

Chapter 7

**TRIPS-minus and
Protection still Pending**



7.1 Introduction

The multilateral intellectual property protection framework, as exemplified by TRIPS, has been constructed to best deliver the protection on those intellectual property rights that the major players – the developed countries – have sought to have protected. The multilateral framework is given further substance by the network of TRIPS-plus treaties and bilateral agreements, in which the same developed countries figure prominently. The dominant characteristic of this framework is that, to be protectable as intellectual property, a right must be private in nature and ascribable, identifiable, and commercially exploitable. Issues or rights which do not fit within this framework – notably traditional knowledge in the broadest sense - enjoy little, if any, of the protection offered by TRIPS, the TRIPS-plus treaties and the bilateral agreements. The absence of protection on an international scale for these issues has witnessed them subject to encroachment by the multilateral protection framework on terms dictated by that framework. In essence, they suffer a TRIPS-minus protection environment.

Foremost in this TRIPS-minus environment are those areas encompassing intellectual property issues related to genetic resources, traditional knowledge and folklore, which have emerged in a wide range of policy areas, including food and agriculture, biological diversity and the environment, human rights, cultural policy, trade and economic development. Intellectual property rights have been granted for uses of plants which form part of traditional knowledge systems in the agricultural, health and environmental fields.¹ Traditional designs, songs and dances have been used by the entertainment and fashion industries to create works which are

¹ WIPO International Bureau, "Intellectual Property And Traditional Knowledge: Our Identity, Our Future", WIPO International Forum on Matters Concerning Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore, Oman, 21-22 January 2002, WIPO Document WIPO/IPTK/MCT/02/INF.11, November 2002

protected for the industries by intellectual property.² Discussions about such uses of genetic resources, traditional knowledge and folklore have linked the protection of intellectual property to policy objectives as diverse as the promotion of free trade, environmental conservation, food security, and cultural diversity.³

Early attempts at creating a protection regime to encompass these areas have met with only limited success. In 1981, WIPO and UNESCO adopted a model law on folklore. In 1989 the concept of Farmers' Rights was introduced by the FAO into its International Undertaking on Plant Genetic Resources and in 1992 the Convention on Biological Diversity highlighted the need to promote and preserve traditional knowledge. The protection of traditional knowledge and folklore has also been discussed for a number of years within the framework of UNESCO and other international organisations such as UNCTAD and WHO. In spite of these efforts, a comprehensive and universally acceptable legislative framework for the protection and promotion of traditional knowledge, folklore and genetic resources has not yet emerged.

In 1998 and 1999, WIPO undertook a number of global fact-finding missions "to identify and explore the intellectual property needs and expectations of new beneficiaries, including the holders of indigenous knowledge and innovations, in order to promote the contribution of the intellectual property system to their social, cultural and economic development."⁴ These missions were intended to enable the "study of current approaches to, and future possibilities for, the protection of intellectual property rights of holders of indigenous knowledge, innovations and culture."⁵ During the subsequent WIPO-sponsored conferences to discuss the missions'

² Ibid.

³ Ibid

⁴ "Intellectual Property Needs and Expectations of Traditional Knowledge Holders", *WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-9)*, Geneva (2001), 5.

⁵ The fact finding missions were carried out in the following areas: South Pacific (Australia, New Zealand, Fiji and Papua New Guinea), South Asia (Bangladesh, India and Sri Lanka), Southern and Eastern Africa (Uganda,

findings in respect of the linkages between intellectual property and traditional knowledge and their implications, three primary issues which were of universal concern to the countries involved in the studies emerged, namely:

- the protection of traditional knowledge, innovations and creativity, whether or not associated with those resources; and
- the protection of expressions of folklore, including handicrafts;
- access to genetic resources and benefit-sharing.⁶

7.2 Traditional Knowledge, Folklore and Cultural Heritage

Traditional knowledge, folklore and cultural heritage are complex, multifaceted concepts that encompass many elements. They are characterized by the fact that, generally, they are not produced systematically, but in accordance with the individual or collective creators' responses to and interaction with their cultural environment. Being representative of cultural values, they may constitute elements that integrate a vast and mostly coherent complex of beliefs and knowledge. More than likely they will be held collectively, being vested in the community rather than in individuals (although individuals as leaders or elders may hold them in trust). Furthermore, most traditional knowledge, folklore and cultural heritage are transmitted orally

United Republic of Tanzania, Namibia and South Africa), North America (United States of America and Canada), West Africa (Nigeria, Ghana, Mali and Senegal), **the Arab countries (Oman, Qatar, Egypt, and Tunisia)**, South America (Peru and Bolivia), Central America (Guatemala and Panama) and the Caribbean (Trinidad and Tobago, Guyana and Jamaica); the reports of the missions are available at www.wipo.int/globalissues/tk/report/final, last accessed 31 December 2005.

⁶ WIPO International Bureau, above n 1, 2.

from generation to generation, and thus remain largely undocumented. They are also dynamic in the sense that they are current, possess everyday relevance, and are subject to processes of constant evolution. Accordingly, existing intellectual property mechanisms, which are intended to function in a trade-related, private protectionist context, do not fully respond to the essential nature of traditional knowledge, folklore and cultural heritage.

Whilst a number of descriptions for traditional knowledge, folklore and cultural heritage have been put forward, there are no widely acceptable definitions.⁷ This is as much a reflection of the broad scope of what may be encompassed within their bounds, as well uncertainty what might constitute “protection” and its purpose. It has been suggested, for example, that the term “folklore” is quite inappropriate in this context since it presumes matter of a historical nature only, and suggests that “expressions of culture”, being current self-expressions of living functional traditions, should be used instead.⁸ What seems a common consensus is that “protection” in the narrow intellectual property sense does not address the needs or scope of these concepts, even allowing for differences in their possible definitions.

Many developing countries, holders of traditional knowledge, expressions of culture and cultural heritage, and non-governmental and civil society organisations are advocating for greater protection to be made available. Within both WTO and WIPO extended debate has taken place on the nature of the appropriate system to protect traditional knowledge, expressions of culture

⁷ WIPO currently uses the term “traditional knowledge” to refer to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. “Tradition-based” refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and are constantly evolving in response to a changing environment.

⁸ Kamal Puri, “How Intellectual Property Rights Could Work Better for Developing Countries and Poor People” Conference Transcript, Session 3: Traditional Knowledge and Folklore, UK Commission on Intellectual Property Rights (2002), 2.

and cultural heritage within the international sphere. Central to the debate is the question of whether they can be protected under the current multilateral intellectual property system, and, if not, what *sui generis* system should be adopted.

Some commentators argue that the very attributes of traditional knowledge prevent it from being included into the traditional IP system.⁹ Traditional knowledge seeking protection under conventional copyright provisions runs afoul of the requirement for identification and attribution. In the area of patent protection, traditional knowledge does not meet the patentability requirements of novelty, inventive step, and industrial application. Some countries have decided that the existing intellectual property framework is inadequate to protect traditional knowledge, and are pursuing their own *sui generis* systems of protection.¹⁰ However, the calls for the creation of an international *sui generis* system are increasing.

The challenge has been, and continues to be, the most appropriate and efficient means by which to protect in the international context, instead of just local laws constructed to suit local circumstances. Since the local populations or their representatives often act as both custodians and exponents of the traditional knowledge and expressions of culture, they do not constitute the main threat to the preservation of the traditional knowledge and culture. The main threat comes from outside the community.

The above-mentioned WIPO fact-finding missions on traditional knowledge and the subsequent consultative fora devised a number of observations and recommendations which were addressed

⁹ Ibid. 2; see also Report of the UK Commission on Intellectual Property Rights, (2002), 78-9.

¹⁰ See Kamal Puri, "Is Traditional Knowledge or cultural knowledge a form of Intellectual Property?" *Oxford Electronic Journal of Intellectual Property Rights*, 18 January 2000, powerpoints 8-9; at www.oiprc.ox.ac.uk/EJWP0100.pdf; last accessed 30 December 2005; see also Surinder Verma, "Protecting Intellectual Property: Is a Sui Generis System an Answer?" (2004), 7 *Journal of World Intellectual Property*, 770.

to the states themselves, to the international community, and to the international organisations with an interest in the protection of traditional knowledge. The missions and consultative fora recommended that WIPO, UNESCO and the other international organizations should work towards the creation of a *sui generis* international convention for the protection of expressions folklore. Most of the fora also commented on the WIPO model law of 1982 as a relevant basis for national laws on the protection of traditional knowledge.¹¹

The mission which examined traditional knowledge in Arab countries and the subsequent consultative forum made a number of pertinent observations and recommendations. They observed that:¹²

- Arab countries are rich with one of the most precious cultural and civilizational heritage in the world, which constitutes an important pillar for human civilization and an integral part of the world patrimony;
- Arab folklore (Arab popular heritage) is a strong means of bringing together the Arab peoples. However, this common aspect does not exclude nor diminish the importance of the local variations specific to each people;
- Arab folklore (Arab popular heritage) and traditional knowledge are subject to various dangers, including negligence, disappearance, piracy, mutilation and illegal exploitation; therefore, there is a need for the provision of legal protection at national, regional and international levels;
- currently, there is no legal framework available for the protection of expressions of Arab folklore at either national and international levels.

¹¹ Namely, the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore from Illegal Exploitation and Other Prejudicial Actions, 1982.

¹² WIPO, above n 4, Part III, Annex 5, 83-4.

