

Documentation of Traditional Knowledge and Traditional Cultural Expressions



Introduction

Documentation of traditional knowledge (TK) and traditional cultural expressions (TCEs) has attracted increasing attention in recent years from governments and cultural institutions as well as from indigenous peoples and local communities (IPLCs), in parallel with the growing recognition of the cultural and economic value of TK and TCEs. New information technologies, such as electronic digitization and the internet, have also made documentation easier and facilitated access and dissemination.

However, documenting TK and TCEs should not be regarded as an end in itself. It needs to be undertaken within a framework of sound objectives and principles, and guided by a clear assessment of the risks and potential benefits, particularly for the traditional holders.

The World Intellectual Property Organization (WIPO) does not promote documentation of TK and TCEs as such, but rather advises governments, cultural institutions and traditional custodians wishing to document TK and TCEs on related intellectual property (IP) issues. This brief describes the main objectives of documenting TK and TCEs, the IP issues that may arise and options for addressing them.

Definition and objectives of documenting TK and TCEs

For the purposes of this brief, documentation of TK and TCEs refers to all activities of identification, fixation and classification aimed at facilitating retrieval from an organized data set, such as paper files, digital databases, archives or libraries. In this brief, “registration” refers to a specific form of documentation that grants legal protection to its content through its inclusion in a register.

Documenting TK and TCEs may serve five valuable purposes, separately or in combination.

Safeguarding and preservation

The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage obliges Parties to document TK and TCEs as a means to safeguard cultural heritage. In this context, the aim of documentation is to ensure the maintenance, use and development of TK and TCEs by present and future generations of peoples and communities in a traditional context. Safeguarding appears to be the underlying purpose of most of the documentation undertakings initiated so far. Documentation in this sense may also extend to disseminating, promoting, revitalizing and repatriating TK and TCEs and, thereby, saving them from extinction.

Protection of secret and sacred TK and TCEs

Confidential or secret records or registers of TK and TCEs safeguard particularly sensitive cultural materials, access to which and use of which are exclusively reserved for the relevant traditional holders in accordance with their customary laws and practices. Restricted access contributes to the protection of TK and TCEs from an IP perspective, as it prevents disclosure and third-party uses prohibited by those customary laws.

Research and development

Databases of TK and TCEs can be used for research and development (e.g. based on traditional medical knowledge) and can help to enhance awareness, knowledge, innovation and creativity among IPLCs, as well as third parties such as research centers and industry.

Defensive protection of TK

It is an important principle of the international patent regime that public disclosure of an unprotected invention means it is no longer “novel”, a condition for granting a patent. Documenting TK, and making it available to patent offices, facilitates the search for TK as “prior art”, and may thus help to prevent its misappropriation through the erroneous granting of patents that do not involve a genuinely inventive step. The confidential

access for patent offices to India's Traditional Knowledge Digital Library, and the inclusion in 2002 of certain TK journals in the Patent Cooperation Treaty's minimum documentation, as well as the 2011 United States Patent and Trademark Office Database of Official Insignia of Native American Tribes are important examples of documentation initiatives that aim at defensive protection of TK and TCEs.

Positive protection of TK and TCEs

Documentation and registration of TK and TCEs may help provide "positive" protection, enabling customary holders to benefit from their TK and TCEs in dealings with third parties. As such, they can act as regulated "platforms" or "gateways" by which traditional custodians can grant access to particular TK and TCEs to third-party users under certain conditions, such as prior informed consent (PIC) and fair access and benefit-sharing (ABS) mechanisms. These conditions can be set to accord with the IP rights, needs and aspirations of the holders of TK and TCEs, as well as any applicable international or national regime, including the Convention on Biological Diversity.

IP issues arising from documentation of TK and TCEs

Despite the foregoing benefits, documenting TK and TCEs remains a controversial endeavor, particularly from the perspective of indigenous peoples and local communities.

Documentation may lead to misuse or unwanted disclosure of TK and TCEs

Documentation of TK and TCEs that has not involved PIC from their traditional holders may be seen by them as misuse of their heritage. Loss of secrecy or confidentiality that may result from documentation could harm the interests of traditional holders, while subsequent use of documented TK and TCEs may infringe the moral rights of their custodians and/ or lead to misappropriation. On the other hand, confidential dissemination of documented TK among patent offices may provide defensive

protection of TK against misappropriation. The effect of documentation under conventional IP law thus depends on how dissemination of and access to its content is undertaken and regulated.

The IP rights belong to those who document or record TK and TCEs and not necessarily to their traditional holders

Under conventional IP law, the copyright vested in the documented content belongs to those entities and individuals who “authored” that content, generally those who undertook the documentation or made the recordings (such as ethnologists and museums). This may create a legal situation where the traditional holders of the documented TK and TCEs do not own the rights to the content and may be deprived of their ability and right to exercise control over, for example, the use of recordings by third parties and incidentally over the underlying TK and TCEs.

The protection granted to the documented content under the copyright regime has a limited scope

Under the conventional IP regime, documentation of TK or TCEs provides protection only for the form in which the TK and TCEs have been expressed. But, in the absence of a specific (*sui generis*) protection regime or a contractual commitment of similar scope, third parties could still use the documented TK and TCEs freely as long as they did not infringe the IP rights vested in the particular way the TK and TCEs were expressed. Documentation in itself thus cannot substitute for positive protection of TK and TCEs.

Options and resources to address IP issues

Several technical and legal options are available to help manage the IP rights involved in documentation in the best interests of the parties, including by ensuring implementation of the PIC and fair ABS principles at all steps of the documentation process. These options should be adopted within the framework of a

consistent and balanced IP strategy that reflects the applicable IP legal regimes, customary laws and best practices in the field of TK and TCEs.

WIPO offers a set of resources to facilitate implementation of those options before, during and after documentation takes place. The WIPO Creative Heritage Training Program includes most of the available resources and program activities that relate to TCEs and cultural heritage documentation – see “Further reading” below.

Digitization and software tools can support protection

Digital Rights Management (DRM) refers to technological measures that ensure that access to and use of digitized content accord with the conditions set by the relevant right-holders. These could include digital watermarks on digital images, identification and application forms for users, tracking devices that allow control on the use of the content, and so on.

Access to and use of documented content can be regulated by licenses and other contracts

IPLCs can manage access to and use of their documented TK and TCEs through licenses and other contractual arrangements. As an example of technical assistance initiative, the Traditional Knowledge License and Label Platform, being developed with support from WIPO, aims to provide TCE holders, particularly IPLCs, and those collaborating with them on the development of digital archives, with tailored licenses for copyrighted material derived from TCEs and educative labels for unprotected TCEs.

Existing protocols and guidelines can be used as models of best practice

Many cultural institutions have developed codes, guidelines and protocols that relate to the recording and dissemination of documented intangible cultural heritage, with an emphasis on best practices in dealing with traditional communities under customary law as well as other IP right-holders before, during

and after documentation. WIPO has established a searchable database of existing guidelines for cultural documentation, and has also commissioned surveys and case studies in this field. A guide, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives*, is also available.

Community-led documentation initiatives

The documentation process may create rights in the recorded material that are not necessarily vested in their traditional holders but in the person or entity responsible for the documented content. By recording and documenting their own cultural heritage, traditional holders can ensure they retain exclusive IP rights on the use of that content. They can also ensure that recording and documentation occur in a way that accords with their customary laws and practices and responds to their needs and expectations. The WIPO Creative Heritage Training Program helps IPLCs acquire the technical skills to undertake documentation as well as the technical and legal skills to manage their own IP rights. The WIPO TK Documentation Toolkit similarly aims to assist holders of TK to identify and defend their IP-related interests when their TK is documented or otherwise recorded.

Sui generis protection of TK and TCEs and the role of documentation

Examples of *sui generis* legal regimes for the positive protection of TK and TCEs have already been adopted at the national and regional level. These may include provisions requiring documentation of TK and TCEs as well as the use of documented content to have the PIC of their traditional custodians, and providing mechanisms to ensure fairness in sharing the benefits accruing from documentation between traditional custodians, IP rights-holders and third-party users.

As mentioned above, documentation can be used to facilitate management of the rights associated with TK and TCEs under *sui generis* protection regimes, providing platforms or gateways through which third parties can gain access under stipulated

conditions. Policymakers may also use documentation to support positive protection of TK and TCEs, as a means to register TK and TCEs as a condition for their protection or as evidence of their protection.

In 2009, WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) initiated negotiations with the objective of reaching agreement on one or more international legal instruments that would ensure the effective protection of genetic resources, TK and TCEs. The role of documentation forms an important question in those negotiations.



Conclusion

Documentation of TK and TCEs should not be regarded as an end in itself, but as part of a broader IP strategy that aims at the preservation and protection – be it “defensive” or “positive”- of TK and TCEs. Measures that give traditional holders a sense of ownership, appropriately regulate access to content, and offer protection to TK and TCEs that extends beyond the particular ways in which they have been documented, are the main elements of a pro-active documentation approach that contributes to the protection of TK and TCEs.

The well-being of the peoples mostly concerned by documentation of TK and TCEs should be the guiding principle of any course of action. In that context, the rights, needs and expectations of indigenous peoples and local communities, as traditional holders of living TK and TCEs, should be placed front and center, by ensuring either that documentation is community-led or, at least, that the holders are consulted at each step.

Further Reading

For key issues and terms, see *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions. An Overview*, www.wipo.int/edocs/pubdocs/en/wipo_pub_933_2020.pdf

The WIPO Creative Heritage Project provides a set of resources to traditional holders and cultural institutions for developing best practices, notably in documenting TCEs and managing related IP rights. See its home page, www.wipo.int/tk/en/resources/training.html and a *WIPO Magazine* article: www.wipo.int/wipo_magazine/en/2008/03/article_0009.html

The WIPO Guide on *Intellectual Property and the Safeguarding of Traditional Cultures: Legal and Practical Options for Museums, Libraries and Archives*, is available on www.wipo.int/freepublications/en/tk/1023/wipo_pub_1023.pdf

Surveys of existing practices, protocols and policies regarding the digitization of cultural heritage: www.wipo.int/tk/en/databases/creative_heritage/

A WIPO International Workshop was held in Muscat (Oman) in June 2011, on Documentation and Registration of TK and TCEs. For information, see: www.wipo.int/meetings/en/details.jsp?meeting_id=22484

The *WIPO TK Documentation Toolkit*: www.wipo.int/tk/en/resources/tkdocumentation.html

Documentation and disclosure of genetic resources in patent systems raises specific issues. See, for example, *Technical Study on disclosure requirement in patent systems related to genetic resources and traditional Knowledge* www.wipo.int/edocs/pubdocs/en/tk/786/wipo_pub_786.pdf and www.wipo.int/tk/en/genetic/

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