

# The Cross-Border Protection of Intellectual Property and its Relevance for the Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources

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# The Global Protection Challenge

- much of traditional knowledge, traditional cultural expressions and genetic resources are place-based
- challenge is how to achieve protection in places other than where the traditional knowledge originates
- much of intellectual property law is territorial and international agreements have created ways to address some cross-border issues

# National Treatment

- National treatment broadly means that foreign creators and owners of intellectual property are treated as well as national creators and owners.
- In intellectual property (intangibles) the point of attachment of national treatment is the creator, author, rights owner.
- In goods (tangibles) the point of attachment is the goods.

# National treatment clauses

- Berne Convention, art 5(1): **Authors shall enjoy**, in respect of works for which they are protected under this Convention, **in countries of the Union other than the country of origin**, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.
- Paris Convention, art 2(1): **Nationals of any country of the Union shall**, as regards the protection of industrial property, **enjoy in all the other countries of the Union the advantages that their respective laws now grant**, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.

# National treatment clauses

- Rome Convention, art 2.1: For the purposes of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed...
- TRIPS Agreement, art 3(1): Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property.

# Regional agreement example

- Swakopmund Protocol, ARIPO 2010, art 24:  
Eligible foreign holders of traditional knowledge and expressions of folklore shall enjoy benefits of protection to the same level as holders of traditional knowledge and expressions of folklore who are nationals of the country of protection, taking into account as far as possible the customary laws and protocols applicable to the traditional knowledge or expressions of folklore concerned.

# New Zealand trade mark law example, Trade Marks Act 2002 , s17(1)(c)

The Commissioner must not register as a trade mark or part of a trade mark any matter the use or registration of which would, in the opinion of the Commissioner, be likely to offend a significant section of the community, including Māori.

# The rationales and goals of national treatment

- Economic and cultural justifications
- Assimilation of foreign works and owners into national systems
- Creating an even playing field; non-discrimination
- Functions with minimum standards
- Combined with minimum standards helps to embed common norms
- Incentivising harmonisation BUT
- Is not complete harmonisation
- This structure explicitly recognises difference and allows it within a framework
- Bringing greater co-operation but allowing for difference



# Minimum standards continuum



# Alternatives to national treatment

- Material reciprocity
  - Can be a starting point, but not the preferred approach of international ip
  - Entrenches differences
- Mutual recognition
  - Often used for goods (primarily used for promoting market access)
  - Recognition of others' standards
  - Can be combined with national treatment

# Mutual Recognition in IP

- Major patent offices prefer to do their own examination reflecting the territorial nature of patents and concerns about sovereignty
- Training and technocratic trust lead to some regulatory co-operation
- UK study of mutual recognition to reduce patent backlog in major offices
- In trade marks *telle quelle* has elements of but not complete mutual recognition

## *Telle Quelle* (as is) trade mark registration

- “every trademark duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union, ....”
- Paris Convention, Article 6 *quinquies* (A)(1)

# Combining national treatment and mutual recognition

- The international rule provides the minimum standard
- There can be mutual recognition of foreign standards in national systems. Possible venues for such recognition are registration, border controls, tribunals, and courts
- A good or awkward fit for TK, TCE and GR?

# What national treatment isn't but can partner with

- does not usually provide
  - a jurisdiction rule
  - a choice of law rule (applicable law in a dispute)
- these procedural rules may very well provide greater harmony where substantive law cannot because of territorial differences

# Berne Convention as an example

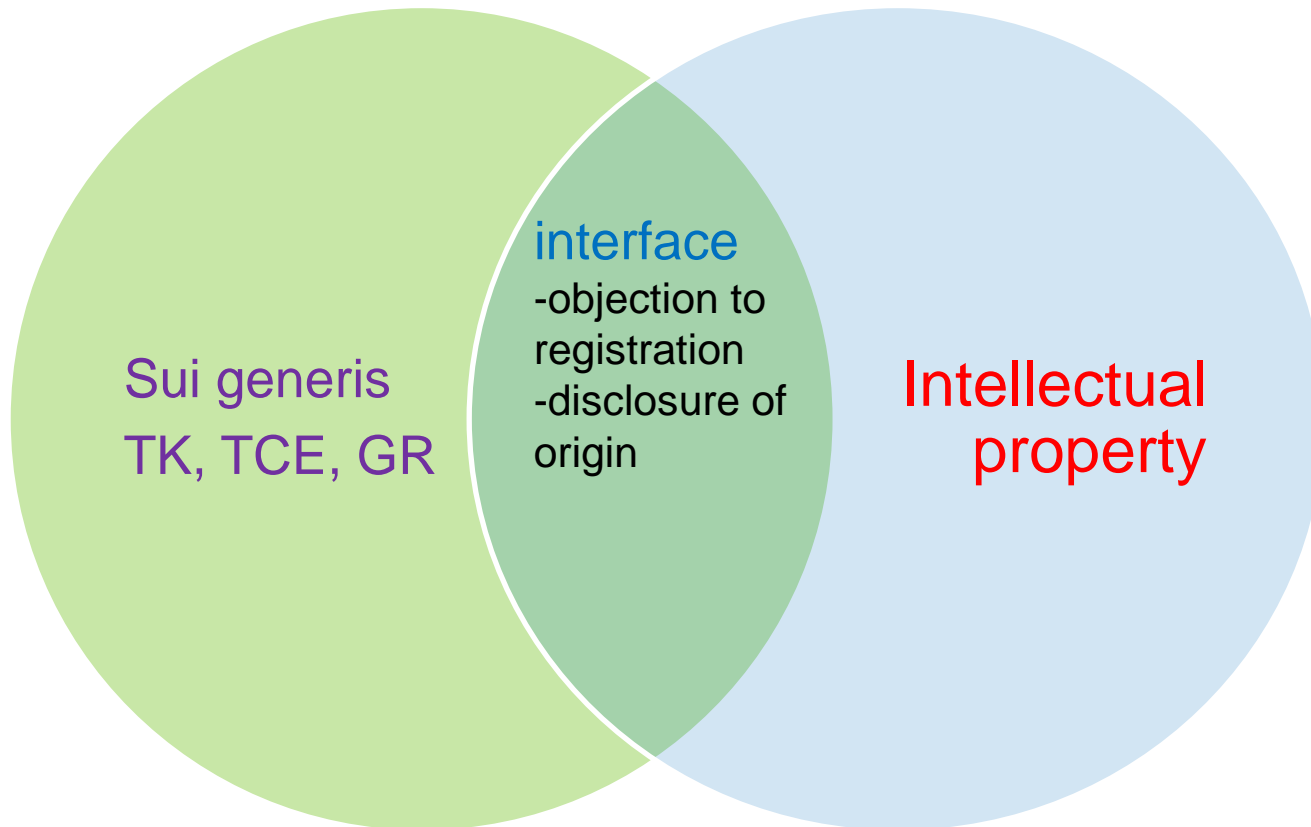
- minimum standards governed by national laws
- Article 5(2): The enjoyment and the exercise of these rights ... shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, **the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.**
- those laws “of the country ...” are most often national copyright law
- a court or tribunal may apply foreign law in some situations

# Private international law rules

- choice of law and jurisdiction are determined by national law (sometimes regional law)
- as yet there is no multilateral agreement over jurisdiction and choice of law (regional agreements such as EU exist)
- example is no common approach to ownership
- foreign laws vs. local laws



# Potentially different implications for national treatment and other rules



# The possibilities and advantages of combined approaches

- national treatment ensures that some protection (minimum standards) are global
- for registered rights mutual recognition is a possibility
- mutual recognition is not a choice of law rule for disputes
- choice of law rules can recognise the law of the tk/tce/gr holder/owner
- an effective pluralism can emerge through the combination of minimum standards with national treatment