

Developing a National Strategy on Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions



This brief summarizes the legal, policy and operational issues that need to be considered in developing a national strategy for the intellectual property protection of traditional knowledge and traditional cultural expressions, also known as folklore.

At present, intellectual property protection of traditional knowledge and traditional cultural expressions, are matters primarily for national governments. Negotiations are currently underway in the World Intellectual Property Organization (WIPO) to develop an international legal instrument (or instruments) for the effective protection of traditional knowledge and traditional cultural expressions, and to address the intellectual property aspects of the access to and the sharing of benefits arising from the use of genetic resources. These negotiations are taking place in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), established by the WIPO General Assembly in 2000.

Traditional Knowledge and Traditional Cultural Expressions

The meaning of “protection”

This brief is concerned with a very specific understanding of the term “protection”, to mean the use of intellectual property (IP) laws, values and principles to prevent unauthorized or inappropriate uses, by third parties, of traditional knowledge (TK) and traditional cultural expressions (TCEs). The objective of IP protection is to make sure that the intellectual innovation and creativity embodied in TK or TCEs are not wrongly used.

IP protection can take two forms - positive and defensive protection. Positive protection grants IP rights in the subject matter of TK and TCEs. This may help communities prevent third parties from gaining illegitimate access to TK and TCEs, or from using them for commercial gain without equitably sharing the benefits. It may also enable active exploitation of TK and TCEs by the originating community itself, for example, to build up its own handicraft enterprises. Defensive protection, on the other hand, does not grant IP rights over the subject matter of TK and TCEs but aims to stop such rights from being acquired by third parties. Defensive strategies include the use of documented TK to preclude or oppose patent rights on claimed inventions that make direct use of TK.

Protection in the IP sense is different from “preservation” and “safeguarding”, which involve the identification, documentation, transmission, revitalization and promotion of cultural heritage. The objective in that case is to ensure that TK and TCEs do not disappear and are maintained and promoted.

“Protection,” “preservation” and “safeguarding” are not mutually exclusive. Although their objectives are different, implementing them together may be mutually supportive, for example, through documentation and the compilation of inventories. However, these different forms of protection may also conflict. Preservation efforts that document TK or TCEs, particularly in electronic (digitized) form, can make them more accessible and vulnerable to uses that are against the wishes of their holders, thereby undermining the effort to protect them in an IP sense. It is therefore advisable to have policies in place for the strategic management of IP during the recording, digitization and dissemination of TK and TCEs.

Throughout this brief, the issues discussed concern IP-type protection of traditional innovation and creativity, and not the safeguarding or preserving of traditions, life-styles and cultures.

Developing a national strategy

National laws are currently the prime mechanism for achieving protection of TK and TCEs. While there may be several approaches to protection, reflecting the diversity of TK and TCEs and their social context, developing a strategy for IP protection usually involves the following key components:

- **Policy initiatives**, including political decisions to give greater attention and value to TK and TCEs and their protection, as well as policy statements that set overall directions on key issues;
- **Legislative initiatives**, including strengthening existing legal tools and creating new ones;
- **Infrastructure**, especially inventories, databases and other information systems, which can complement and support the implementation of legal systems;
- **Practical tools**, including the use of contracts, guidelines and protocols, as well as capacity-building and awarenessraising, if and when appropriate.

These four components provide the basis for developing a comprehensive protection strategy that integrates policy, legal, infrastructural and practical steps. Developing a strategy would also need to consider implementation

at the community, national and possibly regional and international levels. It would involve a review of the TK and TCEs held in the country, a decision on overall goals, and a survey of the options available to provide the desired level of protection.

Policy initiatives

A first step towards policy development is to have a clear understanding of the IP interests of the holders of TK and TCEs. It is important to determine what forms of TK and TCEs exist, and which TK and TCEs are considered to be in need of legal protection. The next step is to set out general objectives for their protection. For example, is protection to be aimed at preserving TK and/or TCEs, preventing their misuse, or using them as a basis of community economic development? A decision on objectives will assist in the design of legal mechanisms and in assessing needs for capacity building.

Legislative initiatives

When considering legislative options for the IP protection of TK and TCEs, it is first necessary to examine the available legal and policy options under conventional IP systems. Existing IP rights can indeed be useful for the protection of TK and TCEs; for example, rights granted by trademarks and geographical indications, as well as the protection afforded by unfair competition laws, can be very helpful in protecting reputations associated with TK and TCEs and related goods and services. If there are gaps in existing national legislation, it may be possible to fill them by adapting the existing IP framework.

However, in some cases, adapting existing IP rights may not be considered sufficient to cater for the holistic and unique character of TK and TCEs. A decision may then be taken to protect TK and TCEs through *sui generis* systems. *Sui generis* systems are specialized measures or laws aimed exclusively at addressing the characteristics of specific subject matter, such as TK and TCEs.

When considering a *sui generis* system for the protection of TK and TCEs, key questions include defining the objectives of protection and identifying the subject matter to be protected. It is also important to clarify what the TK and TCEs are to be protected against, and what forms of behavior should be considered unacceptable or illegal. Other issues to consider include the formalities to be required (such as registration), the sanctions and penalties that should apply, the exceptions and limitations attached to the rights (for example,

the use of TCEs in archives, libraries or museums for non-commercial cultural heritage purposes), the duration of protection, the application in time of legal protection (retroactive or prospective), the enforcement of rights and dispute resolution mechanisms, and the protection of foreign beneficiaries.

Finally, non-IP legislative and policy measures (for example, those concerning cultural diversity and cultural heritage, regional development, the conservation of biodiversity, the promotion of the use of traditional medicine, and the collection of ecological TK) should also be taken into account and coordinated with as necessary.

Infrastructure

Inventories, databases and other information systems can form part of the infrastructure that complements and supports policies and legal systems. Over the past decades, initiatives to document TK and TCEs have taken place all over the world, sometimes in conjunction with the legal protection of TK and TCEs, sometimes simply for preservation or safeguarding purposes. While documentation does not in itself ensure legal protection of TK or TCEs, inventories and databases may nevertheless create rights, whether these are to restrain use by third parties or to be used by the holders themselves to derive economic benefits from their TK or TCEs.

Practical tools and steps

Practical tools, such as contracts, guidelines and protocols, and practical steps, such as community consultations, capacity-building and awareness-raising activities, are also valuable if not necessary to support the overall policy objectives and complement the development and implementation of legal measures.

Key questions to be considered on traditional knowledge and traditional cultural expressions

- What TK/TCEs should be protected? What form and characteristics do TK/TCEs have in your country? Which forms of TK/TCEs are especially vulnerable to misappropriation? What actual examples are there?
- What are the desired objectives of IP protection for TK/TCEs?
- Who should benefit from any such protection or hold the rights to protectable TK/TCEs?
- What forms of behavior or acts in relation to the protectable TK/TCEs should be considered unacceptable or illegal?

- How can the existing IP system be used to its full extent to protect interests related to TK/TCEs?
- Are there gaps in the protection already available and, if so, could those gaps be filled by **adapting** the existing IP framework, or would TK/TCEs be better protected by a distinct *sui generis* system?
- For how long should protection be accorded?
- Should there be any formalities (such as examination and registration)?
- Should there be any exceptions or limitations to rights attaching to protectable TK/TCEs?
- What sanctions or penalties should apply to behavior or acts considered unacceptable or illegal?
- Should newly recognized rights in TK/TCEs have retrospective effect?
- How should foreign rights holders/beneficiaries be treated?

Further Information

Background Brief 1, Traditional Knowledge and Intellectual Property,
www.wipo.int/edocs/pubdocs/en/wipo_pub_tk_1.pdf

Database of legislative texts on the protection of protection of traditional knowledge and traditional cultural expressions and legislative texts relevant to genetic resources, www.wipo.int/tk/en/legal_texts

Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions,
www.wipo.int/tk/en/resources/glossary.html

Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) (WIPO Publication No. 768),
www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf

The Protection of Traditional Knowledge: Updated Draft Gap Analysis, document WIPO/GRTKF/IC/47/8,
www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_47/wipo_grtkf_ic_47_8.pdf

The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis, document WIPO/GRTKF/IC/47/9,
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