

Intellectual Property and Traditional Knowledge

The current international system for protecting intellectual property was fashioned during the age of industrialization and developed subsequently in line with the perceived needs of technologically advanced societies. However, in recent years, indigenous peoples, local communities, and governments mainly in developing countries, have demanded equivalent protection for [traditional knowledge](#). WIPO member states take part in negotiations within the [Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore](#) (IGC), in order to develop an international legal instrument (or instruments) that would give traditional knowledge, genetic resources and traditional cultural expressions (folklore) effective and balanced protection. Such an instrument could range from a recommendation to WIPO members to a formal treaty that would bind countries choosing to ratify it. Representatives of indigenous and local communities are assisted by the [WIPO Voluntary Fund](#) to attend the IGC, and their active participation is crucial for a successful outcome.

Traditional knowledge is not so-called because of its antiquity, much traditional knowledge and many traditional cultural expressions are not ancient or inert, but a vital, dynamic part of the lives of many communities today. The adjective “traditional” qualifies a form of knowledge or an expression which has a traditional link with a community: it is developed, sustained and passed on within a community, sometimes through specific customary systems of transmission. In short, it is the relationship with the community that makes knowledge or expressions “traditional.”

Traditional knowledge is not easily protected by the current intellectual property system, which typically grants protection for a limited period to inventions and original works by named individuals or companies. Its living nature also means that “traditional” knowledge is not easy to define.

Recognizing traditional forms of creativity and innovation as protectable intellectual property may enable indigenous and local communities, and possibly others, to have a say over the use of their traditional knowledge by third parties. This may make it possible, for example, to protect traditional remedies, artwork and music against misappropriation, and enable communities to control and benefit collectively from their commercial exploitation.

Although the negotiations underway in WIPO have been initiated and propelled mainly by developing countries, the discussions are not neatly divided along “North-South” lines, and some developed country governments, especially those with indigenous populations, are also active.

Two angles to intellectual property protection exist:

- **Defensive protection** aims to stop people outside the community from acquiring intellectual property rights over traditional knowledge. India, for example, has compiled a searchable database of traditional medicine that can be used as evidence of prior art by patent examiners when assessing patent applications. Defensive strategies might also be used to protect sacred cultural manifestations, such as sacred symbols or words from being registered as trademarks by third parties.
- **Positive protection** is the granting and exercise of rights that empower communities to promote their traditional knowledge, control its uses and benefit from its commercial exploitation. This can be achieved through the existing intellectual property system, and a number of countries have also developed specific legislation. However, any specific protection afforded under national law may not hold for other countries, one reason why many are advocating for an international legal instrument.

WIPO’s work on traditional knowledge addresses three distinct yet related areas: traditional knowledge in the strict sense (technical know-how, practices, skills, and innovations related to, say,

biodiversity, agriculture or health); traditional cultural expressions/expressions of folklore (cultural manifestations such as music, art, designs, symbols and performances); and genetic resources (genetic material of actual or potential value found in plants, animals and micro-organisms).

Although for many communities traditional knowledge, traditional cultural expressions, and genetic resources form part of a single integrated heritage, from an intellectual property standpoint they raise different issues and may require different sets of solutions. In all three areas, in addition to work on an international legal instrument, WIPO is responding to requests from communities and governments for practical assistance and technical advice to enable communities to make more effective use of existing intellectual property systems and participate more effectively in the IGC's negotiations. WIPO's work includes assistance to develop and strengthen national and regional systems for the protection of traditional knowledge (policies, laws, information systems and practical tools) and other capacity-building initiatives. WIPO has prepared a [Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities](#), which explains, with many examples, how different indigenous peoples and local communities around the world are using intellectual property successfully, whether to promote their own culture and creations or to prevent misappropriation.

Traditional knowledge

When community members innovate within the traditional knowledge framework, they may use the patent system to protect their innovations. However, traditional knowledge as such - knowledge that has ancient roots and is often informal and oral - is not protected by conventional intellectual property systems. This has prompted some countries to develop their own *sui generis* (specific, special) systems for protecting traditional knowledge, based on the kinds of measures, principles and values that make up the intellectual property system. There are also many initiatives underway to document traditional knowledge. In most cases the motive is to preserve or disseminate it,

or to use it, for example, in environmental management, rather than for the purpose of intellectual property protection. There are nevertheless concerns that if documentation makes traditional knowledge widely available, especially if it can be accessed on the Internet, this could lead to misappropriation and use in ways that were not intended by its holders.

At the same time, documentation can help protect traditional knowledge, for example, by providing a confidential record reserved for the community only. Some formal documentation and registries of traditional knowledge support *sui generis* protection systems, while databases - such as India's database on traditional medicine - play a role in defensive protection within the existing intellectual property system. It is important to ensure that documentation of traditional knowledge is linked to an intellectual property strategy and does not take place in a policy or legal vacuum. WIPO has prepared a practical guide, [Documenting Traditional Knowledge: a Toolkit](#) that provides guidance on how to undertake a traditional knowledge documentation exercise.

Traditional cultural expressions

Traditional cultural expressions (folklore) are seen as integral to the cultural and social identities of indigenous and local communities, embodying know-how and skills, and transmitting core values and beliefs. Protecting traditional cultural expressions contributes to economic development, encourages cultural diversity and helps preserve cultural heritage.

Traditional cultural expressions can be protected by existing systems, such as copyright and related rights, geographical indications, trademarks and designs. For example, contemporary adaptations of traditional cultural expressions may be copyrightable, while performances of traditional songs and music may come under the [WIPO Performances and Phonograms Treaty](#) or the [Beijing Treaty on Audiovisual Performances](#). Distinctive signs, such as trademarks and certification marks can also be used to identify authentic

indigenous arts. Some countries also have special legislation for the protection of traditional cultural expressions. Panama has established a registration system for traditional cultural expressions, while the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture gives “traditional owners” the right to authorize or prevent use of protected traditional cultural expressions and receive a share of the benefits from any commercial exploitation. WIPO’s work in the field of traditional cultural expressions includes a [hands-on training program on cultural documentation and intellectual property management](#). WIPO has also prepared a [guide on Intellectual Property and the Safeguarding of Traditional Cultures](#) addressed to museums, libraries and archives.

Genetic resources

Genetic resources themselves are not intellectual property (they are not creations of the human mind) and thus cannot be directly protected as intellectual property. However, inventions based on or developed using genetic resources (associated with traditional knowledge or not) are eligible for protection through the IP system, either through a patent or, in the case of research and breeding activities that can lead to the creation of new plant varieties, by a *sui generis* system that regulates plant breeders’ rights.

Genetic resources are subject to access and benefit-sharing (ABS) regulations, in particular within the international legal and policy framework defined by the [Convention on Biological Diversity \(CBD\)](#), and its [Nagoya Protocol](#), and the [International Treaty on Genetic Resources for Food and Agriculture](#) of the [United Nations Food and Agriculture Organization](#) (the International Treaty).

Issues under discussion at WIPO include:

- **The prevention of erroneous patents.** Inventions based on or developed using genetic resources may be patentable. A number of WIPO Member States have adopted policies aimed at the defensive protection of genetic resources, to prevent

erroneous patents being granted over inventions based on or developed using genetic resources and associated traditional knowledge that do not fulfill patentability requirements such as novelty and inventiveness. The defensive protection of genetic resources can involve the development and implementation of a range of legal and practical mechanisms, such as databases and other information systems on genetic resources and associated traditional knowledge to help patent examiners find relevant prior art and avoid the granting of erroneous patents. Patent disclosure requirements may also address this issue.

- **The consistency and synergy between the intellectual property system and ABS systems.** A key intellectual property issue in the context of ABS consists in examining whether, and to what extent, the intellectual property system should be used to ensure and track compliance by users of genetic resources with national ABS systems established pursuant to the CBD, the Nagoya Protocol and the International Treaty. WIPO members are considering whether, and to what extent, the intellectual property system should be used to support implementation of obligations related to prior informed consent, mutually agreed terms and fair and equitable benefit-sharing that are provided for by these ABS systems. One of the options under discussion is to develop mandatory disclosure requirements that would oblige patent applicants to show the source or origin of genetic resources, as well as evidence of prior informed consent and a benefit-sharing agreement, if they are required by the provider country. WIPO has prepared a [study which gathers practical and empirical information on patent disclosure requirement in relation to genetic resources and traditional knowledge](#).

WIPO also deals with the intellectual property aspects of mutually agreed terms for fair and equitable benefit-sharing. It has developed, and regularly updates, an [online database of relevant contractual practices](#), and has prepared a [Guide to Intellectual Property Issues in Access and Benefit-sharing Agreements](#).

Developing an international legal instrument

Because the existing international intellectual property system does not fully protect traditional knowledge and traditional cultural expressions, discussions are underway to develop an international legal instrument providing *sui generis* protection.

An international legal instrument would define what is meant by traditional knowledge and traditional cultural expressions, who the rights holders would be, how competing claims by communities would be resolved, and what rights and exceptions ought to apply.

In WIPO negotiations, many argue that use of traditional knowledge ought to be subject to free, prior and informed consent, especially for sacred and secret materials. However, others fear that granting exclusive control over traditional cultures could stifle innovation, diminish the public domain and be difficult to implement in practice.

Working out the details is complex and there are divergent views on the best ways forward, including whether intellectual property-type rights are appropriate for protecting traditional forms of innovation and creativity.

To take just one example, communities may wish to control all uses of their traditional cultural expressions, including works inspired by them, even if they are not direct copies. Copyright law, on the other hand, permits building on the work of others, provided there is sufficient originality in the new creations. The text of the legal instrument will have to draw the line between legitimate borrowing and unauthorized appropriation.

On genetic resources, countries agree that intellectual property protection and the conservation of biodiversity should be mutually supportive, but differ on how this should be achieved and whether any changes to current intellectual property rules are necessary.