



Traditional Knowledge and Traditional Cultural Expressions

An overview of policy and legal issues from a intellectual property perspective

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Overview

- 1. What is Traditional Knowledge and what are Traditional Cultural Expressions?
- 2. Does / can the IP system protect TK and TCEs?
- 3. If it doesn't, should the IP system protect TK and TCEs?
 - Why should TK and TCEs be protected?
 - What do we mean by protected? Legal protection? National or international protection?



What is Traditional Knowledge?

- Includes know-how, practices, skills, and innovations
- resulting from intellectual activity
- in a traditional context
- passed from generation to generation
- that forms part of the traditional lifestyle of indigenous peoples and local communities



Examples of TK

- Thai traditional healers use plao-noi to treat ulcers
- Sustainable irrigation is maintained through traditional water systems such as the aflaj in Oman and Yemen, and the qanat in Iran



Exercise – Are these TK?

- The use of *Ayahuasca* in the western Amazon to prepare various medicines
- The recipe of vegetable soup which Emma's Grandma told her
- The use of the Hoodia cactus by Kung Bushmen in Africa to stave off hunger



What are Traditional Cultural Expressions?

- Forms in which traditional culture is expressed
- Form part of the identity and heritage of a traditional or indigenous community / nation
- Are passed down from generation to generation

Can the current IP system protect TK?

- Yes!
- No!
- Maybe!
- It depends!



Conventional IP tools to protect TK

- 1. **Copyright**

- Prevents outright copying

- 2. **Patents**

- TK based inventions: two Australian examples
- Defensive protection: nutmeg case

Conventional IP tools to protect TK

- 3. Trademarks / **collective marks**
 - *Products based on TK*

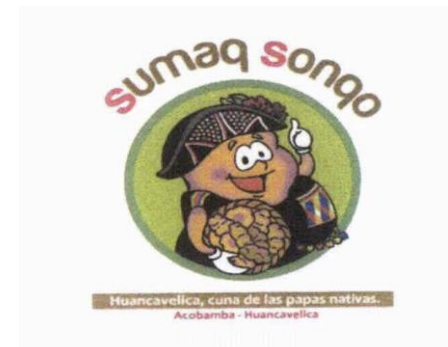


Source: <https://www.iponz.govt.nz/>



Source:

<http://www.ic.gc.ca/app/opicipo/trdmrks/srch/viewTrademark?id=0792174&lang=eng&tab=reg>
(Canadian IP Office)



Source: Peruvian Patent Office

Conventional IP tools to protect TK

- 4. **Unfair competition**
 - Preventing misleading claims
- 5. **Trade secrets**
 - Undisclosed / secret TK
- +1 **Specially adapted laws;**
 - New Zealand's trademark laws (cannot be offensive, especially to Maori)



But there are gaps...

- Some specific gaps...
 - Public domain
 - Copying vs. inspiration
 - Offensive marks
- AND: while innovations and creations based on TK can be protected using patents, ***the ‘underlying’ TK is unprotected, despite the fact that it is valuable and important***



So...

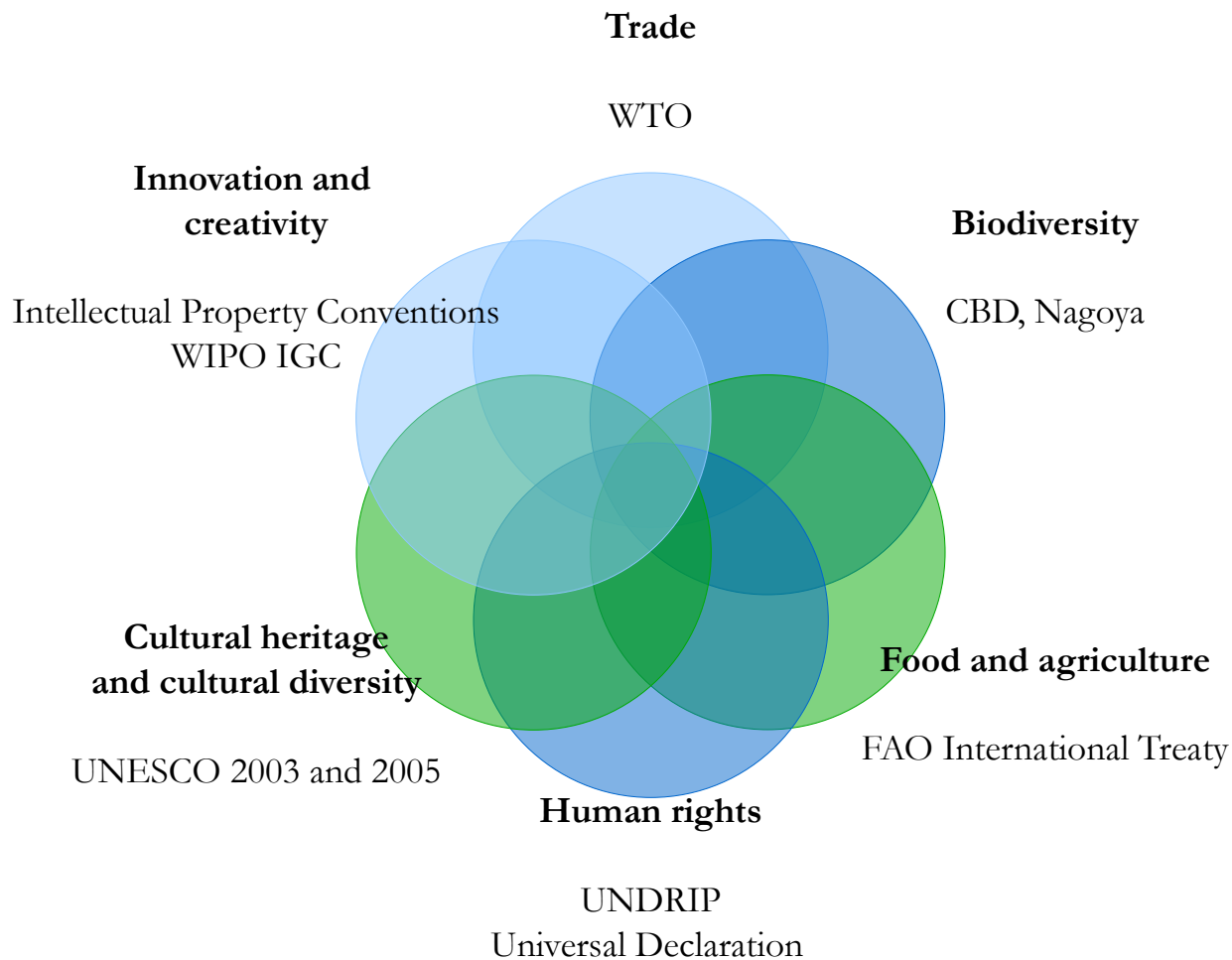
- (1) Should underlying TK be “protected” in the intellectual property sense?

- (2) ... and, if so, what does “protected” mean?
 - *Safeguarding or preservation?*
 - *National vs. international level protection?*
 - *Non-legal forms of protection?*



What is “Protection”?

- Treating TK as intellectual property: Holders have a say over **access and use** of TK by third parties
- Using intellectual property principles and values to prevent unauthorized or inappropriate uses of TK by third parties (misuse and misappropriation)
- *Sui generis* protection: Intellectual property adapted to respond to the particular features of TK





Protect; how?

- Positive protection ... granting of rights that empower communities / nations to promote their TK, control their uses by third parties and benefit from their commercial exploitation.
- Defensive protection ... to stop people outside the community / nation from acquiring intellectual property rights over TK.



Protect; how?

- Legal measures?

- Practical measures?

- At a national level?

- At a regional level?

- At an international level?



Possible Protection Systems: No one size fits all

- Prevention of access and use without prior and informed consent [*exclusive rights model*]
- Acknowledgement of source + prevention against derogatory use [*moral rights model*],
- Benefit-sharing/compensation [*access and benefit-sharing/compensatory liability/ “use now, pay later” models*]; and/or
- Defensive protection against acquisition of IP rights



(a) Positive protection: *sui generis* national laws

- New Zealand's Trade Marks Act 2002:
 - Mark cannot be registered if offensive, including to Maori: s 17(1)(c)
 - Establishes a Maori Advisory Committee, which advises on whether the mark is offensive or not: s 178



(b) Defensive protection: The Indian Traditional Knowledge Digital Library

- Objective: Prevent misappropriation of Indian TK
 - Break language and format barriers
- Input: Ayurvedic, Unani, Siddha and Yoga systems of medicine in local languages
- Output: Multilingual database (English, French, Spanish, German and Japanese)
 - For use of International Patent Offices, in the framework of access and non disclosure agreements: For search and examination only ... can give print outs to patent applicants for citation purposes
 - The content should not be disclosed to third parties



(c) Practical protection: The British Library Archival Sound Recordings

- Non-legal measures
- In collaboration with WIPO, it developed the following statement regarding the ethical and permitted use of all recordings from their archive:
- *“While the British Library... may be the owner of the intellectual property in the digitization of the sound recordings... broader rights may... reside with the traditional custodians. Therefore, the prior information consent of the Library ... as well as the traditional custodians is required for the republication and commercial use... of these materials...”*



(d) International level protection: The IGC

- Mandate: undertaking text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s), which will ensure the effective protection of TK, TCEs and genetic resources
- Three texts
- Renewed mandate
- Next IGC: March 2018

