Traditional Knowledge and Intellectual Property

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INTRODUCTION

During the past two decades, the search for an appropriate mechanism to protect 'traditional knowledge' has been a subject of discourse among international law and policies agents, actors of global trade, academia, environmentalists, and the indigenous-rights activists. Within the framework of international law, the discussion went into two main directions: protection of knowledge products, and protection of rights over knowledge resources as a part of a movement to preserve vitality and diversity of indigenous cultures.

Western intellectual property (IP) has been a prime mechanism for the development of legal solutions for the protection of traditional knowledge. As pertinent to the issues of indigenous peoples, the concept, the legal instrument, and the goal of intellectual property are discussed today in relation to human rights, preservation of biodiversity, indigenous cultures, religious freedom, indigenous survival, and innovation in law.

BACKGROUND

Intellectual Property: Conceptual Framework

The World Intellectual Property Organization (WIPO) refers to intellectual property as legal rights resulting from intellectual activity (WIPO, 2004). The concept is defined further by the Convention Establishing the World Property Organization (1967) and includes rights relating to artistic, literary, and scientific works; inventions; industrial designs; performances, broadcasts, and sound recordings; trademarks; scientific discoveries; protection against unfair competition; and other rights resulting from intellectual activities on the scientific, artistic, literary, and industrial levels.

The essence of the IP concept reflects a necessity of creation of the state-sponsored monopoly of ideas. The next main reason for existence of intellectual property is economic: the state guarantees an inventor profit by providing her or him with the right of ownership to stimulate, as believed, innovation/development. To answer a need to regulate both social and economic aspects of IP, most legal structures work under utilitarian perspective, where intellectual property provides a balance between the need for knowledge invention and its dissemination and open access (Maskus, 2000; Boyle, 1997).

The main categories of intellectual property are *copyrights (and related rights)* and *industrial property.*

The development of rights of ownership over knowledge stems primarily from eighteenth-century European philosophy about social progress, and is directly linked to the rise of industrial capitalism and the nation state. The most prominent historical evidence of this process, considered to be the genesis of the current copyright law, is the 1709 *Stature of Ann,* generally served to benefit publishers in early eighteenth-century England (Woodmansee & Jaszi, 1994). The major forces which allowed development of the IP concept are those that influenced major shifts in Western culture and philosophical thought:

- **Mid-1400s–18th Century—**The Print Revolution: A consequent need to consign ownership over published works -> development of a concept of authorship. **Consequence:** Author is an *original creator,* rather than a producer of a work -> a work of mind/creativity is a product and property of its creator.
- **18th–20th Centuries:** Development of science and growth of its influence in the society -> reductionism is a leading mode to evaluate knowledge. **Consequence:** Disappearance of book culture.

- **Mid-20th Century–Today:** Invention of information technology. **Consequence:** Knowledge as information; information as a central resource of global economy.

The two treaties that establish the base of international IP law are the *Berne Convention for the Protection of Literary and Artistic Works* (adopted in 1888) and the *Paris Convention for the Protection of Industrial Property* (1883). The third most significant document is considered to be the *TRIP* agreement (1986), which reflects an international effort to strengthen and upgrade global norms for the IP protection today.[1] Under the TRIP agreement the functional areas of the IP under protection include copyrights, trademarks, and geographic indications, patents, integrated circuits, and trade secrets.

The international forum for discourses toward development of IP as related to the issues of traditional knowledge on a global level is the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), created in 2000.

Traditional Knowledge: Conceptual Framework

The concept of traditional knowledge (also referred to as indigenous, native, and aboriginal knowledge) in respect to developments of legal structures to define rights over knowledge of indigenous communities stems primarily from the definition of "folklore," first used in the 1980s, and developed by WIPO and UNESCO.[2] "Folklore" referred to art forms, created by individuals or groups, tradition-based, group-oriented, which adequately expressed cultural and social identity and reflected the expectations of a community (expressed as language, literature, rituals, dance and music, mythology, crafts, architecture, and other art forms). The term later implied inferiority of indigenous cultures (Carpenter, 2004). The further developments resulted in the broader definition and a term, *traditional knowledge.*

Today traditional knowledge is described as a holistic concept, which embodies expressions of culture, folklore, and science. It is developed, sustained, and transmitted between generations, and presents means for defining the cultural/spiritual identity of a group or of a person. The concept includes the knowledge derived from plants and animals to allow norms of the copyright law, patent law, and biodiversity rights standards to be applied to description and evaluation of traditional knowledge expressions and products (Daes, 1993; Blakeney, 1999; Simpson, 1997; UNPFII, 2005; WIPO, 2005).

In parallel to the developments in the spheres of international law and human rights, attempts to define distinct characteristics of traditional knowledge came from academia.[3] Efforts to describe the essence of knowledge of indigenous peoples on the base of differences within the accepted Western modes of scientific knowledge ended with the notion of absence of any universal criteria to be used to distinguish both entities (Agrawal, 2002).

Finally, from the perspectives of indigenous scholars, traditional knowledge appeared in professional literature as "living knowledge" (Urion, 1999) and consisted of physical, emotional, mental, and spiritual components. Since it comes from the Creator, it is understood as sacred; since it provides means for living and connects all living things, it is viewed as an expression of life itself. Contrary to Western scientific paradigms of knowledge evaluation, which validate certain types of data and exclude others, indigenous scholars see all experiences and all data to be relevant to all things, viewing indigenous knowledge systems as an interrelated net between all forms of existence (Stewart-Harawira, 2005).

Awareness that traditional knowledge constitutes and safeguards the foundations of indigenous cultures influences the global movement to seek protection of knowledge of indigenous communities as a part of the world heritage. A major part of this movement—the struggle of indigenous peoples to protect their cultures—is centered around concerns over misappropriation of traditional knowledge, the preservation of biodiversity, use and endorsement of knowledge for development, and outside pressures exercised on marginalized groups (Commission on Intellectual Property Rights, 2002).

DISCUSSION

The Western intellectual property system—the prime instrument for protection of rights over knowledge in the global economy—has been a conceptual framework for development of a mechanism to protect traditional knowledge.[4]