Protection of Traditional Knowledge and Cultural Expressions
Recent Developments

Master of Laws in Intellectual Property
University of Turin
Study Visit to Wipo

Brigitte Vézina
Traditional Knowledge Division
Contextualization: Illustrations

- Indigenous art: copied onto carpets and t-shirts
- Traditional music: remixed and sold
- Process of making a traditional musical instrument: patented
Traditional knowledge *broad sense*

Knowledge *(TK narrow sense)*

Cultural expressions (TCEs)

SONGS

TEXTILES

HANDICRAFT

PERFORMANCES

DANCES
The issue

- Important elements of the living heritage of a nation or community, of its cultural identity and of its sustainable lifestyle
- Protection of biological diversity, food security, cultural identity, cultural diversity, health…
- Until recently, considered as belonging to common heritage of humanity
- Today:
  - Growing awareness of the economic potential – for communities and industry
  - Cultural “assets” – part of social and cultural identity
  - Growing vulnerability to misuses

...NEED FOR PROTECTION...
Approaches to “protection”

Cultural and biological heritage
  ↓
  “Stewardship”
  ↓
Safeguarding of intangible cultural heritage (UNESCO Convention, 2003)

Conservation of biodiversity (CBD, 1992)

Human rights
  ↓
Self-determination, identity, culture
  ↓
Human rights conventions and declarations (e.g., ILO, 1969, UNDRIP, 2007)

Intellectual property
  ↓
  “Ownership”
  ↓
Economic and moral rights under IP treaties (e.g., Paris Convention, 1883, Berne Convention, 1886)
Policy Issues

Economic policy  Trade policy  Environmental policy  Cultural policy

Intellectual property policy, law and practice

What is IP policy about? What is it not?

What is the contribution/relevance of IP policy to the objectives?
Intellectual property – creations and innovations of the human mind

Intellectual property “protection” – possibility to regulate:

- access
- use
- attribution
- integrity

IP rights do not provide perfect control: limitations and exceptions / the public domain

IP “protection” is not the same as “preservation/safeguarding”

The world of IP is in transformation – e.g., a2k movement
Options for protection

- Of course, TK and TCEs should be protected, preserved, safeguarded, etc.

- But should it also be protected by IP?

Innovations and creations based on TK and TCEs

TK & TCEs

Is the current IP system adequate?

Or should it be adapted?

Or create an independent sui generis system?

NEXT SLIDE!
Can **existing IP** systems protect TK/TCEs?

- Patent/Copyright
- Unpublished works of unknown authors
  (Berne Convention, Article 15.4)
- Related rights
- Databases and compilations
- Collective trademarks/GIs
- Confidential information
- Unfair competition
Creating a new system of protection

- **Use of** IP principles and systems: new applications of core values embedded in IP systems
- **Focus:** prevention of acts by third parties beyond the community that are considered acts of misappropriation and misuse
- **Challenges:**
  - Avoid inappropriate forms of protection that interfere with communities’ own values and customary law and protocols
  - Respect other processes and integrate IP’s contribution within the holistic preservation, promotion and conservation of TK/TCEs
Key considerations

- What to protect? Terminology
- Why protect? Objectives
- Who will benefit? Owners
- How to protect? Options

© 2010 Brigitte Vézina
What to protect? **Terminology**

- **Traditional Knowledge**
  knowledge resulting from intellectual activity in a traditional context; includes know-how, practices, skills, and innovations.

- **Traditional Cultural Expressions**
  any form, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested.

“traditional”
Why protect? Objectives

- **What do you want TK holders to be able to do?**
  - Ownership, control, PIC, acknowledgement, remuneration, prevention, respect?

- **What do you want to stop others from doing?**
  - Unauthorized, unwanted, inappropriate commercial use, distortion, “passing off”, no attribution or acknowledgement, disclosure?

- **No property rights (keeping TK/TCEs “IP free”)**
Positive and Defensive Protection

Positive protection: acquire IP rights to meet your protection objectives

Defensive protection: prevent others from acquiring IP rights on TK/TCEs
Levels of operation

- community
- national
- regional
- international  WIPO IGC
WIPO Activities

1. WIPO IGC
2. Capacity-building and practical tools
WIPO’s Role: (1)
Normative Development

**WIPO Intergovernmental Committee**
(created in 2000, first session in 2001)

- Member States, other organizations and NGOs
- Participation of indigenous and local communities: speedy accreditation and Voluntary Fund

- IWG 1: 19 to 23 July 2010
- IGC 17: 6 to 10 December 2010
Current Mandate

- **text-based negotiations** with the objective of reaching agreement on a text of an **international legal instrument** (or instruments) which will ensure the effective protection of GRs, TK and TCEs

- a clearly defined work program for the 2010/2011 biennium (including sessions of the IGC and IWG)

- build on the **existing** work carried out by the Committee and use all WIPO **working documents**, including WIPO/GRTKF/IC/9/4, WIPO/GRTKF/IC/9/5 and WIPO/GRTKF/IC/11/8A, which are to constitute the basis of the Committee’s work on text-based negotiations

- submit the text (or texts) of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCEs to the 2011 **General Assembly**, which will decide on convening a **Diplomatic Conference**

- without prejudice to the work pursued in **other fora**

- bearing in mind the **Development Agenda** recommendations
What happened at IWG 1?

- Experts:
  - WIPO member states
  - indigenous experts
  - NGOs
- Participating in their personal capacities
- Lively and active discussion
- Intense drafting
Next…IGC 17: 6 to 10 December 2010

- **Documents on TCEs**
  - TCEs draft provisions
  - Substantive outcomes
  - Draft provisions, as amended by IWG

- **Documents on TK**
  - TK draft provisions
  - List and technical explanation of various forms in which TK may be found
  - Meaning of the term “public domain” in the IP System with special reference to the protection of TK and TCEs

- **Documents on GR**
  - GR list of options
  - Canadian *et al.* proposal on GR
  - Report: Updating WIPO’s online database on biodiversity – related ABS agreements
  - Glossary of key terms related to IP and GR
  - Guidelines on ABS (Updated version of 7/9)
The Draft Provisions: Origins

Draft provisions on TK and TCEs 2004 -

Lists of Issues, 2006 - 2008

Compilations, Factual Extractions and African Group comments

Gap analyses, 2008

Comments
TCEs: Issues relevant to *sui generis* systems of protection

- Definition of the subject matter (Article 1 of the *Draft Provisions*)
- Formalities (Art. 7)
- Illegal acts (Art. 3)
- Exceptions and limitations (Art. 5)
- Beneficiaries (Art. 2)
- Management of rights (Art. 4)
- Transitional Measures (Art. 9)
TCEs: Definition of the subject matter (Article 1)

- Any tangible or intangible form in which traditional culture or knowledge are expressed
- Verbal, musical, expressions by action and tangible expressions
- The product of creative intellectual activity, characteristic of a community’s identity and maintained, used or developed by such community
Beneficiaries (Article 2)

I. Cultural communities
II. Competent national authority/state-appointed bodies
III. Individuals

Who should benefit from protection?
Who should be the rights holder(s)?

Distribution of benefits
Allocation of rights

Role of customary law and practices
Protection: Automatic or Subject to Formalities? (Article 7)

Acquisition of rights: easily available & practically feasible
→ certainty, transparency

1) General principle: no formalities, cf. copyright system

2) However:
   “specific” TCEs of particular cultural or spiritual value or significance receive strong protection (exclusive rights) → registration/notification is required, cf. patent system

- Information is publicly accessible
- Declaratory + prima facie evidence
- Dispute resolution: customary law, ADR, existing cultural resources

Still many issues unresolved, to be determined at national level (manner of application, examination of applications, etc.)
What rights should be available?
(Article 3 — Acts of Misappropriation (Scope of Protection))

1) Registered: FPIC required for any use
   • TCEs other than words, signs, names and symbols (including performances)
     ■ ≈ copyright exclusive rights
   • Words, signs, names and symbols
     ■ ≈ trademark protection

2) Not registered: no FPIC, but protection of how TCEs are used
   • ≈ moral rights
   • ≈ unfair competition
   • ≈ compulsory license (benefit sharing)

3) Secret
   • ≈ confidential information
Management of Rights (Article 4)

Authorization

Who?

How?

I. Cultural communities
II. Competent national authority/state-appointed bodies
III. Individuals

Role of “agency”?

Exercise of rights by communities

Prior informed consent

The draft provision seeks to identify only certain core principles that could apply
How to strike a balance with the rights conferred?
(Article 5 — Exceptions and Limitations)

1. Measures are not meant to regulate use by community members inside of traditional context, but third-party use
   - Should not restrict/hinder normal use by community but extend only to uses outside of traditional context, whether commercial or not
   - Could allow unrestricted use, in accordance with custom and traditional practice, by community or nationals of a country

2. Measures must take account of public interest
   - Measures should not apply in certain cases, under 3 conditions: compatible with fair practice, acknowledgement of the source, not offensive
Transitional Measures (Article 9)

Utilization of TCEs

Past → Ongoing → New

Retroactive protection

Prospective protection

Prior authorization

Need for an intermediate solution?

Role of customary law and practices

Role, contours, boundaries of the “public domain”
What rights do foreigners have?
(Article 11 — International protection)

- **Starting point:** National treatment, cf. Berne Convention, article 5 → eligible foreign beneficiaries enjoy the same rights and benefits as the nationals

- **Other mechanisms:** Reciprocity, mutual recognition, assimilation (habitual residents), MFN

- **Issues:** application of own customary laws, legal standing of beneficiaries, shared cultural heritage

- **Exploration**... points of attachment, assimilation, regional folklore, relationship with registration requirement (national, regional or international registers)
Relationship with other forms of protection (Article 10)

- Conventional IP Laws
- Protection of TCEs
  - UNESCO Conventions
  - Other non-IP measures
Draft Provisions for protection of TK

Sui generis provisions

Based on extensive comments and experiences of States and communities

Not yet adopted or agreed, but contributing to national, regional and international processes
Key Issues

- Why protect TK? (Policy Objectives and Principles)
- Definition of the subject matter (Articles 3 & 4)
- Beneficiaries (Art. 5)
- Which acts should be prevented? (Art. 1)
- Exceptions and limitations (Art. 8)
- Fair and equitable benefit-sharing and recognition of knowledge holders (Art. 6)
- Prior informed consent (Art. 7)
- Duration (Art. 9)
Why protect TK? (policy objectives and principles)

Objectives:
- Recognize value
- Promote respect
- Meet the actual needs of holders of TK
- Promote conservation and preservation of TK …

Principles:
- Responsiveness to the needs and expectations of traditional knowledge holders
- Recognition of rights
- Effectiveness and accessibility of protection
- Flexibility and comprehensiveness
- Equity and benefit-sharing …
What is to be protected? (Articles 3 & 4)

Article 3: General Scope of Subject Matter
- Intellectual activity
- Traditional context
- Include the know-how, skills, innovations etc.
- Not limited to any specific technical field

Article 4: Eligibility for Protection
- In a traditional and intergenerational context
- Association with its traditional holders
- Role of customary laws and practices
Who should benefit from this protection (beneficiaries)? (Article 5)

- Indigenous and traditional communities
- Individuals within these communities
- The role of the customary law and practices
Which acts should be prevented? (Article 1)

- The nature of misappropriation in a general and non-exclusive manner (paragraph 2)
- Inclusive list of specific acts (paragraph 3)
  - the *illicit acquisition* of TK
  - breach of the principle of *prior informed consent* for access to TK, when required under national or regional measures
  - breach of *defensive protection* measures of TK
  - commercial or industrial uses which *misappropriate the value of TK* where it is reasonable to expect the holders of TK to share the benefits from this use
  - willful morally offensive uses of TK which is of particular *moral or spiritual value* to the TK holder
- Specific acts of *unfair competition* in Article 10bis of the Paris Convention
- The role of customary practices, norms, laws and understandings of the knowledge holder
Exceptions and Limitations (Article 8)

- Customary practice, exchange, use and transmission
- Household uses and public health uses of traditional medicine
- Already available to the general public
  - But provide equitable compensation for industrial and commercial uses
Fair and equitable **benefit-sharing** and recognition of knowledge holders (Article 6)

- Implementing policy objectives, such as “recognition of the value of TK”, “ensuring respect for TK and TK holders” and “promoting equitable benefit-sharing”
- Commercial and non-commercial uses
- Mention source of TK, acknowledge its holders
- Remedies provided by legal means
- Role of customary laws and practices

**Prior Informed Consent** (Article 7)

- Any access
- Entitle the holders to grant PIC
- Mutually agreed terms
Duration (Article 9)

- As long as the criteria of eligibility in Article 4 are fulfilled
- What if national or regional laws or measures available?

Formalities (Article 11)

- Should not require any formalities
- May establish registries or databases
WIPO’s Role: (2) Capacity-building and practical tools

- **Awareness-Raising**
  - case studies; surveys on national experiences; fact-finding missions

- **Legal and Policy Development**
  - laws database; bills; advice; legal comments

- **Training Activities**
  - Cultural digitization projects for indigenous communities and cultural institutions

- **Practical tools and Documents**
  - Practical guide for TK documentation; distance learning; medical knowledge documentation standards; GR contractual terms database; patent examination guidelines
Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore

NEWS

- First Intersessional Working Group Session - Summary Report [PDF]
- IGC Sixteenth Session - Initial Draft Report [DOC]
- Questionnaire of Contractual Practices and Clauses relating to Intellectual Property, Access to Genetic Resources and Benefit-Sharing [DOC]
- IGC Sixteenth Session - Decisions
- IGC Mandate for 2010 and 2011 [PDF]

Overview

Traditional knowledge (TK), genetic resources (GRs) and traditional cultural expressions (TCEs, or "expressions of folklore") are economic and cultural assets of indigenous and local communities and their countries. WIPO’s work addresses the role that intellectual property (IP) principles and systems can play in protecting TK and TCEs from misappropriation, and in generating and equitably sharing benefits from their commercialization and the role of IP in access to and benefit-sharing in genetic resources.

WIPO’s activities comprise:
Thank you!
Sign up for the TK e-Newsletter and Updates

brigitte.vezina@wipo.int
grtkf@wipo.int