

Technical Review of Key Intellectual Property-Related Issues

Peer Review

February 28, 2022





Background Documents

- 51st Session of the WIPO GA: Report on the IGC GRTKF (WO/GA/51/12), Annex I - The Protection of Traditional Knowledge: Draft Articles.
- 51st Session of the WIPO GA: Report on the IGC GRTKF (WO/GA/51/12), Annex II - The Protection of Traditional Cultural Expressions: Draft Articles.
- Consolidated document: the 51st Session of the WIPO GA : Report on the IGC GRTKF (WO/GA/51/12), Annex III - The Consolidated Document Relating to Intellectual Property and Genetic Resources.
- Chair's text: the 51st Session of the WIPO GA: Report on the IGC GRTKF (WO/GA/51/12), Annex IV - Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources.



Part I: TK and TCEs



Balancing of Interests

- The concept of “balancing” envisions creating mutual advantages of holders of the subject of protection and the users, with the view to fostering innovation.
- The power to exclude others from use.
- What level of protection should be conferred on innovators?
- What level of protection is ideal?

Balancing: Mainstream Interests



- The protection and enforcement of IP rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology.
- Rights of innovators and term of protection should be available to all.
- There is a need to better understand why Indigenous peoples seek to obtain a different set of rights than other innovators.
- There should be no law or prohibitions to limit the use of TK and TCEs should commercial applications become the norm.
- Human rights are long lasting and cannot be circumvented by IP laws.
- What access should be provided to 3rd parties.

Balancing: Indigenous Interests



- Recognition of pre-existing Indigenous legal orders or traditions over TK, TCE, & TK Associated with GRs.
- Indigenous peoples require a different rights than others because of connection to collective culture, identity & survival.
- Rights of Indigenous peoples to control and safeguard their TK and TCEs.
- Rights of Indigenous peoples to continue to use their TK and TCEs where such info becomes public.
- Indigenous peoples possess human and other rights over TK and TCEs, specifically where it is integral to customary laws, culture, language, religion, etc.

Balancing: Potential Solution



- A potential solution lies partly in crafting a sui-generis system of protection of TK and TCEs, taking into account indigenous peoples human rights and customary laws, as opposed to fitting it within the IPR system as described in other parts of this update.
- Regime can recognize the following characteristics:
 - Indigenous TK and TCEs are *inalienable*;
 - *Source* of rights is the time immemorial aspect or the prior occupation of modern states by Indigenous peoples;
 - TK and TCEs are held *communally*, or by the entire Indigenous Nation/group.

Public Domain



- Public domain refers to “expiry of exclusive rights,” including discontinuation of obligations on the part of users of a literary creation to provide benefits or obtain consent prior to using the subject matter.
- Individual rights vs. collective rights
- Multi-layered works.

Issues with the Public Domain



- TK and TCEs may contain Indigenous peoples' customary laws, customs, ceremonies, world views that are integral to the collective's culture. It is difficult for this type of innovations to enter into the public domain when it is so closely tied to a nation's/group's identity.
- One element of Indigenous peoples' opposition to the public domain centers on control.
- Self-determination can set rules for culturally appropriate conditions of access to TK and TCEs. The challenge is to create space for an alternative to the public domain for TK and TCEs that is culturally appropriate and includes an alternative framework for the protection, use and sharing.
- Modifications of existing TK and TCEs.



Exceptions & Limitations

- Range from the need for availing knowledge for study and education, non-commercial uses, museums, and libraries.
- Other justifications are protection of public health and the environment; and diagnostic, therapeutic and surgical methods for the treatment of humans or animals.
- Other common justifications include the need to foster freedom of expression and the common heritage of humankind.
- The sui-generis protection of databases with content that is free to use, since content does not benefit from copyright protection.

Tiered Approach



- Divides TK into categories or tiers and proposes protection efforts to be commensurate to the level of sensitivity:
 - Sacred;
 - Secret;
 - closely held;
 - widely held or defused; and
 - publicly available.
- The tiered approach is more aligned to indigenous peoples' rights framework because it conceptually allows indigenous peoples to withhold TK they consider sacred or more attached to spiritual purposes hence unfit to be made public.
- Indigenous peoples themselves would decide which TK and TCE should fall under what category.

Databases



- The use of databases seeks to prevent the granting or awarding of IP rights protection. To qualify for protection under laws of many jurisdictions, inventions must be new, useful.
- The use of databases thus works by signaling existence of “prior art”.
- Data sovereignty means Indigenous peoples’ data and information is governed by Indigenous laws. Data sovereignty underpins rights to self-determination and self-government.
- How to implement free, prior and informed consent.



Part 2: Draft Text on Genetic Resources

Objectives



- The objective of the draft legal instrument is recognized by the Technical Review as advancing indigenous peoples' proprietary over genetic resources and to prevent misappropriation and misuse of their resources and associated traditional knowledge.
- Some challenges will exist in creating a sui generis system for GRs. On one hand, state parties are interested in access to TK and GRs and fostering innovation. On the other hand, the rights of indigenous peoples as referenced by Int'l human rights instruments exist. The challenge for the IGC is how to reconcile both interests.



Indigenous Peoples Interests

- Indigenous Peoples' seek a binding regime that acknowledges their rights to own/control resources and to protect, maintain and control associated TK.
- Access may only be granted with free, prior and informed consent for its utilization and exploitation in the future.
- Mutually Agreed Terms.

Policy is Behind the Science



- Synthetic alternatives.
- Cloning.
- GMOs.
- Digitally sequenced and disembodied genetic material.
- Lack of governance.
- Skirting around PIC and MAT.

Redress



- Right of Indigenous peoples to redress for the utilization and exploitation of their resources.
- An element of redress includes a right of indigenous peoples to continue to use their TK associated with GRs without prohibitions.
- Where theft or misappropriation occurs, is compensation or restitution appropriate along with other measures?

Public Domain



- The public domain is seen as a culturally specific framework that perpetuates the past marginalization of indigenous peoples.
- Need to address the view that the TK of Indigenous peoples as part of a global commons or public domain.

Databases



- Most members of the caucus are of the view that databases and registers cannot be solely controlled by the national government.
- While register and databases may prevent patents from being granted erroneously, Indigenous groups expressed reservations regarding the use of databases because they are concerned that databases would encourage free dissemination of the information contained within it.
- Is data sovereignty of Indigenous people workable?



Part 3: Obligation to Include Human Rights

Rational



- There are a host of barriers Indigenous groups face when trying to use intellectual-property laws to protect their TK associated with GRs.
- Many Indigenous peoples were or are not afforded basic protections in the past that has to disadvantage for some groups.