

INFORMATION SHEET: INTELLECTUAL PROPERTY

POLICY AREA / POLICY ISSUE

Intellectual property

ISSUES TO CONSIDER

In 1973, a concern about intellectual property (IP) rights was at the very heart of the request to UNESCO by Bolivia to start working towards an international convention for ‘folklore preservation, promotion and diffusion’ and an ‘International Register of Folkloristic Cultural Property’. Although when it was drafted in the early 2000s, it was decided (article 3(b)) that the Convention would not affect existing kinds of IP rights in ICH, but rather focus on safeguarding (article 1), the Convention does encourage States Parties to develop policies at the national level to assist in this process (article 13). The ODs recognize that some of these policies may relate to IP protection (OD 104 and 173).

IP protection can support safeguarding of ICH by promoting community stewardship over and benefit from their ICH. Because IP rights can help owners to control access to and use of certain knowledge, representations and practices, they can be used to support requirements for community consent, access control and benefit outlined in the Convention and the Ethical Principles. This can help prevent the misappropriation of ICH from communities concerned and ensure that benefits are channelled back into communities (OD 104).

The Committee ‘welcomed the diverse initiatives of States Parties to implement intellectual property protections and other forms of legal protection for intangible cultural heritage’ at its 2012 meeting. However, it also sounded a note of caution, particularly about how IP protection mechanisms could ‘freeze’ ICH. The Committee reiterated the need to ensure that communities concerned benefit from the safeguarding of their ICH through IP protection.¹

Policymakers in the field of ICH should thus consider the relationship between policies for ICH safeguarding and for IP rights protection, exploring ways of maximizing beneficial outcomes, while taking account of any potential negative effects of applying IPR regimes to ICH. This does not mean that ICH-related policies should necessarily influence or refer to IP policies, or *vice versa*, but that IP-related issues should be carefully considered in ICH policymaking. This is important even where no specific *sui generis* laws exist to protect traditional knowledge (which overlaps significantly with ICH), because conventional IPR protection (e.g. patent, copyright) applies (sometimes without the need for any registration process) to many aspects of ICH.

Conventional and sui generis IPR regimes

Every State makes its own IP laws, and these have in the past differed quite markedly from each other, but most States now provide basic levels of conventional IPR protection set by international agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs agreement) under the World Trade Organization (with 160 member States), and the Berne or Paris Conventions. Conventional IPR protection gives rights to individuals or commercial concerns, usually for a limited time, over the use of creative expressions of ideas, signs or inventions.

1. UNESCO, Intergovernmental Committee of the Intangible Heritage Convention, Decision 7.COM 6.

It is possible to apply conventional IPR regimes to some aspects of ICH, whether for example by asserting individual copyrights or design rights over creative products inspired by traditional designs (called 'positive protection'), or preventing others from patenting traditional knowledge ('defensive' protection).² Conventional IPR regimes protect the rights of individual authors or inventors, but in some States, the legal system has been able to stretch their scope, for example in one case in Australia, by using the idea of 'cultural harm' in customary law to help assess damages for copyright infringement of a ritually important artwork created by a member of an Indigenous community.³

Geographical indications (GIs) probably come closest to protecting ICH-related products because they can be used to refer to traditional ways of producing things within a specific territory. However, international agreements for protecting GIs are still in their infancy. They only protect designations of origin (e.g. champagne comes from the Champagne region) and not the copying of practices themselves (e.g. how to make champagne).⁴ Also, GI registration and enforcement is usually the preserve of the State.

Some States also put *sui generis* regimes in place for IP protection of traditional knowledge (TK) or traditional cultural expressions (TCEs), and this has been a growing trend in the developing world. WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has been working on developing a *sui generis* framework for IPR protection over community-owned aspects of cultural practice since 2001.⁵ In the absence of binding international agreements on this issue, States have considerable flexibility in developing *sui generis* regimes on TK or TCEs. However, in some localities, such as the Pacific Island States, regional agreements have also been very influential in shaping local legislation.⁶

The main benefits of *sui generis* regimes are that they can protect the rights of communities and bearers (rather than just individuals) over a wide range of ICH, including that which is already disclosed. This can be done without registration or formalities, in perpetuity, while remaining sensitive to the very specific requirements of customary protocols about ownership and access to and use of the ICH.

There are a number of benefits that can arise from the use of IP protection in ICH safeguarding, especially where policies are designed to maximize synergy between these two approaches, but there are also challenges in ensuring that communities retain control over the use of their ICH and also benefit from it.

Possible challenges

How questions of agency and representation are addressed in the IP system, including 'who gets to register the manifestations of heritage on behalf of the community, and who administers and controls the rights of the community to attribution and even royalties', influences whose interests the system serves.⁷

In extending conventional IP regimes to cover ICH, some States assert 'ownership' of IP rights in ICH, and over ICH itself, both *vis a vis* communities, and *vis a vis* neighbouring countries.⁸ A general approach of this kind would not be in the spirit of the Convention, which focuses on

2. For examples see Janke, T. 'Case studies on Intellectual Property and Traditional Cultural Expressions', WIPO 2003 http://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf.

3. See Indofurn case, Janke, T. Case studies on IP and TCEs, p.8.

4. For a discussion on this see Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press 2013), p.193.

5. See http://www.wipo.int/tk/en/igc/draft_provisions.html

6. Forsyth, M. 2011. 'The traditional knowledge movement in the Pacific Island countries: the challenge of localism', *Prometheus*, 29:3, pp.269-286.

7. Lixinski, *Intangible Cultural Heritage in International Law*, p.210.

8. Antons, 'Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions'.

reaffirming community stewardship over their ICH. However, States may also wish to balance the conferring of rights on communities under *sui generis* IPR regimes with the need to create opportunities for general benefit to society, and the maintenance of a 'creative commons' for all artists and inventors.⁹ The model of compulsory licensing under conventional IP regimes¹⁰ allows States to consider the interests of society in general, and has thus also been incorporated into many *sui generis* regimes. This situation might come into play where for example traditional remedies offer a cure for serious illnesses.

Giving communities stronger IP protection over their ICH will not always aid in its safeguarding. As Forsyth notes, 'it is difficult to boil down the multiple links and resonances that traditional knowledge has within the community of which it is a part to a single 'right' that is 'owned' by a clearly defined group of people'.¹¹ Conferring IP rights on ICH-related products may change its relations of production: it is 'perhaps the most extreme form of legal commodification [to which] intangible heritage can be subject'.¹² IP regimes for protection of TK can impose alien ways of conceiving value and property on ritual objects and practices.¹³ It may undermine the ability of 'institutions of customary law, as well as customary norms, to determine questions regarding responsibility for, and access to, traditional knowledge'.¹⁴

For some of these reasons, not all communities wish to protect the IP rights associated with their ICH, either through conventional forms of IPR or *sui generis* regimes that favour a western model of IP.¹⁵ In other cases, reducing the economic marginalization of poorer communities is better achieved through development and benefit-sharing agreements rather than IP rights protection. Contractual arrangements can be set up at the community level in regard to the use of specific ICH, perhaps with the assistance of State agencies or NGOs.¹⁶ Standards for negotiating IP-related agreements with communities in regard to their ICH, such as the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (2010), may be of some assistance in regulating such agreements, although they have little power to prevent abuses by the State itself.¹⁷

TK databases and ICH inventories

States are required under articles 11-12 of the Convention to ensure that ICH inventories are set up at the national level to aid in safeguarding. Policies may be developed to this end. TK databases may also be used at the national level to record and administer IP rights in TK, if *sui generis* legislation is in place. This raises two main questions for policymakers in the field of ICH. How do TK databases compare to ICH inventories? How can these two kinds of recordkeeping best be coordinated, and should they be coordinated to promote safeguarding?

Some have criticized the existence of separate IP regimes for TK and TCEs on the basis that communities do not distinguish between these kinds of ICH;¹⁸ one could raise similar objections to having separate ICH inventories and TK databases. Some States will therefore want to implement a system that merges ICH inventories and TK databases, or two systems of identification and inventorying. One reason for not merging TK databases with ICH

9. See for example the discussion in Lixinski, *Intangible Cultural Heritage in International Law*, p.212.

10. Compulsory or statutory licensing is intended to make certain goods more widely available where this is in the common interest, for example in respect of anti-malaria drugs in developing countries. Under a compulsory license, licenses for producing and marketing some medical treatments can be acquired (usually at a fixed, but reasonable, rate) by anyone in the relevant territory.

11. Forsyth, 'The traditional knowledge movement in the Pacific Island countries', p.272.

12. Lixinski, *Intangible Cultural Heritage in International Law*, pp.175-6.

13. Forsyth, M. 2012, 'Do You Want it Giftwrapped? Protecting Traditional Knowledge in the Pacific Island Countries', in Peter Drahos and Susy Frankel (ed.), *Indigenous peoples' innovation: Intellectual Property Pathways to Development*, ANU ePress, Canberra, pp. 189-214.

14. Forsyth, 'The traditional knowledge movement in the Pacific Island countries', p.272.

15. Lixinski, *Intangible Cultural Heritage in International Law*, pp.207-8.

16. Lixinski, *Intangible Cultural Heritage in International Law*, p.210.

17. Lixinski, *Intangible Cultural Heritage in International Law*, p.217.

18. Forsyth, 'The traditional knowledge movement in the Pacific Island countries'.

inventories is that they perform very different functions, and inclusion of elements on them usually has somewhat different effects.

The information in a TK database may need to differ somewhat from that in an ICH inventory for the same element because the purpose of the listing is different. Especially where they are associated with positive protection of IP rights, TK database entries require a level of consistency over time and codification of information to determine the scope of IP protection. ICH inventories, whose purpose is simply to contribute to safeguarding of each element, could contain relatively little information about the element, or very generalized information. 'Fixing' the identification of elements in TK databases to protect IP rights in it contrasts with the principle of regularly 'updating' descriptions of ICH in inventories to avoid 'freezing' it. Any ICH documentation process presents a snapshot in time, however, and some information on ICH inventories will remain the same over time if the practices and knowledge have not changed.

Different groups may become involved in the two processes because the legal implications of including information in TK databases offers different incentives for community members seeking to include their ICH on the database or giving consent for its inclusion. Both TK databases and ICH inventories can place information about ICH in the public domain, thus raising awareness, but also risking potential misuse or misappropriation where communities giving consent for its publication have not foreseen the consequences of making some information public. It is important to ensure that a TK database does not reveal information that is restricted in an ICH inventory, or *vice versa*, because different groups have been involved or given their consent. Coordination may thus be needed in the process of developing inventory and database entries with the involvement and free, prior and informed consent of the communities concerned. Different levels of public access can easily be provided in both TK databases and ICH inventories for categories of secret, sacred, restricted or public information.

Management of IP rights associated with ICH is also an important issue to consider in both ICH inventorying projects and in the compilation of TK databases. As the report on the Periodic Reports of States Parties in 2012 noted, 'recording and digitization of intangible cultural heritage ... can ... have serious intellectual property implications'.¹⁹ Those documenting ICH elements, whether they are community members or not, automatically gain copyright in the documentary materials they have created, unless they assign the rights to others, such as community archives. While broader access to ICH-related information might aid safeguarding through awareness-raising, communities have to be alerted to potential exploitation of traditional botanical and other knowledge by commercial companies in cases where their rights are not protected.²⁰

When developing policies that will create the context for establishing ICH inventorying processes and the functions of responsible institutions, it is thus important to consider both the relationship between TK databases and ICH inventories, and management of IP rights in documentation about ICH.

WHAT THE CONVENTION AND ITS TEXTS SAY

The Convention

Article 3(b) of the Convention states that the Convention does not affect existing kinds of IP rights in ICH:

Nothing in this Convention may be interpreted as ... affecting the rights and obligations of States Parties deriving from any

19. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 46.

20. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 103.

international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties.

However, the Convention does encourage States to take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory (article 11(a)), and under 13(d)(ii) to 'adopt appropriate legal, technical, administrative and financial measures aimed at (among other things) ... ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage'.

Operational Directives

ODs 104 and 173 encourage States Parties to use IP rights regimes among other means to help communities promote and profit from their ICH and enable sustainable development:

OD 104: States Parties shall endeavour to ensure, in particular through the application of intellectual property rights, privacy rights and any other appropriate form of legal protection, that the rights of the communities, groups and individuals that create, bear and transmit their intangible cultural heritage are duly protected when raising awareness about their heritage ['or engaging in commercial activities', is added in OD 173].

Ethical Principles

Ethical Principle 4: 'All interactions with the communities, groups and, where applicable, individuals who create, safeguard, maintain and transmit intangible cultural heritage should be characterized by transparent collaboration, dialogue, negotiation and consultation, and contingent upon their free, prior, sustained and informed consent'.

Ethical Principle 5: Customary practices governing access to intangible cultural heritage should be fully respected, even where these may limit broader public access.

Ethical Principle 7: 'The communities, groups and individuals who create intangible cultural heritage should benefit from the protection of the moral and material interests resulting from such heritage, and particularly from its use, research, documentation, promotion or adaptation by members of the communities or others'.

OTHER RELEVANT LEGAL INSTRUMENTS

Andean Community, Decision No. 486 Establishing the Common Industrial Property Regime (2000) <http://www.wipo.int/wipolex/en/details.jsp?id=9451>

Bangui Agreement of the African Intellectual Property Organization (OAPI, amended in 1999). http://www.wipo.int/wipolex/en/other_treaties/details.jsp?treaty_id=227

Berne Convention for the Protection of Literary and Artistic Works http://www.wipo.int/treaties/en/text.jsp?file_id=283698

Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture <http://www.forumsec.org.fj/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprssnssofCulture20021.pdf>

Paris Convention for the Protection of Industrial Property (1883) <http://www.wipo.int/treaties/en/ip/paris/index.html>

Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=201022

TRIPS agreement http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm

WIPO database on legislation for TK and TCEs - <http://www.wipo.int/tk/en/databases/tklaws/>

EXAMPLES

- Raising awareness about IP issues: In Seychelles the 2008 Research Protocol and 1994 Copyright Act provide an ethical and IPR framework for collecting and making publicly available documentary materials, recordings, etc. on ICH.²¹
- Establishing databases of traditional knowledge for IP protection: In Abu Dhabi there is a specific Inventory of Traditional Medicine managed by the Zayed Complex for Herbal and Traditional Medicine Research Centre.²²
- Assisting communities to protect IPR in their ICH: In Madagascar the registration of a Zafimaniry trademark in the Madagascar Intellectual Property Office is used by the Zafimaniry Association on all woodcraft products by Zafimaniry artisans in order to protect their interests and involve them more directly in safeguarding.²³
- Developing flexible *sui generis* solutions: In the Philippines, the Indigenous Peoples Rights Act of 1997 requires that the free, prior, and informed consent of indigenous communities must be obtained, in accordance with their customary law and practices, prior to the use of their ICH by third parties. The legislation gives the community group rights over the IP associated with their ICH. Where this approach 'does not fit with the affected community's worldviews, a *sui generis* solution is to be developed for each case' after community negotiations.²⁴

RELEVANT CASE STUDIES IN THE CAPACITY-BUILDING MATERIALS

Case Study 5. Ensuring respect for customary practices concerning access to ICH in Australia

CS5-v1.0: [English](#)|[French](#)|[Spanish](#)|[Russian](#)|[Arabic](#)

Case Study 13. A solution to a conflict between intellectual property law and customary law in Australia

CS13-v1.0: [English](#)|[French](#)|[Spanish](#)|[Russian](#)|[Arabic](#)

Case Study 30. Protecting intellectual property rights: the toi iho trademark in New Zealand

CS30-v1.0: [English](#)|[French](#)|[Spanish](#)|[Russian](#)|[Arabic](#)

Case study 38: Tatau

CS38-v1.0: [English](#)|[French](#)|[Spanish](#)

Case study 46: A secret tapestry is made available to the public

CS46-v1.0: [English](#)|[French](#)|[Spanish](#)

Case study 45: Safeguarding and patenting a cheese-making process

CS45-v1.0: [English](#)|[French](#)|[Spanish](#)

Case study 55: Silk making in Tchaa

CS55-v1.0: [English](#)|[French](#)|[Spanish](#)

FURTHER INFORMATION

Unit 55 Hand-out 7: Introduction to intellectual property and intangible cultural heritage

U055-v1.0-HO7: [English](#)|[French](#)|[Spanish](#)

WIPO website <http://www.wipo.int/tk/en/>

21. Examination of the reports of States Parties 2012, ITH/12/7.COM/6, para 26.

22. Examination of the reports of States Parties 2014, ITH/14/9.COM/5.a, para 56.

23. Examination of the reports of States Parties 2013, ITH/13/8.COM/6.a, para 39.

24. Lixinski, *Intangible Cultural Heritage in International Law*, p.140.

Antons, C. 2009. Traditional knowledge, traditional cultural expressions, and intellectual property law in the Asia-Pacific region, Kluwer Law Intl.

Antons, C. 2013, 'Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions', *Modern Asian Studies*, Volume 47, Issue 04, pp.1403-1433 <http://dro.deakin.edu.au/eserv/DU:30054576/antons-asianborderlands-2013.pdf>

Forsyth, M. 2011. 'The traditional knowledge movement in the Pacific Island countries: the challenge of localism', *Prometheus*, 29:3, pp.269-286.

Janke, T. 'Case studies on Intellectual Property and Traditional Cultural Expressions', WIPO 2003 http://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf

Nicholas, G. et al. 2010. 'Intellectual Property Issues in Heritage Management Part 2: Legal Dimensions, Ethical Considerations, and Collaborative Research Practices', *Heritage Management*, Volume 3, Issue 1, Spring 2010. http://www.sfu.ca/ipinch/sites/default/files/outputs/publication/nicholas_et_al_legal_dimensions_ethicalconsiderations_collaborativeresearchpractices.pdf

QUESTIONS TO CONSIDER

- Are there any examples where communities have not been able to control access to and use of their ICH that could have a negative effect on community development and safeguarding of this ICH? What remedies (legal and otherwise) have been considered most appropriate in these cases?
- What legal and policy measures are already in place (or being planned) that could be used to protect community IP rights in regard to their ICH, including moral rights (rights of attribution)?
- Will conventional forms of IPR (copyright, patents, trademarks, etc.) be the only means to protect community rights over ICH or will a *sui generis* regime also be developed?
- How will a *sui generis* regime for the protection of IPR associated with ICH, if developed, prioritize the rights of communities concerned, or will the IP rights be owned by the State? How does this relate to approaches to ICH under the Convention?
- How (if at all) is research on traditional knowledge or ICH (including bioprospecting) regulated?
- What initiatives are underway to document or research traditional knowledge?
- How will identification, documentation and inventorying of ICH under the Convention intersect or interact with the development of databases under systems for protecting IPR in TK or TCEs?