the Internet and Web technologies. It is anticipated that TKRC structure and details will create interest in those countries that are concerned about prevention of grant of wrong patents for non-original discoveries relating to traditional knowledge systems.¹⁶⁸

Traditional Medicine

WHO defines the term as "the sum total of the knowledge, skills and practices based on the theories, beliefs and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health, as well as in the prevention, diagnosis, improvement or treatment of physical and mental illnesses."¹⁶⁹ WHO also defines "traditional medicine" as "including diverse health practices, approaches, knowledge and beliefs incorporating plant, animal, and/or mineral based medicines, spiritual therapies, manual techniques and exercises applied singularly or in combination to maintain well-being, as well as to treat, diagnose or prevent illness."¹⁷⁰

¹⁶⁵ WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) "Intellectual Property Needs and Expectations of Traditional Knowledge", p. 26.

¹⁶⁶ List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found (WIPO/GRTKF/IC/17/INF/9), paras. 43 and 44 of Annex.

¹⁶⁷ *Id*

¹⁶⁸ More information is available at <http://www.tkd.l.res.in/tkd.l/langdefault/common/TKRC.asp?GL=Eng>

¹⁶⁹ WHO General Guidelines for Methodologies on Research and Evaluation of Traditional Medicine (WHO/EDM/TRM/2000.1), p. 1.

¹⁷⁰ WHO Traditional Medicine Strategy 2002-2005, p. 7.

Tradition-Based Creations and Innovations

Traditions are a set of cultural practices and ideas, which are considered to belong to the past and which are designated a certain status.¹⁷¹ Tradition-based creations or innovations refer to innovations and creations based on traditional knowledge *as such*, developed and innovated beyond a traditional context.¹⁷² Traditional knowledge *as such* refers to “knowledge systems, creations, innovations and cultural expressions that: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; have generally been developed in a non-systematic way; and, are constantly evolving in response to a changing environment.”¹⁷³ Tradition-based innovation refers the case where tradition is a source of innovation by members of the relevant cultural community or outsiders, and can also identify others uses of tradition relevant to an intellectual property analysis.¹⁷⁴ The “List and Brief Technical Explanation of Various Forms in which Traditional Knowledge may be Found” (WIPO/GRTKF/IC/17/INF/9) discusses traditional knowledge “as such” and traditional knowledge-based creation and innovation further.¹⁷⁵

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

The Convention was adopted by United Nations Education, Science and Culture Organization (UNESCO) in 1970 to protect the cultural property existing within the territories of States against the dangers of theft, clandestine excavation, and illicit export. It entered into force in 1972.

The Convention requires its States Parties to take action in three main fields:

- 1- Preventive measures: inventories, export certificates, monitoring trade, imposition of penal or administrative sanctions, educational campaigns, etc.
- 2- Restitution provisions: Per Article 7 (b) (ii) of the Convention, States Parties undertake, at the request of the State Party “of origin,” to take appropriate steps to recover and return any such cultural property imported after the entry into force of the Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. More indirectly and subject to domestic legislation, Article 13 of the Convention also provides provisions on restitution and cooperation.
- 3- International cooperation framework: The idea of strengthening cooperation among and between States Parties is present throughout the Convention. In cases where cultural patrimony is in jeopardy from pillage, Article 9 provides a possibility for more specific undertakings such as a call for import and export controls.

UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

The United Nations Education, Science and Culture Organization (UNESCO) *Convention on Cultural Diversity* is an international convention adopted by UNESCO in 2005. It entered into force on March 18, 2007.

¹⁷¹ Draft Glossary, National Commission for UNESCO.

¹⁷² See Articles 10-13 of the ITPGRFA.

¹⁷³ See WIPO Document WIPO/GRTKF/IC/3/9.

¹⁷⁴ Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/5/3, para. 57.

¹⁷⁵ Daniel Gervais, *The TRIPS Agreement. Drafting and Analysis*, 3rd Edition, Sweet & Maxwell, p. 132.

The Convention has several objectives set out in Article 1, namely (a) to protect and promote the diversity of cultural expressions; (b) to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner; (c) to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace; (d) to foster interculturality in order to develop cultural interaction in the spirit of building bridges among peoples; (e) to promote respect for the diversity of cultural expressions and raise awareness of its value at the local, national and international levels; (f) to reaffirm the importance of the link between culture and development for all countries, particularly for developing countries, and to support actions undertaken nationally and internationally to secure recognition of the true value of this link; (g) to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning; (h) to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory; [and] (i) to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries in order to protect and promote the diversity of cultural expressions.

UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage

The Convention was adopted by United Nations Education, Science and Culture Organization (UNESCO) in 2003 and entered into force on April 20, 2006. It aims at safeguarding intangible cultural heritage, at ensuring respect for the intangible cultural heritage of communities, groups and individuals, at raising awareness of the importance of intangible cultural heritage and at ensuring mutual appreciation thereof, and at providing for international cooperation and assistance.

Unfair Competition

Black's Law Dictionary defines "unfair competition" as "dishonest or fraudulent rivalry in trade and commerce; esp., the practice of endeavoring to pass off one's own goods or products in the market for those of another by means of imitating or counterfeiting the name, brand, size, shape, or other distinctive characteristic of the article or its packaging."

Paragraph 2 of Article 10*bis* of the *Paris Convention for the Protection of Industrial Property* (1883) provides that "[a]ny act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition". Paragraph 3 of Article 10*bis* further provides that "[t]he following in particular shall be prohibited: (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods."

United Nations Declaration on the Rights of Indigenous Peoples

The United Nations General Assembly adopted the *United Nations Declaration on the Rights of Indigenous Peoples* in 2007. The Declaration acknowledges the equal human rights of indigenous peoples against cultural discrimination and seeks to promote mutual respect and harmonious relations between the indigenous peoples and States.

In relation to traditional knowledge, traditional cultural expressions and genetic resources, Article 31.1 states that: "[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well

as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.” Article 31.2 further provides that “[i]n conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.” On traditional medicine, Article 24 provides that “[i]ndigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals.”

Use of Traditional Cultural Expressions/Traditional Knowledge

Traditional knowledge and cultural expressions can be used for different purposes. The use of traditional knowledge or cultural expressions includes commercial or industrial use, customary use, fair use, household use and public health use of traditional medicine, and research and educational use.

Commercial Use

Black’s Law Dictionary defines “commercial use” as “[a] use that is connected with or furthers an ongoing profit-making activity.” “Non-commercial use” is defined as “[a] use for private pleasure or business purposes that non involving the generation of income or bestowing a reward or other compensation.”

Customary Use

The Pacific *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture*, 2002, defines customary use as “the use of traditional knowledge or expressions of culture in accordance with the customary laws and practices of the traditional owners.”

The term “continuing customary use” refers to the persistence and living nature in the use of traditional knowledge and/or traditional cultural expressions by indigenous communities in accordance with their own customary laws and practices.

Fair Use

In the field of copyright, Black’s Law Dictionary defines “fair use” as “[a] reasonable and limited use of a copyrighted work without the author’s permission, such as quoting from a book in a book review or using parts of it in a parody. Fair use is a defense to an infringement claim, depending on the following statutory factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount of the work used, and (4) the economic impact of the use.”

Household Use and Public Health Use

Black’s Law Dictionary defines “household” as “[b]elong to the house or family; domestic”.

Paragraph 1 of Doha Declaration on the TRIPS Agreement and Public Health recognize “the gravity of the public health problems afflicting many developing and least-developed countries, especially those resulting from HIV/AIDS, tuberculosis, malaria and other epidemics.”

Paragraph 5(c) further states that “[e]ach Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency.”

Research and Educational Use

In the field of patents, Black's Law Dictionary defines "experimental-use defense" as "[a] defense to a claim of patent infringement raised when the construction and use of the patented invention was for scientific purposes only. While still recognized, this defense is narrowly construed and today may apply only to research that tests the inventor's claims."

It is to be noted that, although intellectual property rights are exclusive rights, certain exceptions and limitations to the exclusive rights are provided. For example, in the field of patents, a number of countries provide in their national legislations for certain exceptions and limitations to the exclusive rights, including, but not limited to:

- a) acts done for private and non-commercial use;
- b) acts done only for experimental purposes or research purposes.

Utilization

The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (2010) defines at Article 2(c) as follows: "to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention."

The "Like-Minded Countries Contribution to the Objectives and Principles on the Protection of Genetic Resources and Preliminary Draft Articles on the Protection of Genetic Resources" (document WIPO/GRTKF/IC/19/11) provides the following definition of "utilization of genetic resources" at Article 1(2)(e): "to conduct research and development on the genetic and/or biochemical composition of genetic resources, their derivatives and associated traditional knowledge including through the application of biotechnology".

WIPO Traditional Knowledge Documentation Toolkit

Documentation programs can raise intellectual property questions for holders of traditional knowledge. Conscious consideration of intellectual property implications is particularly important during the documentation process. The consultation draft of the WIPO Traditional Knowledge Documentation Toolkit focuses on management of intellectual property concerns during the documentation process, and also takes the documentation process as a starting point for a more beneficial management of traditional knowledge as a community's intellectual and cultural asset. The consultation draft of the WIPO Traditional Knowledge Documentation Toolkit is structured according to three phases of documentation, namely before documentation, during documentation and after documentation, so as to illustrate more clearly the diverse intellectual property issues that arise at each stage of documentation.¹⁷⁶

The consultation draft of the WIPO Traditional Knowledge Documentation Toolkit is especially designed to be used by indigenous peoples and local communities. Others might also find it useful, such as public officials from IP offices, policy makers in general, research and cultural institutions undertaking documentation projects, among others.

Intellectual property rights and other legal tools may be available to protect the knowledge when it is documented, but only if the right steps are taken during documentation. The consultation

¹⁷⁶ The World Intellectual Property Organization Traditional Knowledge Documentation Toolkit – Consultation Draft is available at: <http://www.wipo.int/tk/en/resources/tkdocumentation.html>

draft of the WIPO Traditional Knowledge Documentation Toolkit will help to assess the intellectual property options, plan and implement intellectual property choices and strategies when documenting traditional knowledge.

WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions

The *Model Provisions* were adopted in 1982 by a Committee of Governmental Experts convened jointly by WIPO and United Nations Education, Science and Culture Organization (UNESCO). The provisions provide a *sui generis* model for intellectual property-type protection of traditional cultural expressions/expressions of folklore, which has been fairly widely used by WIPO Member States.

The *Model Provisions* seek to maintain a balance between the protection against abuses of expressions of folklore, on the one hand, and the freedom and encouragement of further development and dissemination of folklore, on the other. They take into account the fact that expressions of folklore form a living body of human culture, which should not be stifled by too rigid protection.

Under the *Model Provisions*, traditional cultural expressions/expressions of folklore are protected against “illicit exploitation and other prejudicial actions.” In 2000 and 2001, WIPO surveyed States’ experiences with use and implementation of the Model Provisions. A report is available as WIPO document WIPO/GRTKF/IC/3/10.

[End of Annex and of document]