

Customary Law and Traditional Knowledge*





* This Background Brief draws on previous published materials, notably an issues paper prepared by the WIPO Secretariat and studies by Dr. Brendan Tobin and Mr. Rodrigo de la Cruz (see "Further Reading" below).

Customary laws are central to the very identity of indigenous peoples and local communities, defining rights, obligations and responsibilities of members relating to important aspects of their lives, cultures and world views. 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.

Maintaining customary laws can be crucial for the continuing vitality of the intellectual, cultural and spiritual life and heritage of indigenous peoples and local communities, who have also called for various forms of respect for and recognition of customary laws beyond the scope of their own communities, for example, in claims over land and natural resources. This can raise complex issues in national constitutional law.

Similar issues can arise in considering the interface between customary laws and practices and conventional intellectual property laws, and in deciding on appropriate forms of protection of traditional knowledge against misuse and misappropriation.

This brief will explore the issues concerning customary law, traditional knowledge and intellectual property. "Traditional knowledge" is used in a general sense in this brief, embracing the content of knowledge itself as well as traditional cultural expressions.

What Is Customary Law?

Customary law is a set of customs, practices and beliefs that are accepted as obligatory rules of conduct by indigenous peoples and local communities. Customary law forms an intrinsic part of their social and economic systems and way of life.

What characterizes customary law is precisely that it consists of a group of customs that are recognized and shared collectively by a community, people, tribe, ethnic or religious group. This contrasts with written law emanating from a constituted political authority, the application of which is in the hands of that authority, generally the State.

How Does Customary Law Protect Traditional Knowledge?

What makes knowledge “traditional” may be the very fact that it is developed, maintained and disseminated in a customary, intergenerational context, and often that context will be defined and shaped by customary law. So even the basic question in discussing protection of traditional knowledge – what does this term refer to? – may require an understanding of customary law. This is one reason why indigenous peoples and local communities have consistently argued that measures for the protection of traditional knowledge against misuse and misappropriation should be based upon and support enforcement of their customary laws.

Customary law is thus one potential element of a holistic approach that may include customary and indigenous laws and protocols as part of a wider set of tools for protecting traditional knowledge.

Protection of Traditional Medical Knowledge

These tools may encompass existing intellectual property systems, adapted intellectual property systems with *sui generis* elements, and new stand-alone *sui generis* systems, as well as non-intellectual property options such as trade practices and labeling laws, liability rules, use of contracts, regulation of access to genetic resources, and remedies based on such torts (delicts) as unjust enrichment, rights of publicity and blasphemy.

Amongst the principal attributes of customary law may, depending on context, be its legitimacy, flexibility and adaptability. In some countries it is recognized as a source of law, in others its role is limited to the exercise of internal autonomy or self-government by indigenous peoples and local communities, while many countries have yet to give formal recognition to customary law.

Generally speaking, customary law can serve as:

- the fundamental legal basis or source of law for a community's legal rights over traditional knowledge;
- a factual element in establishing a community's collective rights over traditional knowledge;
- one element of the definition of traditional knowledge, or can otherwise establish the relationship between the knowledge and a community that is central to the concept of 'traditional knowledge';
- a means of determining or guiding the procedures to be followed in securing a community's "free prior informed consent" for access to and/or use of traditional knowledge;
- the basis of specific user rights or exceptions, exempting a community's continuing customary uses and practices from legal restrictions on the use of traditional knowledge;
- a guide for the assessment of cultural or spiritual offence or damage caused by inappropriate use of traditional knowledge;
- a determinant of or guide to how benefits from the use of traditional knowledge should be shared equitably within a community;
- a means of determining appropriate remedies, sanctions or restitution following a breach of rights over traditional knowledge;
- an avenue for resolving disputes over ownership or other forms of custodianship over traditional knowledge; and
- a guide for the transmission of rights over traditional knowledge from generation to generation.

Customary Law and Intellectual Property Protection Of Traditional Knowledge

The interplay between customary law and intellectual property protection of traditional knowledge is complex. Indigenous peoples and local communities, as distinctive societies, have often evolved diverse governance norms that, among other things, may regulate flows of knowledge and innovation, in a way that reflects the knowledge related values of that indigenous people and local community. Though different from intellectual property systems, these regulations are considered just as effective in protecting the local innovator.

Traditional knowledge holders, where they have desired to do so, have often had difficulties in accessing the formal intellectual property system, which is based on document-intensive, codified and governmentally administered structures and procedures. Many indigenous peoples and local communities have lacked the resources, written records and externally recognized representative governance structures that would facilitate control over their traditional knowledge, preventing knowledge holders from effectively protecting against misappropriation, or seeking positive intellectual property protection.

Moreover, customary law and practice may, for example, require traditional knowledge to be kept secret, whereas disclosure is part of the core rationale of patent law. Unless an invention is fully disclosed, a patent on that invention is invalid. In addition, a patent based on traditional knowledge, even if granted, provides only time-limited protection, which may be an inadequate safeguard for knowledge that is transmitted down the generations.

However, customary law can be used in conjunction with formal intellectual property systems to fill some of the gaps in protection of traditional knowledge. For example, customary laws concerning inheritance may determine ownership of intellectual property or the legal identity of a community as a right-holder; customary laws imposing an obligation of confidentiality may be effectively extended to prevent disclosure beyond the traditional circle; and customary laws governing use of a sacred symbol may be drawn upon to deny registration of the symbol as a trademark by a third party.

From a procedural point of view, customary law may govern how consultations should be undertaken, how disputes should be settled, how competing claims should be reconciled, and what penalties or remedies should be applied. In principle, such procedural aspects could be applied to subject matter that is not within the traditional scope of customary law – for example, in determining the equitable sharing of benefits from the commercial exploitation of traditional knowledge, or in determining the distribution of damages in the case of infringement of intellectual property rights.

The much richer experience of recognition of customary law in areas other than intellectual property may shed light on untapped possibilities for intellectual property law. Examples include resources and environmental law, property law and the law of inheritance or succession; the application of customary law in dispute settlement and in criminal law; the law of contracts, trusts and equity; and general civil and family law.

***Sui generis* laws and customary law**

Representatives of indigenous peoples and local communities have been actively participating in both the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) and the meetings on the Convention on Biological Diversity (CBD) (such as the Ad Hoc Open-Ended Working Group on Article 8(j) and Related Provisions, the meetings on access and benefit-sharing prior to the Nagoya Protocol, and the meetings relating to Nagoya Protocol), where they have called for the development of mechanisms relating to traditional knowledge in tune with their realities, values and customary laws. In both fora, work has focused on proposals for *sui generis* mechanisms to protect traditional knowledge, in particular against misappropriation. Indigenous peoples and local communities have frequently made the case that their customary laws and practices are in essence *sui generis* regimes specifically crafted for protection of their traditional knowledge.

At the national or regional level, existing *sui generis* laws for protection of traditional knowledge have taken a variety of positive approaches towards recognizing customary law.

At the international level, negotiations are currently underway in the IGC towards development of an international legal instrument or instruments for the effective protection of traditional knowledge. Many participants in the work of the IGC, including WIPO Member States and representatives of indigenous peoples and local communities, have emphasized the role of customary laws in this area.

Recognition of customary law in sui generis laws on protection of traditional knowledge at the national and regional level

- The Philippines Indigenous Peoples Rights Act, 1997 establishes a “right to the restitution of cultural, intellectual, religious and spiritual property” taken *inter alia* “in violation of [indigenous peoples’] laws, traditions and customs”. Access to indigenous knowledge is subject to prior informed consent obtained in accordance with customary laws. When disputes arise, “customary laws and practices shall be used to resolve the dispute.”
- One objective of the Peruvian Law No. 27811 of July 24, 2002, introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples derived from Biological Resources, is “to promote the fair and equitable distribution of the benefits derived from the use of [...] collective knowledge”. The law recognizes customary laws and protocols in the context of benefit-sharing, stating that “indigenous peoples [...] may have recourse to their traditional systems for the purposes of the distribution of benefits.” The law also provides that “the traditional exchange between indigenous peoples of the collective knowledge” shall not be affected.
- The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) recognizes the role of customary laws and practices in several articles. There is also a definition of customary laws and practices.

Conclusion

Effective protection of traditional knowledge cannot be ensured only at international level. The commitment of national decision-makers to promoting such protection at the international level needs to be mirrored by adoption of relevant national traditional knowledge law and policy. Regional law and policy will be important to protect the rights over shared traditional knowledge held by indigenous peoples and local communities in more than one State. Continuing use of traditional knowledge

by indigenous peoples and local communities, development of policies for traditional knowledge management, and establishment of community-managed traditional knowledge databases are needed for the longterm protection of traditional knowledge. Adoption of legislation and development policies which empower indigenous peoples and local communities to exercise control over their traditional knowledge in accordance with customary law is crucial to traditional knowledge protection.

Issues for consideration concerning customary law and intellectual property law

- What forms of relationship between customary law and intellectual property law have been encountered in practice? What models could be explored?
- What lessons can be drawn from recognition of customary law in relation to other (but potentially related) areas of law, such as family law, the law of succession, the law of land tenure and natural resources, constitutional law, human rights law and criminal law, as well as dispute resolution in general?
- What experiences have been reported concerning the role of customary law in relation to intangible property, and rights and obligations relating to traditional knowledge?
- What role for customary law has been recognized in existing and proposed *sui generis* laws for the protection of traditional knowledge?
- For the holders of traditional knowledge, what is the preferred role or roles of customary laws and protocols:
 - As a basis for sustainable community-based development, strengthened community identity, and promotion of cultural diversity?
 - As a distinct source of law, legally binding in itself
 - on members of the original community, and on individuals outside the community circle, including in foreign jurisdictions?
 - As a means of factually guiding the interpretation of laws and principles that apply beyond the traditional reach of customary law and protocols?
 - As a component of culturally appropriate forms of

alternative dispute resolution?

- As a condition of access to traditional knowledge?
- As the basis for continuing use rights, recognized as exceptions or limitations to any other rights granted over traditional knowledge or related and derivative subject matter?

Further Information

WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999),
www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf

Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions: An Overview (WIPO Publication No. 933),
www.wipo.int/edocs/pubdocs/en/wipo_pub_933_2020.pdf

A series of Background Briefs prepared by WIPO,
www.wipo.int/tk/en/resources/publications.html

Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues, WIPO Secretariat, 2013, www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf

The Role of Customary Law in Access and Benefit-Sharing and Traditional Knowledge Governance: Perspectives from Andean and Pacific Island Countries, jointly produced by UNU and WIPO, Dr. Brendan Tobin, 2008, www.wipo.int/export/sites/www/tk/en/resources/pdf/customary_law_abs_tk.pdf

WIPO study on customary law in the Andean region, Rodrigo de la Cruz, 2006, www.wipo.int/export/sites/www/tk/en/resources/pdf/study_cruz.pdf

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

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC),
www.wipo.int/tk/en/igc/index.html

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