

New Forms of Sui Generis Protection

Graham Dutfield. Queen Mary Intellectual Property Research Institute, Queen Mary University of London. Email: g.m.dutfield@qmul.ac.uk

Some Initial Reflections

Patents, copyrights and other currently existing intellectual property formulations are inadequate in providing positive protection for TK, and in some ways also make defensive protection more difficult. This does not mean their use should never be considered, but that their limitations are fairly severe and we might as well accept that as given. Apart from the basic conceptual and practical challenges in applying western formulations of intellectual property to TK, for many traditional societies the incompatibilities go very deep indeed.

Consider the views of Brazilian shamans from 20 indigenous tribes that met in São Luis, Maranhão in December 2001. Among a set of recommendations and proposals on the theme of “Indigenous Knowledge and Science and Industrial Property” that they published in a letter, the following passage stands out:

As traditional indigenous peoples who inhabit diverse ecosystems, we have knowledge about the management and sustainable use of this biodiversity. This knowledge is collective and is not a product that can be commercialized like an ordinary piece of merchandise. Our knowledge of biodiversity cannot be separated from our identities, laws, institutions, value systems and our cosmological vision as indigenous peoples.

For peoples holding such perspectives, the idea that TK can be fragmented, with each “piece” converted into separate units of quite distinct forms of alienable intellectual property, is likely to be completely alien. Consequently, any legal system of protection must somehow accommodate the holistic nature of TK. It must also avoid imposing notions of authorship that are alien to the beneficiary communities. While it would go too far to suggest that innovation and creativity in traditional societies are always collective achievements, they usually are. Even community knowledge specialists such as healers and artists do not necessarily consider themselves to be the creators or authors but rather as intermediaries between the community and the spirit world. On the other hand, the sui generis system should not dogmatically vest rights in whole communities that rightly belong to individuals or smaller groups. This could be very divisive. Close collaboration with TK holders and their communities is essential in the design of the sui generis system. This point cannot be emphasised strongly enough.

Devising such a system must of course have clear objectives. Three may be derived from CBD Article 8(j): (i) to respect, preserve and maintain traditional knowledge, innovations and practices; (ii) to promote their wider application with the prior informed consent and involvement of the holders; and (iii) to encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices with these holders.

Since CBD Parties agree in principle to these objectives, it seems appropriate that the sui generis system should also adopt them. But is this enough? It does not seem rational or even respectful towards TK holding peoples and communities to separate the task of protecting the knowledge from that of maintaining the integrity of the cultures which generate the knowledge. Such an approach is unlikely to work anyway. In this context, the Secretariat of the Convention on Biological Diversity produced a document¹ which noted that in the light of past discussions on this matter, “it is essential that sui generis systems:

- Be not only consistent with but supportive of the provisions of the Convention on indigenous and local communities, and conservation and sustainable use of biodiversity;
- Be based on an integrated-rights approach guided by human-rights principles and concern for the environment;
- Have among their basic objectives:
 - The encouragement of conservation and sustainable use of biodiversity;
 - The promotion of social justice and equity;
 - The effective protection of traditional biodiversity-related knowledge and resources against unauthorized collection, use, documentation and exploitation - in part this would require a provision on prior informed consent; and
 - The recognition and reinforcement of customary laws and practices, and traditional resource-management systems that are effective in conserving biological diversity; and
- Be developed in close collaboration with indigenous and local communities through a broad-based consultative process that reflects a country’s cultural diversity.²

As for the scope and extent of protection, given the existence of the CBD and the particular interest that many countries have in biodiversity-related TK, the system should probably be limited in its coverage to TK associated with biological resources or with the environment more generally. This is not to argue that this particular element of TK should be protected to the exclusion of other elements. But an international consensus is much more likely to be achieved by limiting the scope of protection in this way. After all, many of the discussions and proposals put forward so far focus primarily on biodiversity-related TK.

Putting the National Cart before the Multilateral Horse? Identifying Priorities

Should efforts be devoted to developing a national sui generis system first, in order to gain experience that makes it easier to determine what a workable international solution should look like? Or is a multilateral settlement a pre-condition for the effective protection of the rights of TK holders? And what kind of a multilateral settlement is feasible anyway?

While each country will no doubt come up with good reasons to answer these questions differently, the undeniable problem with having a national system in a world where few such

¹ Secretariat of the Convention on Biological Diversity (2000), “Legal and other appropriate forms of protection for the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. Note by the Executive Secretary” [UNEP/CBD/WG8J/1/2].

² [CBD Secretariat paper] Dutfield, G. 1997. *Can the TRIPs Agreement Protect Biological and Cultural Diversity?* Biopolicy International Series No. 19, Nairobi: ACTS Press.

systems exist is that no matter how effective it may be at the domestic level, it would have no extra-territorial effect. Consequently, TK right holders would not be able to secure similar protection abroad, and exploitative behaviour in other countries would go on as before.

Dilemma and Dangers

An international sui generis system may turn out to be useless or even dysfunctional. Consider that indigenous peoples and traditional communities make up most of the world's cultural, intellectual and jurisprudential diversity. A legal system that works for a group inhabiting a valley in the Upper Amazon may be totally inappropriate for another group in Siberia or even in a neighbouring valley. For a common international regime to provide effective international legal protection in foreign jurisdictions, a certain degree of harmonisation would be necessary. And a harmonised system cannot easily accommodate diversity. The result may be a regime that is appropriate to no culture and is therefore useless.

On the other hand, a legal system tailored to the specificities of a few prominent ethnic groups may well alienate other indigenous peoples, constituting another case of globalised localism to be added to intellectual property rights - which are really just European legal models that have been exported around the world including countries and cultures that really have little use for most of them.

A Checklist of Key Points for Negotiating and Policy Making

In conclusion, the following list of key points is provided for the consideration of negotiators and policy makers:

- Act on the understanding that different countries have varied interests and concerns in respect of TK and also that their positions may be based on quite different assumptions and ideological standpoints concerning TK and TK-holding groups;
- Do not expect early solutions to this issue. Devising workable measures and achieving consensus on their adoption will take a long time given the complexity of the issue, the stakes involved and the conflicting interests of the various "stakeholders";
- Avoid or discourage protracted discussions on the applicability of existing IPRs to TK, and on the "need" to define TK first before solutions may be formulated;
- Conduct studies to estimate the costs of implementing proposals or measures to protect TK and weigh these against the benefits that can realistically be gained *before* deciding to actively pursue them in international forums;
- Ensure that national policies and multilateral-level negotiating positions and strategies are consistent, coherent and mutually supporting;
- Encourage the active participation of TK holders and traditional communities in both the formulation of national policies and of multilateral negotiating positions;
- Place the interests of indigenous peoples and traditional communities at the centre of all negotiating strategies on TK; and
- Be aware that many otherwise sympathetic people oppose the creation of new property regimes on the grounds that they will shrink the public domain. Therefore, it may be necessary to emphasise that a sui generis system based upon customary law would not enclose part of the knowledge commons but would merely recognise property rights that already exist but which are not respected.

Finally, TK protection for many indigenous groups is likely to work only with secure land rights. Groups empowered with rights to control access to their lands and communities are far better placed to benefit from legal protection of their knowledge. In fact, it is probably indispensable. In many parts of the world, indigenous groups are being expelled from their ancestral lands. Demanding legal protection of their knowledge without doing anything about this problem is futile and also appears rather perverse.