

Study unit 1

Introduction

Overview

In this study unit you will be introduced to the concepts ‘traditional knowledge’, ‘indigenous knowledge’, and ‘folklore’. You will also be introduced to the customary protection of traditional knowledge, and the problems faced by the holders of traditional knowledge. You will also briefly explore the activities of WIPO in this context.

Learning outcomes

- After completion of this study unit, you should be able to —
- ❑ appreciate the meaning and content of the concepts ‘traditional knowledge’, ‘indigenous knowledge’, and ‘folklore’
 - ❑ understand the customary protection of traditional knowledge and the problems relating to it
 - ❑ understand the problems faced by the holders of traditional knowledge
 - ❑ acknowledge the attempts at international level to protect traditional knowledge

Setting the scene

- ❑ In Vembur village, Tamil Nadu, India, a man by the name of Thiru Palchamy Gounder has been curing animals since he was sixteen. Developing his trade under the guidance of his guru, Kandavilswamy, this traditional veterinarian has gained fame within his region for being able to cure a variety of bovine ailments. Using medications developed from local plants, he is unable to treat common maladies such as fractures, abscesses, broken horns, swollen tongues, swollen faces, and headaches. The treatments can last from two hours to a months, but the continued demand for these services provides little doubt as to their efficacy.
- ❑ The United Nations Food and Agriculture Organization (FAO) has documented that women cultivators of the Aguaranu Jivaro community in northern Perus identify and select the cassava cultivals on the basis of

characteristics that show the greatest phenotypic variation (*The State of the World's Plant Genetic Resources for Food and Agriculture*) (1997)). Panicle harvesting by Mende farmers in Sierra Leone has allowed them to select rice varieties of short, medium and long duration. The FAO Report also found that differences between Cuban and Mexican maize are linked to maize being prepared and eaten in different ways in the two countries, which has led farmers to select varieties for different properties in the two countries.

Discussion

Introduction

emerging issues

Intellectual property issues relating to genetic resources, traditional knowledge, and folklore have emerged in a wide range of policy areas, such as food and agriculture, biological diversity and the environment, human rights, cultural policy, trade, and economic development. For example:

- ❑ intellectual property rights have been granted for uses of plants that form part of traditional knowledge systems in the agricultural, health, and environmental fields; and
- ❑ traditional designs, songs, and dances have been used by the entertainment and fashion industries to create works that are protected by intellectual property.

policy objectives

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, cultural diversity, and so on. These linkages have significant technical, administrative, and policy implications for the intellectual property system.

The concept 'traditional knowledge'

term 'traditional knowledge'

The term 'traditional knowledge' refers 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.

term 'tradition based'

The adjectival phrase 'tradition based', in turn, refers to knowledge systems, creations, innovations, and cultural expressions that —

- ❑ 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.

not limited

Traditional knowledge is not limited to any specific field of technology or the arts. The entire field of human endeavour is open to inquiry by traditional methods and the full breadth of human expression is available for its transmission.

aesthetic aspect

Traditional knowledge systems in the fields of medicine and healing, biodiversity conservation, the environment, and food and agriculture are well known. Other key components of traditional knowledge are the music, dance, and 'artisanat' (the designs, textiles, plastic arts, crafts, and so on) of a people. Although there are creations that may be done purely to satisfy the aesthetic will of the artist, many such creations are symbolic of a deeper order or belief system. When a traditional singer performs a song, the cadence, melody, and form all follow rules that have been maintained for generations. So a song's performance entertains and educates the current audience. But it also unites the current population with the past.

belief system

community effort

Understanding the interplay between practical knowledge, social history, art, and spiritual or religious beliefs provides a valuable foundation for developing an understanding for the people that hold this knowledge. While modern arts and sciences often place individual accomplishment over community development, traditional knowledge systems celebrate the community's cooperative effort.

symbolic or religious meaning

Intertwined within practical solutions, traditional knowledge often transmits the history, beliefs, aesthetics, ethics, and traditions of a particular people. For example, plants used for medicinal purposes also often have symbolic value for the community. Many sculptures, paintings, and crafts are created according to strict rituals and traditions because of

their profound symbolic and/or religious meaning.

response to environment

represents cultural values

transmitted orally

So the concept 'traditional knowledge' has many facets and encompasses several components. What characterizes traditional knowledge is the fact that, generally, it is not produced systematically, but in accordance with the individual creator's, or the collective creators' responses to their cultural environment and their interaction with it. For this reason, existing intellectual property mechanisms, which are intended to function in a trade-related context, may not fully respond to the essentially cultural nature of traditional knowledge. Also, to the extent that traditional knowledge represents cultural values it is generally held collectively. This results from the fact that what can be sometimes seen as an isolated piece of literature (like a poem), or an isolated technical invention (such as the use of a plant resource to heal wounds) is actually an object that integrates a vast and mostly coherent complex of beliefs and knowledge, the control of which is not in the hands of individuals who use isolated items of knowledge, but which vests in the community or collective. Furthermore, most traditional knowledge is transmitted orally from generation to generation, and so remains largely undocumented.

constant evolution

It is important to note that traditional knowledge is 'traditional' only to the extent that its creation and use are part of the cultural traditions of communities. So 'traditional' does not necessarily connote that the knowledge is ancient. 'Traditional' knowledge is created every day. It evolves as a response of individuals and communities to the challenges posed by their social environment. In its use, traditional knowledge is also contemporary knowledge. This aspect further justifies the need for legal protection.

developing countries

The protection of traditional knowledge is important for communities in all countries, especially perhaps in developing countries:

- national cohesion*
- ☐ Traditional knowledge plays an important role in the economic and social organization of those countries. So placing value on such knowledge is a viable means of promoting a sense of national cohesion and identity.
- biodiversity*
- ☐ Developing are engaged in implementing two international agreements — the Convention on Biological Diversity (CBD) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) — that may affect the manner in which

biodiversity rich

participate in global markets

knowledge associated with the use of genetic resources (whether 'traditional' or not) is protected and disseminated. As an outcome of the Uruguay negotiating round, many developing countries have undertaken to establish high standards of intellectual property protection as a means of promoting free trade. One may argue that biodiversity, and the traditional knowledge associated with using it in a sustainable manner, are a comparative advantage of those countries that are rich in biodiversity, which enables them to participate more effectively in global markets and so to rise above their current levels of poverty and deprivation.

sustainable development

In the Plan of Implementation, adopted at the World Summit on Sustainable Development in 2002, the participating countries '[s]ubject to national legislation, recognize the rights of local and indigenous communities who are holders of traditional knowledge, innovations and practices, and, with the approval and involvement of the holders of such knowledge, innovations and practices, develop and implement benefit-sharing mechanisms on mutually agreed terms for the use of such knowledge, innovations and practices' (para 42(j)).

respect for contributions

But intellectual property is not only about property. It is also about recognition of identifiable, human creators and respect for their contributions. From this perspective, intellectual property has a very important role to play in protecting the dignity of the holders of traditional knowledge. By conferring property rights in relation to such knowledge, those holders enabled, to a certain extent, to control its use by others.

'Indigenous' and 'traditional' knowledge

indigenous peoples

The distinction between 'indigenous knowledge' and 'traditional knowledge' is subtle. In a nutshell, 'indigenous knowledge' connotes the knowledge held by 'indigenous peoples' (of which there is no universally accepted formal definition). Although indigenous knowledge is generally considered to be traditional knowledge, not all traditional knowledge is indigenous knowledge. Since indigenous knowledge is otherwise similar to traditional knowledge in its transmission, scope, and diversity, it is appropriate to consider indigenous knowledge a subset of traditional knowledge.

type of knowledge

The value of using the term ‘indigenous knowledge’ arises when one wants to describe the type of knowledge and the people who hold it. For example, information passed down by traditional means amongst the Gagudju of Australia may be referred to as ‘indigenous knowledge’ or ‘traditional knowledge’. But the information passed down by early North American colonists through traditional means would be ‘traditional knowledge’ but not ‘indigenous knowledge’.

Traditional knowledge and folklore

holders of knowledge

different approaches

broadest approach

*not necessarily created by
indigenous peoples*

If ‘traditional knowledge’ can be distinguished from ‘indigenous knowledge’ on the grounds of the identification of their respective creators and holders, what differentiates ‘traditional knowledge’ and ‘folklore’ may be even subtler. “Folklore”, indeed, has been characterized by many different approaches. The broadest approach has been to see folklore as a set of literary, artistic, religious, scientific, technological and other traditions and productions that are transmitted from one generation to another. This expansive approach, which has been adopted in some laws, includes literary works of any kind, oral or written, such as tales, legends, proverbs and myths. It includes styles and artistic productions, such as music and dance, religious traditions and ceremonies, scientific and technical knowledge. Like traditional knowledge, folklore is not necessarily created by indigenous peoples — its creators and holders are all the individuals who form a people, whether indigenous or not.

copyright perspective

protection of ideas

misappropriation

The reason for the distinction between the two terms is that folklore has been almost invariably approached from a copyright perspective, which may be relevant to protect some aspects of its subject matter — literary, musical, and artistic works. But the technological and methodological content of folklore (inventions, crafts, designs, carvings) may not be adequately protected if the holders are given the right to prevent others only from reproducing their creations or disseminating them to the public through performance or broadcasting. Technological content consists of ideas, and ideas are protected by preventing others from using them. So the mechanisms of industrial property protection (such as patents, trademarks and industrial designs) are likewise important tools to protect technical ideas from being misappropriated by unauthorized third parties. This explains why the term ‘traditional knowledge’, which is not linked to a specific area of intellectual property, may be broader and

more inclusive than ‘folklore’.

Customary protection of traditional knowledge

method of regulation

A related aspect of traditional knowledge is the method of its regulation established within the community. The systems that govern the use and transmission of traditional knowledge within a community, which may bear remarkable similarity to formal intellectual property systems, may be referred to as customary (or ‘informal’) regimes.

informal regime

Essentially, an informal regime is a system of rules, rights, and obligations that are generally not written down, but which achieve standing by the community’s consensus to be bound by those rules. Customary law results from the accretion of repeated practices. By way of constant repetition, it is assumed that those practices have been accepted by the community. These informal regimes are often monitored and enforced by elders, specialized experts, and religious leaders within the community.

customary law

representation in litigation

These community leaders will generally settle disputes, determine which artisans are eligible to practice which arts, and preserve the history and culture of the people. In modern times, these leaders have represented their communities’ views in national courts, such as in certain Australian copyright cases (such as *Milpurrurru v Indofurn Pty Ltd* ((1995) AIPC 91). In this case, Aboriginal law and custom were taken into account in fixing the amount of damages. But such a case may be an exception, since customary law is frequently enforceable only within communities, and customary practices will not generally be recognized as binding rules by authorities and courts outside the relevant communities. When the economic interests of industries and consumers, on the one hand, and holders of traditional knowledge, on the other hand, come into contact (as with biopiracy, for example), the existing legal mechanisms may not be adequate to protect either side — existing intellectual property mechanisms do not cover informal sets of non-systematic, undocumented knowledge, and customary norms do not apply to the behaviour of individuals and corporations outside the traditional communities. A major task, then, will be to find a common denominator.

not adequate protection

Problems confronting holders of traditional knowledge

reluctance to learn old ways

Holders of traditional knowledge face a variety of difficulties. A serious problem is the reluctance of the younger generation to learn the 'old ways'. The rejection of traditions by the young and the encroachment of modern lifestyles often result in the decline of traditional knowledge and practices. Either through acculturation or diffusion, many traditional practices are lost.

absence of willing heirs

So a primary need is to document and preserve the knowledge that is held by elders and communities throughout the world. The absence of willing heirs to this knowledge has resulted in the precarious situation where the death of a holder of traditional knowledge can result in the demise of an entire tradition and knowledge system.

lack of respect and appreciation

Another difficulty facing holders of traditional knowledge is the lack of respect and appreciation for such knowledge. The true understanding of the value of traditional knowledge is often overlooked within the modern reductionist approach to science. Unless information is developed under aseptic clinical conditions by scientific methods, it is sometimes viewed as inferior. For example, when a traditional healer provides a mixture of herbs to cure an illness, the healer may not describe the effects on the body as molecular interactions in the terms of modern biochemistry, but the healer bases his 'prescription' upon generations of 'clinical' trials undertaken by healers before him.

prejudice

Sometimes modern society has displayed a prejudice against traditional knowledge for not conforming to accepted methods of learning. Some of the vernacular references to traditional knowledge carry negative connotations, such as denigrating traditional medicine as 'primitive' and its practitioners as 'quacks'.

value of traditional knowledge

But after even a cursory inquiry into the field, one is soon aware of the true vitality and value of this knowledge. Contemporary examples of this recognition are evident in fields ranging from music to medicine, biology, and ecology. For example, music producers have sampled traditional music in chart topping hits, and native swidden farming in South America has been recognized as an ecologically sustainable form of agriculture.

Yet another problem confronting holders of traditional

commercial exploitation

knowledge is the commercial exploitation of their knowledge by others. This raises the issue of the legal protection of traditional knowledge. Cases involving artistic designs (such as the 'Morning Star Pole' in Australia) and natural products (such as oil from the neem tree in large parts of Asia, Africa, and Latin America) all bear evidence to the value of traditional knowledge in the modern global economy.

one-sided commercial transactions

Unfortunately, many of the commercial interactions between traditional communities and private corporations can result in one-sided deals from which legal uncertainty arises for both parties. A lack of experience with existing formal systems, economic dependency, lack of a unified voice, and, in many cases, a lack of clear national policy concerning the utilization of traditional knowledge, results in these peoples being placed at a decided disadvantage. At the same time, the lack of clear rules protecting traditional knowledge creates risks for business interests, which prefer closing deals under well-established, reliable, and enforceable rules.

WIPO and the Protection of Traditional Knowledge

fact-finding missions

As the United Nations specialized agency responsible for the promotion of intellectual property, WIPO undertook in 1998 and 1999 nine fact-finding missions (FFMs) '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.' 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.' A full report of the FFMs can be found at WIPO's website (www.wipo.int/globalissues/tk/report/final).

WIPO has also been requested by its Member States to provide a forum where they may discuss the intellectual property implications of those linkages that were raised but not fully addressed in other fora.

new committee

In that context, in 2000 the WIPO General Assembly established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. During the informal consultations that led to the establishment of the Committee, the Member States identified

issues for discussion

- three primary themes which they wished to discuss — intellectual property issues that arise in the context of
- ☐ access to genetic resources and benefit-sharing,
 - ☐ the protection of traditional knowledge, innovations, and creativity, and
 - ☐ the protection of expressions of folklore, including handicrafts.

work programme

The current work of WIPO include —

- ☐ the development of information materials on options under the existing intellectual property system for the protection of traditional knowledge;
- ☐ practical, national information and training workshops on the intellectual property system and the protection of traditional knowledge;
- ☐ intellectual property information, training, and standards for the documentation of traditional knowledge;
- ☐ practical studies of actual examples in which traditional knowledge protection has been sought under the intellectual property system;
- ☐ feasibility studies on the applicability of customary laws to traditional knowledge; and
- ☐ a pilot project on collective acquisition, management, and enforcement of intellectual property rights in traditional knowledge

sustainable development

In the Plan of Implementation, adopted in 2002 at the World Summit on Sustainable Development, the participating countries '[e]ncourage [the] successful conclusion of existing processes under the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore...' (para 42(p)).

Study map

In Study Unit 2 we shall discuss certain attempts to protect expressions of folklore. In July 2001, the Working Group on Intellectual Property Protection, Trade, and Pro-Poor Cultural Industries of the External Advisory Committee on Empowerment, Culture and Civic Engagement of the World Bank recommended that the following four cultural industries are the most likely to benefit the poor:

- ☐ crafts,
- ☐ community-based tourism,
- ☐ ethnobotanical knowledge, and
- ☐ music.

Community-based tourism does not impact on intellectual property rights, and so does not warrant any further discussion here. But in Study Units 3 and 4 we shall present case studies of the protection of traditional knowledge in the contexts of the crafts industry and ethnobotanical knowledge, respectively. We shall illustrate the application of existing intellectual property rights and mechanisms in these contexts, and the special challenges posed to these rights. In Study Unit 5 we shall discuss the legal protection of biodiversity and genetic resources.

Conclusion

You should now be able to appreciate the meaning and content of the concepts 'traditional knowledge', 'indigenous knowledge', and 'folklore'; understand the customary protection of traditional knowledge and the problems relating to it; understand the problems faced by the holders of traditional knowledge; and acknowledge the attempts at international level to protect traditional knowledge.