International Chamber of Commerce
Policy and Business Practices

PROTECTING TRADITIONAL KNOWLEDGE

SUBMISSION TO WIPO

Prepared by the ICC Commission on Intellectual Property

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Introduction

Traditional knowledge (TK), which has generally been built up over generations, is part of the cultural identity of many indigenous peoples. Over the past few years, interest has grown in the protection of TK against misuse and misappropriation. This may require a new internationally recognised intellectual property right – or an equivalent measure. ICC supports the on-going discussions at WIPO in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to find a balanced solution for the protection of TK.

As a general rule, public knowledge should be free for all. Intellectual property rights are special exceptions, specifically justified. Examples are patents, designs, copyright, plant variety rights, trade secrets and the like. Indigenous peoples have laws and customs that apply within their own communities, but these may not be recognised elsewhere. Why should they not be? In order for such rights (or some of them) to be recognised, what is needed?

In principle, there is no reason why an intellectual property right in traditional knowledge should not be accepted into the canon of intellectual property law. However, for it to work and to be widely accepted outside its traditional context, it must be consistent with international practice. A new IP right is possible – several have been devised in the past. They need not interfere with existing systems: two or more quite different IP rights may govern a single object or action. There is room for a new IP right in traditional knowledge, provided it is appropriately balanced in essential aspects.

Aspects of the scope of IP rights

Existing IP rights have differing scopes, in various respects. Important aspects are term of protection, territorial scope, rights given, proof of entitlement, grounds for challenge, and notice to the public. In general, broad protection under one aspect is balanced by narrower protection in others. With this in mind, we elaborate on several of these key aspects:

***Term of protection*:** In existing IP rights, a patent has a term of 20 years from filing, copyright lasts 70 years from the death of the author, a registered trademark can retain rights for as long as it is used, and trade secrets are protected as long as they remain secret. For TK, many have suggested that the protection should last indefinitely. This might be acceptable, but only if balanced in other aspects.

Territorial scope: Registered rights (such as patents and trademarks) are territorial. To protect an invention by a patent, one must file for protection country by country, and must typically have the application examined for validity. In countries where no patent is filed, the invention may be used by anybody when it becomes public. Trademarks are registered territory by territory. Copyright protection is available without registration in all countries that are members of the Berne Convention. Protection of trade secrets depends on laws in individual countries.

***Effect of the rights given**:* In copyright, as the name suggests, what is prevented is copying – of form, not of substance. Similarity of form is not in itself wrongful, if the work has not been accessed – though close similarity may be evidence of copying. The ideas that the copied article expresses are not protected. A patent has a stronger effect. It is infringed if what it defines is used commercially (in the country where the patent is in force). That there was no "copying" – that the invention was developed independently – is no defence. However, most countries allow non-commercial use of the information; and the patent system is designed to encourage anyone to build on the information given in order to develop improvements or alternatives outside the (legal, territorial or temporal) scope of the right. Further, if the invention claimed is shown not to be new, inventive, or not reproducible, the patent has been wrongly granted. While this is inconvenient, a wrongly granted patent may be ignored, or revoked by a court. A trademark infringes when it (or a deceptively similar mark) is used in the course of trade on goods for which the mark is registered.

Comparing different forms of existing intellectual property rights, we see that they are all balanced in a similar way. Where one dimension is large, other dimensions are reduced. Patents provide powerful protection – because they give strong rights, independent of copying, though only against commercial use. Their territorial scope is, however, limited to those countries where the owner files and pays to have them examined and maintained in force. Above all, their term is standardised to 20 years (by TRIPs) with few possibilities for extension (e.g. up to five years). Copyright is much longer, at 70 years or more, and its territorial scope (following publication) extends automatically to all members of the Berne Convention. However, it has a modest effect, since only the form but not the substance is protected, and copying must be proven. Registered trademarks generally last ten years but may be renewed indefinitely (if still in use), have limited territorial and substantive scope (extending only to countries where registered, and to particular designated classes of goods and services) and limited effect (covering not the goods and services themselves, but only the signs used to distinguish them from other goods or services).

What rights are under discussion for traditional knowledge?

As to duration, some say that rights should last indefinitely – or at least for a time comparable with the time taken to generate the knowledge (perhaps thousands of years?). As to their territorial scope, rights are sought world-wide (or at least in all countries willing to sign the Convention proposed to establish them). It is said that registration in individual countries would impose too great a burden on the (generally weak and impecunious) owners. It is also said that any clear definition of specific 'traditional knowledge' rights would unduly burden the holders, as well as making publicly available what they seek to keep secret.

As to their effect, the rights sought would exceed all existing forms of IP rights. The owners seek the right to prevent any publication or use of the knowledge, if so desired. In this case, private use without publication, or to stimulate development of alternatives or improvements, might be prevented. Knowledge developed completely independently, without any access to the protected knowledge, might also be held to infringe.

The new right is thus apparently of unprecedented nature – exceeding or equalling all existing IP rights in all dimensions. It is difficult to see how the international IP system could accommodate a right so radically new and different from existing rights.

And there is an additional problem, not yet touched on. A fundamental principle of justice - dating back at least to Roman times - is that nobody should judge his own case. However, owners of traditional knowledge claim the right to do this, on the grounds that no one else is qualified to and that only they can recognise what rights are theirs, what their value is, and what the appropriate remedies for breach are.

A new right for traditional knowledge is certainly not impossible, but it will need to be more balanced than has hitherto been suggested. For example, an indefinite length of term could be compensated by a weaker effect – rights of the holder being limited to an acknowledgement of origin, perhaps. If rights are stronger, including a right to prevent commercial exploitation, this should be compensated for - by limiting duration and territoriality, for example. In any event, some way of neutrally adjudicating disputes is essential, as is some advance notice to the public of what they are not allowed to do.

Another major difficulty is the insistence by some indigenous groups on maintaining rights in their traditional knowledge, even if it is already public. This (it is said) is not evidence that it is in the public domain, but rather evidence that it was generated by, and hence belongs to, that indigenous group. However, it is impractically difficult to prevent further dissemination and use of such knowledge, or to link it to legal obligations. Any such retro-active creation of rights would also lead to enormous legal uncertainty. It could block important future scientific and commercial activities. Modern legal systems need to provide certainty and predictability for all stakeholders and cannot function in such a way. In contrast, protection of *secret* traditional knowledge should not be a problem since there is a close analogy with existing trade secret law.

Any international system for protecting traditional knowledge must be compatible with international legal norms. Negotiations that ignore this are bound to fail.

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