

Discussion paper

Protecting traditional knowledge

Commission on Intellectual and Industrial Property, 3 December 2001

I. Introduction

Increasingly the world is connected: by information, by legislation, by trade. This leads to pressures for conformity. Intellectual property is increasingly important to many aspects of life and its scope has been extending. Patents are applied in more spheres, such as molecular biology and software: special rights adapted to specific needs - such as plant variety, chip design, and database rights - have been devised and taken up by certain countries and regions.

Not all appreciate the merit of extending intellectual property rights. For some (particularly those who see in globalisation more dangers than benefits) intellectual property is another tool in the hands of rich nations and organisations giving them more unjustified power to exploit the poor. A particular grievance is an imbalance of rights. The new products and technologies developed by multinational companies can be protected by patents and other intellectual property rights, while valuable 'traditional knowledge'⁽¹⁾, accumulated in indigenous communities over generations, is generally unprotected by modern legal systems, and may be exploited freely by all. This perceived inequity has led to vociferous calls for the protection of 'traditional knowledge', to provide a counterbalance to the rights of companies in new technology. Increasingly, such calls are given credence and have built up political momentum, to the point at which governments may find it necessary to act.

ICC supports initiatives to explore options for the protection of traditional knowledge, whether within the existing intellectual property framework or through the development of new types of rights. While there are numerous difficulties with the concept of protection for traditional knowledge, these are not such as to rule out such protection a priori. The advantages and difficulties require further discussion and debate. Some consensus may result. The debate itself, conducted rationally, can spread light, lower tensions and reduce misconceptions on all sides.

ICC wishes to take an active part in this debate. It will contribute the experience and perspectives of businesses, with the aim that any system put in place should be practical and promote useful objectives.

II. Benefits from protection for traditional knowledge

Protection of traditional knowledge could give to custodians of such knowledge some recognition for the contribution of the knowledge to new developments, and some control over how it is used. Benefits that could flow from this include:

1. Removal (or reduction) of a perceived injustice;
2. Prevention of use of knowledge in a way objectionable to the originators (eg publication of details of sacred rites);
3. Greater recognition of the value of traditional knowledge, and respect for those who have preserved it;
4. More resources for the custodians, raising standards of living and degrees of development, in particular in the developing world;

¹ The concept of traditional knowledge is unclear but is generally considered to cover the knowledge, innovations, creations and practices of indigenous and local communities (CBD Articles 8(j) and 18) These can be in the fields of agriculture, science, technology, ecology, medicine, and include expressions of folklore, names, geographical indications and symbols and movable cultural property (World Intellectual Property Organization Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999))

5. Wider application of useful traditional knowledge throughout the world;
6. Preservation of traditional lifestyles (as promoted by article 8j of the Convention on Biological Diversity)
7. Protection or preservation of the environment.

No doubt there are others, and views will certainly differ widely about their respective importance or relevance. Discussion is needed to explore possible areas of consensus.

Currently, two main options for the protection of traditional knowledge are being discussed: the application of existing intellectual property rights to traditional knowledge, and the possible creation of new rights adapted to the specific characteristics of traditional knowledge. Proposals have also been made for current intellectual property systems to recognise traditional knowledge more effectively.

III. Options for the protection of traditional knowledge

1) The application of existing intellectual property rights to traditional knowledge

ICC supports initiatives to help holders of indigenous knowledge use the existing intellectual property system, including through education and studies of ways in which traditional knowledge can be protected by existing rights. These include practically all types of intellectual property rights, to the extent that the criteria for protection are fulfilled. ICC supports efforts to encourage wider use of the intellectual property system, including by traditional knowledge holders, thereby creating a broader constituency of innovators benefiting from the system. However, it cautions strongly against changing long-established criteria for existing intellectual property rights without thorough analysis of the consequences.

2) The possible creation of new rights for traditional knowledge

a) What sort of rights?

The protection (if any) to be awarded to traditional knowledge will depend on two factors: the objectives sought to be achieved, and the relative importance assigned to them; and what is practically and politically possible. To illustrate this: if the main object is advantage 2 above (prevention of use of knowledge in a way objectionable to the originators), traditional knowledge could be defined relatively narrowly, limiting it to knowledge that has sacred associations. On the other hand, if advantage 4 (more resources for the custodians, raising standards of living and degrees of development, in particular in the developing world) is the priority, what constitutes traditional knowledge will need to be defined widely, so as to maximise benefits to poor countries: but the traditional knowledge of developed countries could be excluded completely.

In any legal scheme for the protection of traditional knowledge, a number of difficult choices need to be made. These include:

- **What kinds of knowledge** should be protected? This is perhaps the single most important issue in traditional knowledge protection. To reply 'all kinds' is impracticably vague. No existing legal system protects knowledge as such, regardless of the form it takes or the use to which it is put. Different aspects of different kinds of knowledge are protected (for example, commercial use of technical processes are protected by patents, literary works by copyright, databases by sui generis protection, etc). Perhaps confining traditional knowledge protection to a specific narrow scope, such as 'medicine, food and agriculture', might be a good start. While this would not satisfy all aspirations, introducing specific protection in priority areas would be a useful opportunity to test the concept. If any protection system is to be workable, it is

essential that the subject matter of that protection can be clearly identified.

Presumably, all protected knowledge will need to be documented in some way.

- **What uses of such knowledge** should be controlled (publication, possession, or only commercial use?)
- **What rights will traditional knowledge give?** (rights to exclude or even to suppress, or just to compensation, or to no more than an acknowledgement of origin?) Will derivation (copying) be a condition of infringement?
- **What conditions will apply to it?** (novelty, as in patents? uniqueness? anything else?)
- **Who will own it?** (an individual, family, clan, tribe, "indigenous people", or a nation?) How will they establish that they own it? How will third parties become aware of their obligations?
- **Where will the rights have effect?** Will they be valid world-wide or have territorial limitations? Who will enforce them and how? Will they require registration? Most of those who might benefit from traditional knowledge rights have no money even for a simple registration process, let alone litigation.
- **How long will the rights last?** - for a limited term (starting when?) - or indefinitely? Would they be retrospective, so that information already in the public domain could become subject to controls?

Clearly there are innumerable possible combinations of conditions, leading to an unlimited variety of possible schemes. While some conditions cause more problems than others, each scheme would need to be judged as a whole. An inclusive definition of traditional knowledge (all knowledge whatever) might for example be balanced by a weak right - only to be referred to as the originator of the knowledge, say. For any scheme there will be a difficult decision as whether its benefits to society as a whole outweigh its drawbacks for specific sectors.

b) Issues and difficulties to be resolved before introducing new rights for protecting traditional knowledge

There are several difficult issues which need to be addressed when examining possible new systems to protect traditional knowledge. These would depend critically on the specific type of protection that was put in place. However, they could include:

1. Restrictions on existing freedoms of action (always difficult to justify). In particular, restrictions on publication of information ('press freedom', 'freedom of speech'), other than in very specific and carefully justified instances, are considered unethical by many groups.
2. Deciding what is to be protected.
3. Principles for resolving conflicts between different claimants for the same traditional knowledge.
4. The risk of introducing new injustices (unless a clear justification can be found for distinguishing 'traditional' from other forms of knowledge that remain free).
5. The risk of impeding dissemination and use of valuable knowledge, perhaps making many worse off than they otherwise would be.
6. Constructing a practical system accessible to users - rights not too complex or expensive to obtain or enforce.

ICC also believes it essential that any new system for protecting traditional knowledge be compatible with existing intellectual property rights, in particular patents.

The first reason for this is that industry values the patent system as a cornerstone of technical progress and economic growth. It has been tested over centuries. As noted in this paper, there

are many doubts and difficulties about introducing a special system for traditional knowledge protection. While these may well prove, in many cases, to be unfounded, there are great risks in making major modifications to a tried and tested system in order to introduce a new right of unproven value.

A second reason is that there is no need for incompatible systems. There is a widespread belief that different kinds of intellectual property rights cannot apply to the same subject-matter, because they may conflict. Experience however shows that this is false. Several different kinds of intellectual property rights may apply to the same object - such as a soft-drinks bottle, the label of which is copyright, the shape of which is a registered design, the recipe for the contents being a trade secret, and the cap being patented. The same bottle (with a different label) could be used to sell a health drink prepared to a recipe protected by a traditional knowledge right. Equally while traditional knowledge is, under most patent systems, 'prior art' that cannot be protected, this is no obstacle to protecting it under a new specific traditional knowledge right.

IV. Proposals for current intellectual property systems to recognise traditional knowledge more effectively

The definition of 'prior art' is one critical point of contact between traditional knowledge systems and the modern intellectual property rights system. Whether an invention is 'new' or 'novel' is evaluated in the light of the 'prior art'. ICC supports amendments to national laws where necessary to make it clear that traditional knowledge is effective as prior art. ICC also supports initiatives to enlarge databases of prior art to include traditional knowledge, thus reducing the risk of existing traditional knowledge being subject to new intellectual property rights.

Traditional knowledge is also linked to the issues of access to genetic resources and benefit sharing. It has been proposed that, to support the provisions of the Convention on Biological Diversity relating to access and benefit sharing, the indication of the origin of plant material and demonstration of Prior Informed Consent (PIC) for its use should be mandatory in applications for patents and *sui generis* rights to protect plant varieties.

Many companies and industries already provide information about origin voluntarily in patent specifications. However, making this, or PIC, a mandatory requirement would create serious difficulties in practice. It is often not clear where a biological sample originated - this may not be the same as where the inventor obtained it. If it is not clear where it originated, it is not clear from whom PIC should be sought. Many countries do not have arrangements in place for granting PIC - and those who do may not act promptly, resulting in loss of intellectual property rights.

The intellectual property system finely balances the reward and encouragement of innovation with the limitations this imposes on other members of society. The well-established criteria for granting, for instance, patents and plant variety rights have been chosen and refined over the years to ensure this balance as well as legal certainty for both innovators and the rest of society. The introduction of mandatory new criteria which are not related to the rationale of the intellectual property system would upset this fine balance and create legal uncertainty.

V. Conclusion

ICC desires to participate actively in the traditional knowledge rights debate, with an open mind, to help society decide what purposes such rights should promote, and what practical schemes could promote such purposes. Business's experience of intellectual property will enable it to point out the likely effects of particular choices, and provide 'reality checks'.

ICC has set out above what it sees as some of the main issues which need to be addressed in this debate. In particular, it would stress how important it is that any system for protecting traditional knowledge be compatible with existing intellectual property rights, in particular patents. There is no fundamental reason why any new right should be incompatible with existing rights. As explained previously, incompatibility will engender significant problems.

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