

Most *Seedling* readers will find the idea of using IPRs to protect traditional knowledge bizarre, if not offensive. IPRs are now routinely used by commercial interests to appropriate and exploit traditional knowledge. Experience tells us that IPRs rank among the major threats to its protection, not one of its defences. But a WIPO committee in Geneva is proposing just that: to create an entirely new form of IPR especially for traditional knowledge. How should indigenous groups, farmers and other holders of traditional knowledge respond?

The great PROTECTION racket

Imposing IPRs on traditional knowledge



13

GRAIN

Over the past three years, the World Intellectual Property Organisation (WIPO) has unexpectedly become a major arena for the international discussion about traditional knowledge and its protection. Several years ago, developing country members started to raise questions at WIPO about the increasing use of intellectual property rights (IPRs) to appropriate both genetic resources (biopiracy) and related traditional knowledge – just like they had already done in other international organisations such as

the Convention on Biological diversity (CBD), the UN Food and Agriculture Organisation (FAO) and the World Trade Organisation (WTO). These questions became so disturbing to other WIPO negotiations that eventually a separate committee was set up to deal with them, no doubt in the hope of isolating and neutralising these problematic issues in a dark corner of the organisation.

Another unresolved matter, folklore, was thrown into the mix, and the result was baptised the Intergovernmental Committee on Genetic

Use or misuse?

The piracy of traditional knowledge and genetic resources by way of IPRs is often referred to as *misappropriation*, and as a *misuse* of the IPR system. We are concerned that this language *misrepresents* the facts.

In many traditional communities, both traditional knowledge and genetic resources are typically managed as an integral part of a community heritage, not as private property in the Western sense. Using the term *misappropriation* implies a change of property ownership and in an improper manner (by theft, to be exact). In reality, what takes place is that something which never was private property at all is made into private property, ie an *appropriation*. The damage persists also after the term of IPR protection expires, as whatever was appropriated does not revert to community management but passes into a *public domain* status, something which is equally foreign to traditional communities as is private property (in fact, a public domain can hardly be conceived of in a culture where there is not private property). Whether as private property or as public domain, whatever was appropriated is irreversibly lost to the community concerned, as its heritage status can never be restored. Up to now, much of this has happened without explicit, free and prior informed consent of the communities involved – be they indigenous peoples or peasant farmers.

For the same reasons, this process can not be described as a *misuse* of the IPR system. Making property out of non-property is exactly what IPRs were created for; this is its main use.

Consequently, we have chosen to avoid these *mis*-nomers in this and future writings on the matter.

Resources, Traditional Knowledge and Folklore, usually referred to as the IGC. Contrary to expectations, the IGC rapidly developed into a very lively forum with the highest participation of any WIPO body, regularly exceeding the capacity of the main plenary hall. The cross-cutting nature of the issues attracted an unprecedented collection of government experts from environment, agriculture, development and culture ministries, in addition to the usual crowd of patent bureaucrats. And the observer benches, usually populated by a narrow selection of industry bodies and patent trade associations, started to fill up with environment and development-oriented NGOs and a colourful contingent of indigenous peoples' organisations.

Traditional knowledge the core issue

Between 2001 and 2003, the IGC has held five meetings. Early on, traditional knowledge (TK) emerged as the core issue. The discovery that TK systems are in fact a complete alternative paradigm for the development and management of knowledge seems to have been both a fascinating and disturbing one for the intellectual property community. In its short existence, the committee has produced an impressive number of documents detailing the characteristics of TK systems and in particular their interface with intellectual property right systems.

Work on the genetic resources and folklore agendas has been largely coloured by the TK perspective. Folklore has been on the WIPO agenda for decades without tangible results, because industrial countries would not agree that folklore should be protection. But the association with TK in a wider sense seems to have created a much better understanding of folklore as an aspect of TK, which is reflected in the change of terminology from folklore to "*traditional cultural expressions*". The specific work on genetic resources has been limited to some quite technical matters, but genetic resources have figured prominently as an important example of a resource often intimately related to TK. (See box on p 17 for a selective overview of documents.)

Inevitably, the work of the IGC suffers from an IPR bias, because that is WIPO's perspective on the world. But discounting for that bias, the documents produced give a thorough and quite inclusive overview of the issues on the table. The IGC has a very able and hardworking secretariat with cross-disciplinary backgrounds and their output is very high quality compared to corresponding documents from, for example, the CBD. The WIPO documents contribute to a deeper understanding of some difficult matters, such as the risks of putting TK into computerised databases, or the technical and legal aspects of a disclosure of origin requirement for biodiversity or TK in patent law.

So both for governments and for WIPO itself, the IGC has brought greatly increased awareness and understanding of TK. For governments, an additional benefit has been that a number of different ministries have been forced to talk to each other about the matter. In many cases, this has meant the first ever contact between for example environment or agriculture ministries and patent offices.

For WIPO as an institution, the process has also been a long overdue introduction to the political conflicts of the real world. Until very recently, WIPO led the life of a closed gentlemen's club, much like the WTO before Seattle, with only one kind of people at the table and developed countries firmly in control of the agenda. The IGC has introduced very different dynamics, with developing countries taking up the proactive role and indigenous peoples' organisations, rather than industry bodies, increasingly providing the expertise.

From exploration to politics

For its first couple of years, IGC work has been of a mainly exploratory nature with compilation of information and wide-ranging discussions. But at the fifth meeting in July 2003, which was also



the last under its original two-year mandate, the committee clearly crossed the line into political mode and latent conflicts came into full play.

Developing countries took the offensive, arguing that a prolonged mandate for the IGC would only be meaningful if it included a clear commitment to “norm-setting”, in particular on new measures for better protection of TK. Developed countries, predictably, wanted no such commitment, only continued analysis and discussion. The outcome was a compromise which left the question open, explicitly stating that “no outcome of its work is excluded”. This simply means that the fight will continue at the next meeting in March 2004, which is expected to spend most of its time debating the IGC’s work plan for the next couple of years.

While there could be no doubt about the political commitment from developing countries to create stronger protection for TK, they had no common message about how this should be done. There were references to the idea of creating a *sui generis* (special, unique) IPR system for TK, but most countries remained vague. The African Group alone made a specific formal demand, asking for the immediate start of negotiations on “a legally binding international instrument on genetic resources, traditional knowledge and folklore”. But when asked to expand on this, the Africans were not able to answer any questions on what such an agreement should contain.

Protection or protection?

A major problem which became evident during the discussion was the confusion about the concept of ‘protection’, which means very different things in intellectual property law and in ordinary usage. ‘Protection’ in the intellectual property sense means that the owner of a patent, a copyright, a trademark or some other piece of intellectual property has a legal right to exclude others from using or reproducing it. It is that specific piece of property which is protected, no more, no less.

In ordinary usage, ‘protection’ of course has a much broader sense. When developing countries speak about the need to protect TK, it is quite obvious that they mean ‘protection’ in the sense of safeguarding the continued existence and development of TK. As repeatedly pointed out by indigenous peoples’ organisations, this necessarily implies protecting the whole social, economic, cultural and spiritual context of that knowledge, something which simply is not possible to achieve with IPRs.

This conceptual confusion has been explicitly addressed in IGC documents (at least those

in English), and the WIPO secretariat now systematically uses ‘protection’ only in the IPR sense and refers to the broader concept as ‘safeguarding’ or ‘preservation’. But this has not helped much, as almost everybody else continues to use ‘protection’ interchangeably in both senses. In the discussion about a *sui generis* IPR system for TK, the confusion has led to a complete mix-up between the two. Even though it is clear from WIPO’s own documents that creating IPRs over TK always requires that a limited piece of knowledge must be cut out from the community context and made into private property, the discussion in the IGC continues to be conducted as if IPRs could equally well be used to protect TK together with its context.

A similar confusion, with a similar outcome, has arisen over the terms “defensive” versus “positive” mechanisms for the protection of TK. Most people would think that you defend TK from IPRs. But through reams of paper and clever language, WIPO has managed to implant the idea that IPR is a form of defensive protection – against the wrong IPR holders!

Analysis overkill

A strongly contributing cause of this confusion is that the volume and complexity of the IGC documentation has grown to the point that it is now hindering the political discussion rather than facilitating it. At the most recent meeting, several countries noted that they had not been able to even read the many hundred pages of documents properly, much less assess them. The representative of UNCTAD concurred and added that under the rules of procedure that they live by, a secretariat would not even be allowed to present such large amounts of documentation without providing shorter summaries of the main issues.

Off the record, there were even suggestions that this analysis overkill could well be intentional from



Patents to protect the people? Or just another case of the leech and the earthworm? (an indigenous tale about the white man failing to keep his promises)



WIPO's side. By producing these huge documents which somehow include or relate every possible angle on the subject matter, WIPO can insure itself against any criticism for bias. Of course there is a pro-IPR bias. Nothing else should be expected from an institution whose mandate is promoting IPRs. But much of the counter-arguments are also there, but buried or scattered in different locations all over the documents, so it becomes exceedingly difficult for the average reader to see them.

Indigenous perspectives

In order for governments to realise how slanted a picture they are getting, the voice of the TK holders needs to be stronger and clearer. So far, although a number of indigenous peoples' organisations have been following the process in Geneva, they do not have much in the way of teeth in the discussions, partly because WIPO's membership is composed of governments and the organisation has not been willing to provide financing for indigenous peoples' to participate, but partly also because it is a daunting task to decipher and challenge WIPO doublespeak. As for other TK holders such as traditional farmers, healers or fisherfolk, they have barely been represented. Then again, not all TK holders would feel it is worthwhile to get involved in processes in Geneva..

There are now signs that this is changing. At least among indigenous peoples, there is a growing capacity to tackle the WIPO process. A number of the indigenous groups looking at what WIPO is doing are arriving at more clearly articulated views on key points, including:

Indivisible heritage. Traditional knowledge is part of the indigenous heritage which cannot be divided into its component parts. Protection of this heritage cannot be achieved by separating out aspects or elements such as songs or science.

Rights. Heritage in turn is linked to territorial and resource rights, which are essentially human rights, not property rights, in terms of Western legal systems (both concepts are really foreign to indigenous customary law). Both TK and biodiversity are best defended by asserting the right to self-determination, land and culture.

IPRs and TK incompatible. IPRs are private monopoly rights and therefore incompatible with the protection of TK. TK is held as part of a community heritage passed down from generation to generation, and not allowed either to be privatised or to slip into the "public domain" (a concept, and current legal reality, that indigenous peoples strongly contest).

Customary law. Any legitimate work on protection of TK should start from an indigenous framework grounded in customary law. If there is a need for *sui generis* legislation, this should be its basis, not IPRs

The overall conclusion is that the IPR system is the problem – and that it is dangerous and wrong to dress the problem as the solution. If WIPO wants to do something useful, it should concentrate on preventing the IPR system from trampling on indigenous peoples' rights in the first place.

What future for the IGC?

The IGC must now extract the obvious conclusions from the huge body of analysis it has produced. Governments should not allow WIPO to continue to bury the issues in overly detailed documents, but demand the key findings up front – even if these are uncomfortable to some member states or to WIPO itself. On the basis of the work done so far, including the strong messages heard from indigenous peoples, at least the following conclusions can be drawn.

Acknowledge the irrelevance of IPRs

It clearly follows from the analysis already done by the IGC that protection of TK as such cannot be achieved through intellectual property systems. This goes for existing IPR systems as well as for any *sui generis* IPRs that could be created. By their very nature, IPRs are only useful for protecting private property, not heritage. To be protected as intellectual property, a piece of TK must first be made into a commodity, something which can be bought and sold, which heritage as such can never be. The fact that IPRs are already used in this way, not only by external actors but also by members of indigenous communities themselves, is not proof that this is a way to protect TK.

Bury the idea of sui generis IPRs for TK

As a consequence, the idea of creating an additional IPR system specifically for TK should be buried for good. No matter how *sui generis*, this would still be an IPR system and for this reason unfit to protect TK as such. Instead, it would most certainly accelerate the commodification, disintegration and destruction of TK.

Focus on damage control

The IGC should instead focus on stopping the damage caused by existing IPR systems. The main reason that the Committee was originally created was to address the increasing use of IPRs for biopiracy and for appropriation of TK, and it should now return to this agenda. In particular, it should review current national IPR systems and international IPR treaties and identify what changes to IPR law and practice are necessary to



eliminate these problems. It should also address the repatriation of already appropriated resources, and consider how IPR systems could be amended to stop interfering with customary law systems and farmers' inherent rights.

Leave the broader agenda to more suitable fora

The broader agenda of protection for indigenous rights over all aspects of their heritage, including traditional knowledge and genetic resources, falls entirely outside WIPO's mandate and competence. But it urgently needs to be addressed. The IGC should explicitly recognise this and issue a call for more suitable fora within the UN system to take over. Some indigenous groups feel that the UN's Permanent Forum on Indigenous Issues should take the lead to convene all relevant UN bodies to produce one coherent set of rules on heritage rights. What is clear is that protection of TK is a cross-cutting issue which cannot be addressed by environment, trade, agriculture or IPR bodies alone.

Fighting in the trenches comes first

As usual, it is a mistake to believe that the real fight takes place in the air conditioned halls of Geneva or other government meeting spots. In order to protect traditional knowledge the first requirement is that communities have the right and the power to make the crucial decisions over their livelihood resources and management systems. This holds true whether we speak of peasant farmers, other rural communities, or indigenous peoples. Rights to livelihood systems have to be secured and constantly defended in the local context.

But while international agreements will never in and of themselves solve problems for communities, they can be either a help or a hindrance. They can put some limits to greed and economic exploitation, or they can promote them. They can create some public pressure on governments, or they can reduce it. Which way they go depends, again, mostly on what happens on local and national levels. If governments feel that they are being watched, if there are visible popular movements which formulate clear political demands regarding international negotiations so such as those taking place at WIPO, they will find it more difficult to go in the wrong direction. This is why farmers' groups and indigenous peoples must carefully consider whether or not to get involved with processes like the IGC and push for conclusions that recognise their fundamental livelihood and heritage rights. There are risks either way. Good ideas can turn bad in the wrong hands, as has happened with the CBD. But a

Further reading

- + A good general introduction to the issues about protection of TK was written by Carlos Correa for the **Quaker UN Office** in Geneva in 2001. It also gives an overview of the different international organisations which had been involved prior to WIPO's IGC. *Traditional Knowledge and Intellectual Property. Issues and options surrounding the protection of traditional knowledge* at www.geneva.quno.info/pdf/tkmono1.pdf
- + **WIPO's IGC** has produced a wealth of documents, but they suffer from a bias and many are heavy reading. All are accessible on the web from www.wipo.int/tk and most come in all six UN languages.
 - A good starting point is WIPO's own evaluation of the IGC process so far, contained in the *Overview of activities and outcomes of the intergovernmental committee* (WIPO/GRTKF/IC/5/12).
 - The main summary document about TK and IPRs is the *Composite study on the protection of traditional knowledge* (WIPO/GRTKF/IC/5/8).
 - The main document on genetic resources is the *Technical study on disclosure requirements related to genetic resources and traditional knowledge* (WIPO/GRTKF/IC/5/10). This will be one of the main inputs when the CBD starts to negotiate more specific rules on access and benefit-sharing in 2004.
- + **Indigenous peoples' organisations** have published a few statements in English on the WIPO process:
 - Call of the Earth, a new indigenous network dealing specifically with TK and IPRs, has posted a copy of the joint statement of the indigenous participants at the last WIPO IGC in July 2003. See www.earthcall.org
 - A statement on TK and IPRs made by a representative of the Tebtebba Foundation at the UN Working Group on Indigenous Peoples in July 2003 is available at www.tebtebba.org/tebtebba_files/ipr/wgipagenda5.rtf
- + The **UN Conference on Trade and Development**, organised a seminal conference on protection of TK in 2000 and has a webpage with a number of documents from that process. See http://r0.unctad.org/trade_env/traditionalknowledge.htm
- + Geneva's **International Centre on Trade and Sustainable Development** (ICTSD) runs a resource page with regularly updated listings of materials on TK and IPRs at www.iprsonline.org/resources/tk.htm
- + **ICTSD** has produced a document exploring ways of taking the TK discussion away from IPRs to look at its protection in the wider sense: www.ictsd.org/dlogue/2003-07-11/11-07-03-desc.htm
- + The **South Centre** and the **Centre for International Environmental Law** have just produced *A Review of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore at WIPO* at www.southcentre.org

complete hands-off approach means that bad ideas can go really far. Either way, the most important thing is that farmers' groups and indigenous peoples succeed in asserting their approaches and systems that protect TK and genetic resources where it counts most: at the grassroots level.

