Can Traditional Knowledge and Copyright Law Go Together? – a South African perspective

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What is Traditional Knowledge (TK)?

- Various definitions – indigenous knowledge; traditional environmental knowledge; local knowledge; indigenous knowledge systems

- Encompasses:
  - the beliefs
  - knowledge
  - practices
  - innovations
  - arts
  - spirituality
  - other forms of cultural experience & expression

- Belongs to indigenous communities -
  http://www2.parl.gc.ca/content/lop/researchpublications/prb0338-e.htm
Need for TK Protection

- Developing countries & least developed countries want TK protection – developing countries not in favour

- Human Rights System vs. IP or Economic Rights System

- IP Rights Regime limited for TK protection

- IP Rights Regime – seen to favour multinationals and non-indigenous interests.
International recognition of TK

- Universal Declaration of Human Rights (1948) – IP recognized
- The Rio Declaration (known as Agenda 21)
- Convention on Biological Diversity, Brazil 1992
- International Covenant on Economic, Social and Cultural Rights
- UNESCO, WIPO, UNCTAD and others
WIPO’S definition & approach to TK

- WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) – 2001
  - WIPO Fact Finding Report –

- Definition of TK - “.. refer[s] 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...” (used for WIPO fact-finding missions 1998-1999)  (Source: http://www.wipo.int/tk/en/glossary/#tk)
WIPO’s Mandate on TK

- WIPO’s Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore -

- Other WIPO documents on TK - http://www.wipo.int/tk/en

- No workable solution has been found yet.

- WIPO IGC May 2010 – new mandate to conduct text-based negotiations - Next meeting of IGC is in December 2010
TK and *sui generis* legislation

- TRIPS Agreement has some provisions but *sui generis* legislation necessary

South Africa and TK

• Multicultural, diverse country with rich TK & cultural heritage

• Misappropriation by multinationals a major problem

• Need to provide protection and fair access to these TK treasures
South Africa’s TK Policy

  - Advisory Committee on Indigenous Knowledge Systems
  - A development function
  - A recordal system for TK and TK holders
  - The promotion of networking structures among practitioners
  - Legislation to protect traditional intellectual property
  - Various intergovernmental workshops
Implementing TK protection in SA

- The Environmental Management Biodiversity Act, and its Regulations – 2004
- The Patents Amendment Act – 2005
- National Indigenous Knowledge Systems Office (DST) - 2006
SA IP Amendment Bill (TK)

• DTI’s Intellectual Property Amendment Bill (May 2008)

• Proposes to amend the following Acts:
  – Performers' Act, 1967;
  – Copyright Act, 1978;
  – Trade Marks Act, 1993
  – Designs Act, 1993

• Proposes to establish:
  – National Council to Advise the Minister
  – National Trust Fund
  – National Database
  – Reciprocity agreements with foreign countries
Problems with the TK Bill

• Fixation
• Copyright ownership
• Originality
More problems with the TK Bill

• Authorship

• Term of Protection

• Perpetual Protection – contentious issue

• Limitations and exceptions necessary
Fair use of TK

- Strong incentive to ensure fair use of TK for good of society
- Without exceptions, works are ‘locked up’
- Limitations & exceptions possible
- “Orphan works” – untraceable rightsholders
- Definitions in the TK too vague
- Compulsory licences an option, e.g. for translating into indigenous languages
Process of TK Bill

- Strong criticism of the TK Bill from most stakeholders
- Two leading IP experts ‘slam’ TK Bill in media
- Regulatory Impact Assessment (RIA) commissioned and report submitted late 2009
- DTI ignored RIA report and stakeholders’ input
- Bill presented to Parliament – Feb and May 2010
- Public hearings postponed to July 2010
- Will stakeholders’ input be considered this time?
Science & Technology’s approach

- DST Working Group – reviewing TK Policy & setting up database

- DST supports the DTI’s IP Amendment Bill (TK), 2010

- *Sui generis* legislation – to cover preservation, database protection, etc. Drafting process will complement DTI’s IP process

- Contradictions will need to be resolved
Some recommendations

• Sui generis legislation more appropriate
• Appropriate exceptions necessary for fair use of TK
• Retrospective protection should not be considered.
• Promote use, respect & understanding of TK in special context
• Give stronger protection to secret or sacred works
• Community ownership preferable to State ownership
• Structures should be put in place to enable collaboration and benefit-sharing arrangements
• Digital archive to prevent misappropriation through commercial patents
Conclusion

Protection, preservation and sharing of TK are key components for keeping it alive!

“Every time an elder dies, it’s as if a library has burnt down”.

(Source: Chiek Oumar Ba (Mandinka) – www.realafrica.net/cdata/2324/docs/27364_1.doc)
Thank you

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Wits Copyright Portal
http://web.wits.ac.za/Library/ResearchResources/SubjectPortals/Copyright+and+Related+Issues.htm

Copyright Blogs
http://aca2k.org and http://kim.wits.ac.za

Free Online Information Service
http://lists.wits.ac.za/mailman/lisinfo/copyrightanda2kinfo
Some useful reading

- Is a *sui generis* necessary? Benefit Sharing Agreements -

- Protecting traditional knowledge - Commission on Intellectual Property –

- The way forward on intellectual property for China and India –

- Intellectual property law protection for traditional knowledge/indigenous knowledge systems in Southern Africa -

- Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge -