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## Intellectual Property Law and the Protection of Indigenous Knowledge

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### Introduction

Intellectual property law rewards and protects the fruits of intellectual endeavour.<sup>1</sup> The subject covers patents, industrial designs, trade marks, utility models, copyright and neighbouring rights, and confidential information.<sup>2</sup> The general aim of intellectual property therefore, is to protect the ownership of creative ideas, such as inventions, designs and works of art and literature. The law protects such intellectual property by giving the registered owner of an invention or piece of work the right to stop others from copying and/or selling it.<sup>3</sup> In this paper, the term 'indigenous knowledge' is used to refer to the intellectual endeavours of indigenous individuals and communities in developing countries in general, and Botswana in particular. The term therefore covers indigenous works of art, music, literature, medicine and manufacturing processes. 'Indigenous knowledge' is also referred to as 'folklore' and in this paper the two terms will be used interchangeably. The forms of expression of folklore are: folk tales, folk poetry and riddles; folk songs and instrumental music; folk dances, plays and artistic forms of rituals; and drawings, paintings, carvings, sculptures, pottery, terracotta, jewellery, basket weaving, needlework, textiles, carpets, costumes, musical instruments and architectural forms. This paper is an examination of how intellectual property law attempts to protect indigenous knowledge.

### Identification of the Problem

Intellectual property law as we know it today was developed entirely by developed countries in order to reflect and enhance their cultural advancement

and preserve their values. Copyright was developed to protect the literary and artistic works in Britain, Italy, France, Germany and other countries. Patent law and the law of designs were developed to protect the inventions of the Industrial Revolution and other technical developments. Trademark law was developed to protect symbols of national and international trade such as names and logos. At a very early stage in the development of these laws, the developed countries realised the need for co-operation and harmonisation. They therefore entered into international treaties on the various aspects of intellectual property. These treaties are: the Paris Convention on Industrial Property 1883 and the Berne Convention for the Protection of Literary and Artistic Works 1886. It can be seen that indigenous knowledge of the developing countries did not feature at all in the genesis of intellectual property law. When the colonial powers such as Britain, France, Italy and Germany colonised the developing countries, they transplanted their Intellectual Property law to these countries with the sole intention of protecting the intellectual property that they brought with them to facilitate exploitation, and any intellectual property that their nationals might develop while in the colonies. This colonial intellectual property law did not reflect the culture and values of the indigenous communities. Such intellectual property is known as dependent intellectual property. Protection in the colonised country depended on protection in the colonising country. In the case of Botswana for example, this dependent intellectual property remained in place until 1996. Before that year, intellectual property was governed by the Copyright Act,<sup>4</sup> the Patents and Designs Act,<sup>5</sup> the Trade Marks Act,<sup>6</sup> and the United Kingdom Trade Marks Act.<sup>7</sup> The relevant statutes on patents, trade marks and designs did not permit any person to register a patent, trade mark or design unless the patent trade mark or design had first been registered in the United Kingdom or South Africa. A further disadvantage of the legislation was that the owner of a patent, registered design or trade mark would, if he wished to sue in Botswana in respect of an infringement, have to do so under the terms and conditions of the legislation in place in the United Kingdom or South Africa, whichever would be applicable.<sup>8</sup> The enactment of the Industrial Property Act in 1996 marked the advent of independent intellectual property legislation in Botswana. Some developing countries still have dependent intellectual property legislation while others have gradually eliminated it since the attainment of independence.

During the colonial era, the colonial powers plundered indigenous knowledge in their colonies and repatriated as much of it as they could back to the developed countries. They repatriated artefacts, paintings, mummies, jewellery, ancient literature and historical documents, plants, animals and entire manufacturing processes. Famous examples of indigenous knowledge repat-

riated to the developed countries include: the Elgin marbles taken by the British from Greece and still in the British Museum; an original Ethiopian Bible taken from Ethiopia and recently returned to the University there; an Egyptian bust of Nepotete taken to Germany after excavation and now in a German Museum; an Egyptian mummy of King Rameses I which was taken to America 140 years ago and kept at Emory University which has just returned it to Egypt; El Negro taken from Botswana and whose bust was only returned to Botswana recently; and Saartjie Bartman taken from South Africa and whose body had also just been returned to South Africa for burial. One can only lament at the revenue lost which would have been obtained by the countries involved if these treasures had been left and preserved at home.

### **The Interface between Intellectual Property Law and Indigenous Knowledge**

The issue here is whether intellectual property law at both national and international level can effectively protect indigenous knowledge.

#### **A. Confidential Information**

One of the best ways of protecting intellectual property and indigenous knowledge is by keeping it confidential. If the owner of intellectual property applies and obtains a patent or registers a trade mark or industrial design, the information relating to that intellectual property falls into the public domain and he would be unable to protect it after the period of protection under the relevant law has lapsed. But if he has a secret recipe for example, (such as that for Kentucky Fried Chicken), he can exploit it and protect it indefinitely by keeping it secret. The issue therefore is whether confidential information (or the law of trade secrets as it is known in some jurisdictions) can be used to protect indigenous knowledge.

The three ingredients required to constitute breach of confidence are:

- (i) The information itself must have the quality of confidence about it;
- (ii) That information must have been imparted in circumstances importing an obligation of confidence; and
- (iii) There must be an authorised use to the detriment of the party communicating it.<sup>9</sup>

A person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.<sup>10</sup> The obligation of confidence does not depend on any express or implied contract. It depends on the principle of equity that he who has received information in confidence shall not take unfair advantage

of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent.<sup>11</sup>

The obligation of confidence rests not only on the original recipient, but also on any person who received the information with knowledge acquired at the time or subsequently was originally given in confidence.<sup>12</sup> While it is generally an essential ingredient of every copyright action that the plaintiff should start with a work in a permanent form, under the general law of confidence the confidential communication relied on may be either written or oral.<sup>13</sup> This is very important especially in the context of protecting indigenous knowledge. Copyright is good against the world generally, whereas confidence only protects against those who receive information or ideas in confidence. Although copyright has a fixed statutory time limit,<sup>14</sup> and confidence, at all events in theory no time limit, in practice the obligation of confidence ceases the moment information or ideas become public knowledge.<sup>15</sup>

Where there has been a breach of confidence the plaintiff has several remedies. These include: interdict; account of profits; delivery up and destruction; and damages. *Prima facie*, the law of confidential information could effectively protect indigenous knowledge. But a deeper analysis of the three ingredients of the action for breach of confidence reveals that it might not be easy to satisfy the three ingredients for an action for breach of confidence. First, most indigenous knowledge—whether it relates to traditional medicine, music or art—is known not just to one individual but to a group of individuals or even an entire community. In such circumstances, the information is in the public domain and might therefore lack that ‘quality of confidence’. Second, when individuals or companies come to developing countries as researchers or in any other guise they collect indigenous knowledge by various methods. Sometimes, they take away plants for further analysis in the developed countries. Most commonly however, they interview members of the community who unwittingly and gratuitously give them all the indigenous knowledge about the particular subject matter. If it is a medicinal plant, the ‘researcher’ will take it away together with the indigenous knowledge of its medicinal qualities. If a drug is developed from the plant through a combination of further research and the indigenous knowledge, the researcher or the drug company employing him will make millions of dollars but none will be paid to the community and there will not even be an acknowledgment of the contribution of that community in the development of that drug. If the community were to sue the researcher for breach of confidence, it would be very difficult to establish that the information was ‘imparted in circumstances importing an obligation of confidence’. Once the second ingredient is not established, it becomes very difficult to establish the third one: once the information is imparted in circumstances which do not import an obligation of confidence,

it then becomes difficult to establish 'unauthorised use'. The researcher and the drug company will argue that they did not need the consent of the community or individual who gave them the indigenous knowledge before developing the drug from the plant.

The above analysis shows why it is important to regulate the activities of foreign research - academic or commercial - in any country. This regulatory regime starts with the control of the grant of entry visas, research permits, licensing agreements, and the exportation of indigenous knowledge in any form. As will be shown below, the most important aspect of this regulation is the licensing. The licensing agreement between the community and the researcher (or research team) should expressly impose the obligation of confidence on the researcher; an obligation to acknowledge the contribution of the indigenous community; and an obligation to pay a royalty to the community where the research results in a commercial product such as a drug.

### **B. Patents**

An invention is patentable in Botswana if it is *new, involves an inventive step and is industrially applicable*.<sup>16</sup> An application for a patent in respect of an invention may be made by the inventor or by any other person who has acquired from the inventor the right to apply.<sup>17</sup>

It can be seen that although Botswana now has independent patent legislation, indigenous manufacturing processes and methods of treatment would not meet the above criteria if they are to be protected at all.

### **C. Utility Model Certificates**

A utility model is a petty patent or short-term patent. It is a minor technical advance that deserves short-term protection.<sup>18</sup> It can be seen therefore that utility models would be a very good way of protecting of indigenous manufacturing processes and products that do not meet the criteria for a patent. Utility models are protected in Botswana. The law governing patents applies to utility models *mutatis mutandis*.<sup>19</sup>

An invention qualifies for a utility model certificate if it is a new and industrially applicable.<sup>20</sup> The duration of a utility model certificate is seven years. At any time before the grant or refusal of a utility model certificate, an applicant, may, on payment of a prescribed fee, convert his application for a utility model certificate into an application for a patent.<sup>21</sup> It is not entirely clear whether indigenous knowledge in this category would be registerable as utility models.

### **D. Industrial Designs**

What is protected here are the design elements in articles mass produced by an industrial process.<sup>22</sup> An industrial design is capable of registration if it is *new and not contrary to public order or morality*.<sup>23</sup> The procedure for application for

registration of a design is basically the same as that for the grant of a patent.<sup>24</sup> The duration of the registration of a design is five years, but may on the payment of a renewal fee be renewed for two further consecutive periods of five years.<sup>25</sup>

It would appear that indigenous knowledge in this category would not meet the criteria for registration as industrial designs.

#### **E. Trade Marks**

Trade marks are an important aspect of intellectual property. Trade marks and related aspects of trading goodwill are protected as symbols needed by consumers to distinguish between competing products and services in a market economy.<sup>26</sup> An application for the registration of a mark accompanied by the prescribed fee is made to the Registrar of Patents, Marks and Designs in writing with a reproduction of the mark and a list of goods and services for which registration of the mark is requested, listed under the applicable class or classes of the International Classification.<sup>27</sup> Registration gives the owner of a mark exclusive right to the mark in Botswana. No person may use a registered mark unless the owner has authorised him in writing.<sup>28</sup> The rights in a mark may be transferred by cession, assignment, and testamentary disposition or by operation of law.<sup>29</sup> The remedies available for infringement available to the owner of a mark are basically same as those conferred on a patentee.<sup>30</sup> The duration of registration of a mark is ten years but may, on the written request and payment of the prescribed renewal fee by the registered owner, be renewed for consecutive periods of ten years.<sup>31</sup>

It would appear that most indigenous knowledge rights in this category would not qualify for protection as trade marks.

#### **F. Geographical Indications and Appellations of Origin**

A geographical indication is a notice stating that a given product originates in a given geographical area. An appellation of origin is a more precise form of geographical indication which specifies that the product has qualities that are derived specifically from the fact that it is made in a particular region.<sup>32</sup> Geographical indications are an important method of indicating the origins of goods and services. One of the aims of their use is to promote commerce by informing the customer of the origin of the product. Often this may imply a certain quality, which the customer may be looking for. They can be used for industrial and agricultural products. The most prominent examples of geographical indications are those used for wines and spirits. For example, the geographical indication 'Champagne' is used to indicate that a special kind of sparkling wine originates in the Champagne region of France. Similarly, 'Cognac' is used for brandy from the French region around the town of Cognac.



The difference between a trade mark and a geographical indication is that a mark is a sign that an individual trader uses to distinguish his own goods or service from the goods or services of his competitors, while a geographical indication is used to show that certain products have a certain origin and can be used by all the producers in that region. For example, 'Stellenbosch' can be used by all wine producers in the Stellenbosch region of South Africa. It can be seen therefore that geographical indications could effectively be used to protect indigenous knowledge products from a particular country or region of a country.

Geographical indications and appellations can be protected nationally as well as internationally. At national level, geographical indications can be protected through legislation or by introducing a register of geographical indications. They can also be protected through the law of unfair competition,<sup>33</sup> or the delict of passing off.<sup>34</sup> Where a trader uses a geographical indication for a product that does not originate in the region named, that amounts to an unfair trade practice.

Geographical indications can also be protected by the registration of collective marks or certification marks. Unlike individual marks, collective marks belong to a group of traders or producers. A certification mark on the other hand does not belong to any particular individual: it is registered on the undertaking that anyone who meets the specified conditions is allowed to use it.

Collective marks and certification marks could be an effective way of protecting indigenous knowledge: producers of artefacts, medicines, drinks, handicrafts, music, food, etc, from a particular community could register a collective mark or certified mark to protect their products from infringement locally and internationally. For example, the weavers from Oodi (Botswana) could register such a mark which would identify and protect their distinctive rugs from infringement anywhere in the world. So too could the potters of Gabane (Botswana) and Thamaga (Botswana).

The Botswana Industrial Property Act 1996 does not specifically refer to geographical indications or to appellations of origin but contains provisions relating to the protection of collective marks. Section 65 provides that the provisions in sections 53-64 relating to marks apply to collective marks. Specific rules relating to collective marks are contained in sections 66 and 67.<sup>35</sup>

At the international level, geographical indications can be protected by bilateral and multilateral arrangements. A country such as South Africa may enter into a bilateral agreement with Botswana for the mutual protection of each country's geographical indications. This would involve the exchange of lists of the geographical indications concerned, and the grant of protection on a reciprocal basis. A multilateral arrangement involves an agreement between several countries. The most prominent one is the Lisbon Agreement

for the Protection of Appellations of Origin and their International Registration.

It is submitted that geographical indications and appellations of origins could effectively be used to protect indigenous knowledge within the context of conventional intellectual property law. In the case of Botswana for example, sections 66 and 67 could be amended so as to cater for indigenous knowledge. At the international level, the Lisbon Agreement could also be expanded to accommodate indigenous knowledge.

### **G. Copyright**

This is the most contentious area of intellectual property law in relation to the protection of indigenous knowledge. The object of copyright is to protect creative individuals such as authors and artists from having their work copied or reproduced without their authorisation.<sup>36</sup> Copyright is fundamentally different from a patent, a design or a mark in that legal protection is automatic. This means that a work protected by copyright does not have to be registered with a government agency in order to gain legal protection. Copyright law is concerned with the copying of actual words or other physical material, as opposed to the reproduction of ideas. Copyright is a form of property which may be sold or licensed for use by others, typically by way of contract for the publication of the work.<sup>37</sup>

The British Imperial Copyright Act 1911 was made operable in Botswana by Order in Council.<sup>38</sup> When Britain enacted the Copyright Act, 1956, this too was made operable in Botswana in 1965 by Statutory Instrument.<sup>39</sup> When Botswana became independent in 1966, the British Copyright Act 1956 continued in force.<sup>40</sup> Botswana is a country steeped in oral tradition.<sup>41</sup> The elders have for generations continued the old tradition of relating to their children and grandchildren Tswana folk tales and traditions.<sup>42</sup> Due to the lack of copyright societies, publishing houses and recording studios, most of this folklore has never been recorded.<sup>43</sup> Although the concept of copyright existed in Botswana, the majority of the people never used the term 'copyright' and did not even know what it meant. Most people did not even realise that Botswana had a Copyright Act.<sup>44</sup>

The Botswana Copyright Act 1956 had numerous limitations and shortcomings. It was obscure, bulky, outdated and complicated. It was not suited to Botswana's social and economic conditions and aspirations. Most importantly it did not protect folkloric works, moral rights and neighbouring rights. Botswana required a copyright law which would reflect its social and economic values and aspirations as well as national and international technological developments. By April 1998, Botswana had acceded to the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS), the



World Intellectual Property Organisation (WIPO) Convention, and the Paris Convention. The ratification of these Conventions and Agreements placed an obligation on Botswana to revise the laws providing for the protection and regulation of copyright so as to bring the levels of protection and type of works protected into line with international standards. These reforms were introduced by the Copyright and Neighbouring Rights Act 2000.

### **The Copyright and Neighbouring Rights Act 2000**

#### **Protected Works**

A literary<sup>45</sup> or artistic work<sup>46</sup> is not protected by copyright under the copyright and Neighbouring Rights Act unless it is *an original intellectual creation* in the literary or artistic domain.<sup>47</sup> The types of literary and artistic works protected by the act include:

- (a) Books, pamphlets, articles, computer programmes and other writings;
- (b) Speeches, lectures, addresses, sermons and other *oral* works;
- (c) Dramatic, dramatic-musical works, pantomimes, choreographic works and other works created for stage productions;
- (d) Stage productions of works referred to in paragraph (a) and of *expressions of folklore*;
- (e) Musical works with or without accompanying words;
- (f) Audiovisual works;
- (g) Works of *architecture*;
- (h) Works of *drawings, painting, sculpture, engraving, lithography, tapestry and other works of fine art*;
- (i) Photographic works;
- (j) Works of applied art; and
- (k) Illustrations, maps, plans, sketches and three-dimensional works relative to geography, typography, architecture or science.<sup>48</sup>

It can be seen that s.3 (2) is very inclusive. Most importantly it protects most of the work that would fall under indigenous knowledge. Expressions of folklore are expressly mentioned. The protection of 'drawings, paintings, sculpture, engraving and tapestry' would cover most of the other indigenous works such as the rock art of the Basarwa; the pottery from different parts of Botswana such as Thamaga and Gabane; the woven mats, carpets, rugs and blankets from Oodi in Botswana and various parts of Lesotho, South Africa and Swaziland. The protection of works of 'architecture' would protect the traditional homes and other architectural works found in many African countries such as Botswana, Egypt, Lesotho, Swaziland and South Africa.

Many musicians and playwrights in Southern Africa have been ripped off for decades due to lack of copyright protection at home and abroad. Artists

from abroad have come to Africa, listened to songs of local artists and then returned abroad and recorded modified versions of these songs passing them off as their own. Music producers have done the same. They come to Africa and take away with them recordings of songs by African artists. When they return to the developed countries they reproduce the songs and make millions of dollars without paying royalties to the original composers of these songs in Africa. This is piracy. Such pirated works have raised much concern, particularly in the area of music recordings, as the authors or producers and other owners of the copyright applicable together with their nations have lost considerable amounts of revenue to pirates of copyright. The Copyright and Neighbouring Act 2000 solves this problem by expressly protecting oral works, dramatic, dramatic-musical works with or without accompanying words. Given the fact that Botswana is a party to the international Conventions referred to above, local copyright holders as well as foreign copyright holders from countries that are party to the Conventions are able to enforce their copyright within Botswana, and local copyright holders are able to enforce their copyright in all other countries that are also party to the Conventions.

#### **Rights of the Author**

The owner of copyright in a protected work may use the work as he wishes, and may prevent others from using it without his authorisation. The rights given to the author by the Act are exclusive rights. He can authorise others to use the work, subject to the legally recognised rights and interests of others.<sup>49</sup> There are two types of rights under copyright: economic rights,<sup>50</sup> which allow the owner of rights to derive financial gain from the use of his work by others; and moral rights,<sup>51</sup> which allow the author to take certain actions to preserve the personal link between himself and the work.<sup>52</sup>

#### **Neighbouring Rights**

Neighbouring rights are the intellectual property rights provided for the protection of the legal interests of certain persons and legal entities who either contribute to making works available to the public or produce subject matter which does not qualify as 'works' under the general understanding of copyright but who nevertheless express creativity or technical and organisational skill sufficient to justify recognition of their contribution as deserving protection.<sup>53</sup> It can therefore be seen that the protection of neighbouring rights is a crucial component in the protection of indigenous knowledge and rights since most of these border on copyright and would not be protected in mainstream copyright law. Neighbouring rights include the rights of performers, producers of sound recordings and broadcasters. The rights of performers<sup>54</sup> are recognised because their creative intervention is necessary to give life, for

example, to musical works, dramatic and choreographic works and motion pictures, and because they have a justifiable interest in the legal protection of their individual interpretation.<sup>55</sup> The rights of producers<sup>56</sup> of recordings are recognised because their creative, financial and organisational resources are necessary to make recorded sound available to the public in the form of commercial phonograms such as tapes, cassettes, CDs and Mini Discs. They also have a legitimate interest in having the legal resources necessary to take action against unauthorised uses whether it be through the making and distribution of unauthorised copies (piracy) or in the form of unauthorised broadcasting or communication to the public of their phonograms. The rights of broadcasters<sup>57</sup> are recognised because of their role in making works available to the public, and in the light of their justified interest in controlling the transmission of their broadcasts.<sup>58</sup>

### **Conclusion**

It can be seen that the Botswana Copyright and Neighbouring Act 2000 is a major breakthrough in the protection of copyright in general and indigenous knowledge in particular. Most of the indigenous knowledge rights are protected and the Act contains modern and effective remedies.<sup>59</sup> for the enforcement of rights under the Act. Where it is not possible to provide copyright protection to indigenous knowledge or literary and artistic works due to problems of ownership and originality, the law should then offer protection to the producers and performers of such works under the law of neighbouring rights.

### **The International Dimension**

The World Intellectual Property Organization and the United Nations Educational Scientific Cultural Organisation (UNESCO) are at the forefront of the international protection of indigenous knowledge. At the meeting of WIPO's Governing Bodies in 1978, it was felt that not enough was being done to protect folkloric works.<sup>60</sup> Following that meeting, the International Bureau of WIPO prepared a first draft of *sui generis* model provisions for intellectual property-type protection of folklore against certain unauthorised uses and against distortion.

In 1982, a Committee of Governmental Experts convened by WIPO and UNESCO in Geneva adopted the 'Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions' (hereinafter referred to as 'the Model Provisions').

In 1984 WIPO and UNESCO jointly convened a Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property which met in Paris. The participants had at their disposal a draft treaty

based on the Model Provisions and an outline of a similar system of protection at the international level based on the principle of national treatment. However, a number of participants considered it premature to establish an international treaty since there was insufficient experience available as regards the protection of expressions of folklore at the national level, in particular concerning the implementation of the Model Provisions.<sup>61</sup> Two main problems were identified by the Group of Experts: the lack of appropriate sources for identification of expressions of folklore to be protected; and the lack of workable mechanisms for settling of questions of expressions of folklore that are found in more than one country in a given region.<sup>62</sup> Given the lack of agreement at the meeting, the idea of preparing an international treaty was suspended indefinitely.

In 1997, the UNESCO-WIPO World Forum on the Protection of Folklore took place in Phuket, Thailand. At the end of the Forum, an 'Action Plan' was adopted to be submitted to the relevant organs of UNESCO and WIPO. This Action Plan urged both WIPO and UNESCO to pursue efforts to ensure an effective and appropriate international regime for the protection of folklore.

Sub-Programme 11.3 of WIPO's 1998-1999 programme dealt specifically with the protection of folklore. It provided for a number of fact-finding missions and thorough studies, for regional consultations and for active contribution to the establishment of adequate databases and regional co-operative schemes.<sup>63</sup>

In 1999, WIPO, in co-operation with UNESCO, organised four regional consultations: in March in Pretoria for African countries;<sup>64</sup> in April in Hanoi for countries of Asia and the Pacific;<sup>65</sup> in May in Tunisia, for Arab countries;<sup>66</sup> and in June in Quito, for countries of Latin America and the Caribbean.<sup>67</sup> The participants at these meetings supported and urged WIPO in co-operation with UNESCO to continue studies and preparatory work for the establishment and application of appropriate norms for the protection of expressions of folklore at national, sub-regional, regional and international levels. The importance of *collection, classification, identification and documentation* of expressions of folklore was also underlined not only from the viewpoint of their conservation and dissemination but also for the purpose of their intellectual protection.<sup>68</sup>

WIPO's Programme for 2000-2001 expanded on the 1998-1999 Programme. Sub-programme 11.3 was expanded to provide for the convocation of two or three expert meetings to examine alternatives for the development of standards for the protection of folklore at national, regional and international levels. Sub-Programme 11.4 included a pilot project on the possible role of intellectual property in electronic commerce relating to the commer-

cialisation of cultural heritage. This is an issue of great significance for the protection of expressions of folklore given the advent of globalisation and the great strides made in the development of information technology. In 2000, WIPO established the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).

Working in co-operation with other international organisations, WIPO provides a forum for international policy debate concerning the interplay between intellectual property and traditional knowledge and genetic resources. WIPO is also in the process of developing a range of practical tools aimed at enhancing the intellectual property interests of the holders of such knowledge and resources.

Over the last two years, the IGC has laid down a solid basis for WIPO's work in this area, and at its most recent meeting in Geneva in July 2003 explored ideas for future work and considered the prospects for accelerated moves towards concrete outcomes.

The IGC has debated a range of pressing current issues in the field of intellectual property, and has overseen the development of practical tools and mechanisms to support traditional knowledge holders, custodians of traditional culture, and indigenous and local communities in identifying and promoting their interests in relation to the intellectual property system. There has been overall agreement that immediate steps need to be taken to safeguard the interests of those communities which have developed and preserved traditional knowledge and traditional cultures.

The IGC's work has led to a much greater understanding of the issues involved, and the possible approaches to deal with concerns about inadequate recognition and protection of traditional knowledge and cultural expressions. There has been particular acknowledgement of the concerns of communities whose cultural identity and spiritual integrity can depend on how their traditional knowledge and cultural expressions are used and disseminated. The IGC considered steps to enhance the participation of local and indigenous communities in the work of the IGC.<sup>69</sup>

The IGC was mandated by the General Assembly as a forum for discussion of these issues. Since the WIPO General Assembly would need to consider and renew this mandate in September 2003, the IGC's fifth session saw extensive debate about future directions for its work, including moving beyond the initial mandate of serving as a forum for discussion, and a range of proposals on how to build on the substantial foundations it has laid.

There was strong support for the idea that the IGC should move towards concrete outcomes within the next two years, and should focus on the international aspects of protection of traditional knowledge and expressions of

folklore or 'traditional cultural expressions' (TCEs). But views differed over the appropriate form and legal status of these outcomes. On the one hand, some delegations felt that the urgent need to respond warranted the conclusion of a legally binding international instrument by 2005; others called for recommendations and principles that would draw together international understanding in the short term and leaving open the possibility of legally binding outcomes in future. A number of NGO participants stressed the need to strengthen and extend international recognition of customary law relating to traditional knowledge (such as the customary laws and protocols that apply within indigenous communities) including a WIPO programme of study on this subject commissioned by the IGC, and to improve the involvement of representatives of indigenous and local communities in any international process.

Improved co-ordination of WIPO's IP-related work in this area with other international processes, including treaty development and implementation on the part of the Convention on Biological Diversity (CBD), the Food and Agriculture Organisation (FAO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) was also stressed.

#### **Traditional Knowledge Protection**

The IGC continued to foster the exchange of practical understanding of possible approaches for legal protection of traditional knowledge and cultural expressions. A composite study on traditional knowledge protection<sup>70</sup> was prepared for the IGC that covered definitions of traditional knowledge, policy issues in protecting traditional knowledge as intellectual property, and options for specific, or *sui generis*, protection of traditional knowledge. An expert panel at the IGC reviewed a range of *sui generis* mechanisms for traditional knowledge protection, drawing together experts from Costa Rica, Nigeria, Peru, the Philippines, Portugal, the United States and Zambia, which illustrated a range of practical and legal responses that have been developed at national and regional levels. An extensive series of surveys, case studies and analysis of legislation was also prepared for the IGC, to ensure that the IGC's work on traditional knowledge protection is based on a rich understanding of existing approaches and the costs and benefits of different policy options.

#### **Genetic Resources and Traditional Knowledge – Defences Against Ill-founded Patents**

The IGC also considered defensive approaches to ensuring that traditional knowledge and genetic resource material are not the subject of illegitimate patent claims (this has led to moves to modify core elements of the patent



system, such as the International Patent Classification (IPC) and the basis of international search and examination under the Patent Co-operation Treaty). The International Plant Genetic Resources Institute briefed the IGC on the 'SINGER' database (System-wide Information Network for Genetic Resources) which provides data concerning genetic resources held in trust internationally. This database was recently linked to a WIPO on-line portal that is designed to help patent examiners take greater account of existing traditional knowledge and genetic resources when assessing the validity of patent claims. The IGC also transmitted to the WIPO General Assembly an extensive technical study, requested by the Conference of Parties of the CBD, on the question of disclosure within patent applications of the origin and legal status of genetic resources and traditional knowledge that are used in inventions.<sup>71</sup>

#### **Protection of Expressions of Traditional Culture and Creativity**

The IGC considered a composite study on the legal protection of expressions of traditional culture and creativity (or folklore).<sup>72</sup> The ensuing IGC debate highlighted the important policy challenges for new approaches to protection of TCEs - for instance, the contested nature of the notion of the 'public domain', and the concern of many indigenous communities about the way the public domain is conceived in the established IP system, such as when traditional cultural materials are considered under IP law to be in the public domain when in fact customary law or spiritual restrictions on its use may well still apply from the indigenous perspective. Talks have moved to a detailed, practical phase, reflecting the request of the IGC at its last session.

The IGC also considered WIPO's ongoing practical work in this area, including its assistance with the establishment of effective national and regional systems for folklore protection, and development of a 'WIPO Practical Guide on the Legal Protection of Traditional Cultural Expressions'.

#### **Documentation of Traditional Knowledge**

Communities in many countries are undertaking a range of programs involving documentation of their traditional knowledge and associated biological resources. These are established for a host of reasons, including preserving traditional knowledge for future generations. But this can fuel concerns that the very process of documentation can undercut the interests of traditional knowledge holders. Unless the right steps are taken in advance, documented traditional knowledge can more readily be accessed, disseminated and used without authorisation, for instance contrary to customary laws and practices. Reflecting these concerns, the IGC noted the further development of a toolkit for managing the IP implications of documentation of traditional knowledge and biological resources.<sup>73</sup> This should heighten awareness of the need to



ensure that documentation does not lead to an unintentional loss of rights or of control over traditional knowledge.

The toolkit will clarify practical options for documentation that do not necessarily place the documented material in the public domain when communities wish to retain control over it and limit access, for cultural, spiritual, legal or commercial reasons. Delegates stressed the need to include indigenous and local communities extensively in the development of this toolkit, and underlined that many indigenous communities viewed documentation of traditional knowledge with scepticism. The toolkit will not encourage or promote documentation in itself, but rather ensure that if a community chooses to document their traditional knowledge, for whatever reason, the necessary safeguards are in place to avoid undermining the community's own interests (such as by inadvertently putting traditional knowledge into the public domain).

### **Latest Developments**

The General Assembly of WIPO met in October 2003 in Geneva to consider future directions for the organisation's work in the area of traditional knowledge and genetic resources. The Sixth Session of the IGC is in Geneva in March 2004.<sup>74</sup>

### **Conclusions**

(a) Developing countries must put a higher premium on the protection of indigenous knowledge. Intellectual property law in general and indigenous knowledge in particular, should be put on top of the agenda by such countries in their national laws and in regional and sub-regional arrangements such as the South African Development Community (SADC), the Common Market of Eastern and Southern Africa (COMESA) and the New Economic Partnership for African Development (NEPAD).

(b) While the developed countries saw the value of indigenous knowledge, they were not interested in protecting it. Their only interest was in exploiting it. The dependent intellectual laws they introduced in their colonies were not suited to protecting such knowledge and were never intended to do so. The independent intellectual property laws enacted by developing countries are also in most cases not fully suited to protect indigenous knowledge. There is therefore a need to enact *sui generis* laws that can effectively protect indigenous knowledge. Furthermore there is need for international co-operation to produce an international treaty on indigenous knowledge and to harmonise the law in this area. The final international agreement as well as the national *sui generis* laws must effectively articulate the following:

- *subject matter* to be protected;
- *criteria* for protection;
- *holders* of rights;
- *rights* conferred;
- *procedures* and *formalities* to be followed to obtain protection;
- *responsibilities* of new or existing authorities and institutions;
- *remedies* and *enforcement* procedures;
- *term* of protection;
- interaction of the *sui generis* legislation with existing intellectual property legislation;
- role of customary laws and protocols; and
- Regional and international protection.

(c) WIPO and UNESCO must be commended for their pioneering efforts in the protection of indigenous knowledge. They have worked tirelessly and ceaselessly to produce model laws and agreements on the protection of intellectual property in general and indigenous knowledge in particular. They have assisted various countries financially and otherwise, in the collection, classification, identification and documentation of indigenous knowledge.

(d) Universities in the developing countries such as the University of Botswana must play a major role in protection of indigenous knowledge by educating the relevant communities about indigenous knowledge rights and must be at the forefront in the collection, classification, identification and documentation of indigenous knowledge. It is interesting to note that most Universities in the developed countries have a Department or School of African or Oriental studies while only a few in the developing countries have a Centre or School of African or even European studies.

(e) The best method by which communities can benefit from the legal exploitation of indigenous knowledge is through licensing agreements between the communities that own the indigenous knowledge and companies or organisations that wish to exploit that indigenous knowledge. There is therefore a need to develop Model Licensing Agreements that can be utilised in all developing countries. These agreements should be developed at national and international level. Once again, WIPO, UNESCO, as well as Universities, have a role to play in developing such Model Agreements. The key feature of these licensing Agreements must be adequate and equitable financial compensation to the relevant communities.

(f) Botswana must be commended enacting independent legislation that adequately protects intellectual property rights in general and indigenous knowledge in particular. The Copyright and Neighbouring Rights Act 2000 to a great extent adequately protects indigenous knowledge rights and should serve

as a model for those Third World countries that are still striving to enact independent intellectual property legislation. It is hoped that Parliament will soon enact the relevant Rules and Regulations so that the Act might come into force.

#### Notes

1. A. Briscoe and J. Kiggundu, *A Guide to Intellectual Property Law in Botswana*, (Morula Press, Gaborone, 2001) p.1.
2. *Idem*.
3. *Idem*.
4. Laws of Botswana, Chapter 68:01.
5. *Ibid*, Chapter 68:02.
6. *Ibid*, Chapter 68:03.
7. *Ibid*, Chapter 68:04.
8. See further Kiggundu, J., 'The Legal Aspects of Doing Business in Botswana', in *The Legal Aspects of Doing Business in Africa* (Kluwer 2000) p.22.
9. *Coco v Clark (A.N.) (Engineers) Ltd* [1968] 1 F.S.R. 415; *Talbot v General Television* [1918] R.P.C.1; *Fraser v Evans* [1983] 2 All E.R.101.
10. *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd & Ors* [1967] R.P.C.375; *Seager v Copydex (No. 1)* [1967] 2 All E.R. 415.
11. *Seager v Copydex (No.1)* [1967 2 All E.R. 415 (CA)]. See also *Saltman Engineering v Campbell Engineering* (1948) 65 R.P.C. 203.
12. *Fraser v Thames Television* [1982] 2 All E.R. 101.
13. *Fraser v Thames Television* [1983] 2 All E.R.101.
14. In Botswana the period is the life of the author and fifty years after his death. See further Copyright and Neighbouring Rights Act 2000, s 10.
15. *Fraser v Thames Television* [1983] 2 All E.R. 101.
16. Industrial Property Act, s.8 (1). See also Kiggundu, *op. cit.*, (note 8) at 23 et seq.
17. Industrial Property Act, s.8 (2).
18. W.R. Cornish, *Intellectual Property* (3 ed, Sweet & Maxwell, London, 1996) p.9. See also Kiggundu, *op. cit.*, (note 16) p.25.
19. Industrial Property Act, s.34.
20. Industrial Property Act, s.35.
21. Industrial Property Act, s.38. See further Kiggundu *op. cit.*, (note 18) loc cit.
22. Cornish, W.R. *op. cit.*, (note 18) at pp.483 et seq.
23. Industrial Property Act, section 39 (1) and (4).
24. Industrial Property Act, ss.42-49.
25. *Ibid*, s.49. See further, Kiggundu *op. cit.* (note 21) loc cit.
26. Cornish, W.R. *op. cit.*, (note 22) p.8. See also Kiggundu *op. cit.*, (note 25) loc cit.
27. Industrial Property Act, s.54 (1).
28. Industrial Property Act, s.58 (1).
29. *Ibid.*, s.60.
30. *Ibid.*, s.60.

31. *Ibid.*, s.61.
32. See Briscoe and Kiggundu *op. cit.* (note 1) pp.8-9. On geographical indications generally, see M.A. Nicholas, 'Geographical indications for Foods, Trips and the Doha Development Agenda', 2003, 47, J.A.L., 199.
33. On which see Briscoe and Kiggundu, *op. cit.*, (note 32) pp.10-12.
34. Passing off is a delict which occurs where a person suggests or creates the impression that his business undertaking is that of another. In order to succeed in a passing off action, a plaintiff has to establish three elements: reputation; a misrepresentation; and a likelihood of damage. See *Reckitt & Coleman v Borden* [1990] R.P.C. 341 at 406 (per Lord Oliver). Lord Oliver's trinity of elements in the Reckitt case is to be preferred to the House of Lords' five in *Warnink v Townend* [1979] A.C. 731 (per Lord Diplock and Lord Fraser of Tullybelton). See further Briscoe and Kiggundu *op. cit.* (note 33) at 11-12.
35. Under section 66, the Registrar of Marks, Patents and Designs may invalidate the registration of a collective mark if (inter alia) the person requesting such invalidation proves that only the registered owner uses the mark, or that he uses or permits its use in a manner which is liable to deceive trade circles, or the public as to the origin or any other common characteristics of the goods or services concerned. Under section 67 (3), the registration of a collective mark, or an application therefore, may not be the subject of a license contract.
36. See Briscoe and Kiggundu *op. cit.*, (note 33) p.16.
37. Briscoe and Kiggundu *op. cit.*, (note 36) *loc. cit.*
38. No. 35 of 1912.
39. The Copyright (Bechuanaland) Order 1965 (S.I 1965/2009).
40. See the Botswana Independence Act 1966 (Cap 23) and the Botswana Independence Order (S.I 1966/117). This is an example of dependent legislation continuing in force after independence.
41. Segopolo, S.M.A., 'Development and Current Status of Copyright Protection in Botswana', (WIPO/CNR/GBE/97/2) p. 3.
42. *Idem.*
43. *Idem.*
44. *Idem.*
45. 'Literary work' means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes a table of compilation and a computer programme. See Copyright and Neighbouring Rights Act 2000, s.2.
46. 'Artistic work' means: (a) a graphic work, photograph, sculpture or collage, irrespective of its artistic quality; (b) a work of architecture being a building or a model of a building irrespective of its artistic quality; and (c) a work of artistic craftsmanship not falling within paragraph (a) or (b) irrespective of its artistic quality: see Copyright and Neighbouring Rights Act 2000, s.2.
47. Copyright and Neighbouring Rights Act 2000, s.3 (1).
48. Copyright and Neighbouring Rights Act, s.3 (2). The Minister of Trade and Industry may by Orders add to or otherwise vary this list of works, s.3 (3). Moreover, under s.4 of the same Act derivative works are also given copyright protection. These

are: translations, adaptations, arrangements and other transformations or modifications of works; and collections of works, collections of mere data (databases) whether in machine readable or other form, and collections of expression of folklore, provided that such collections are original by reason of the selection, co-ordination or arrangement of their contents.

49. Briscoe and Kiggundu, *op cit.*, (note 37) p.17.

50. See Copyright and Neighbouring Rights Act 2000, s.7. The author or other owner of copyright has the exclusive right to carry out or authorise any of the following acts in relation to the work:

- Reproduction of the work;
- Translation of the work;
- Adaptation, arrangement or other transformation of the work;
- The first public distribution of the original and each copy of an audiovisual work, a work embodied in sound recording, a computer programme, a database or a musical work in the form of notation, irrespective of the ownership of the original or copy concerned;
- Importation of copies of the work, even where the imported copies were made with the authorisation of the author or other owner of copyright;
- Public display of the original or a copy of the work;
- Public performance of the work;
- Broadcasting of the work;
- Other communication to the public of work (this covers cable and internet distribution). See further Briscoe and Kiggundu *op cit.*, (note 49) pp.18-19.

51. *Ibid.*, s.8.

52. Briscoe and Kiggundu, *op cit.*, (note 39) p.17.

53. Briscoe and Kiggundu, *op cit.*, (note 52) p.20.

54. See Copyright and Neighbouring Rights Act 2000, s.24.

55. Briscoe and Kiggundu, *op cit.*, (note 53) *loc cit.*

56. See Copyright and Neighbouring Rights Act 2000, s.25.

57. See Copyright and Neighbouring Rights Act 2000, s.27.

58. Briscoe and Kiggundu, *op cit.*, (note 55) *loc cit.*

59. The remedies in the Copyright and Neighbouring Rights Act 2000 can be divided into the following categories: conservatory or provisional measures; civil remedies; criminal sanctions; measures to be taken at the border; and measures, remedies and sanctions against abuses in respect of technical devices. Conservatory or provisional measures (s.29) have two purposes: first, to prevent infringements from occurring, particularly to prevent the entry of infringing goods into the channels of commerce, including entry of imported goods after clearance by customs; and second, to preserve relevant evidence in regard to an alleged infringement. Thus, judicial authorities may have the authority to order that provisional measures be carried out without advance notice to the alleged infringer. In this way, the alleged infringer is prevented from relocating the suspected infringing materials to avoid detection. The most common provisional measure is a search of the premises of the alleged infringer and seizure of suspected infringing

goods, the equipment used to manufacture them, and all relevant documents and other records of the alleged infringing business activities.

Civil remedies (s.30) compensate the owner of rights for economic injury suffered because of the infringement, usually in the form of monetary damages, and create an effective deterrent to further infringement, often in the form of judicial order to destroy the infringing goods and the materials and implements which have been predominantly used for producing them; where there is a danger that infringing acts may be continued, the court may also issue injunctions against such acts, failure to comply with which would subject the infringer to payment of a fine.

Criminal sanctions (s.31) are intended to punish those who wilfully commit acts of piracy of copyright and neighbouring rights on a commercial scale, and, as in the case of civil remedies, to deter further infringement. The purpose of punishment is served by the imposition of substantial fines, and by sentences of imprisonment consistent with the level of penalties applied for crimes of corresponding seriousness, particularly in cases of repeat offences. The purpose of deterrence is served by orders for the seizure, forfeiture and destruction of infringing goods, as well as the materials and implements the predominant use of which has been to commit the offence.

Measures to be taken at the border (s.32) are different from the enforcement measures described so far, in that they involve action by the customs authorities rather than by the judicial authorities. Border measures allow the owner of rights to apply to customs authorities to suspend the release into circulation of goods which are suspected of infringing copyright. The purpose of the suspension into circulation is to provide the owner of rights a reasonable time to commence judicial proceedings against the suspected infringer, without the risk that the alleged infringing goods will disappear into circulation following customs clearance. The owner of rights must generally satisfy the customs authorities that there is prima facie evidence of infringement, must provide detailed description of the goods so that they may be recognised, and must provide a security to indemnify the importer, the owner of the goods, and the customs authorities in case the goods turn out to be non-infringing.

The final category of enforcement provisions, which has achieved greater importance in the advent of digital technology, includes measures, remedies and sanctions against abuses in respect of technical means (s.33). In certain cases, the only practical means of preventing copying is through so-called 'copy-protection' or 'copy-management' systems, which contain technical devices that either prevent entirely the making of copies or make the quality of the copies so poor that they are unusable. Technical devices are also used to prevent the reception of encrypted commercial television programmes except with the use of decoders. However, it is technically possible to manufacture devices by means of which copy-protection and copy-management systems, as well as encryption systems, may be circumvented. The theory behind provisions against abuse of such devices is that their manufacture, importation and distribution should be considered infringements



- of copyright to be sanctioned in ways similar to other violations.
60. See M. Ficsor, 'Indigenous Peoples and Local Communities: Exploitation of Issues Related to Intellectual Property Protection of Expressions of Traditional Culture', in ATRIP, Collection of Papers Presented at the ATRIP Annual Meeting (Geneva 7-9, 1991) p.35 and p.40.
  61. See Ficsor, *op cit.*, (note 60) p.46.
  62. Ficsor, *op cit.*, (note 61) p.47.
  63. Ficsor, *op cit.*, (note 62) p.48. Sub-programme 11.1 set out as its objective 'to identify and explore the intellectual property needs and expectations of... holders of indigenous knowledge and innovations, in order to promote the contribution of intellectual property to the social, cultural and economic development'. Sub-Programme 11.2 addressed the issues of biological diversity and biotechnology. See further Ficsor, *idem.*
  64. See document WIPO-UNESCO/FOLK/AFR/199/1.
  65. See document WIPO-UNESCO/FOLK/ASIA/99/1.
  66. See document WIPO-UNESCO/FOLK/ARAB/99/1.
  67. See document WIPO-UNESCO/FOLK/LAC/99/1.
  68. Ficsor, *op cit.*, (note 52) at 51.
  69. See document WIPO/GRTKF/IC/5/11.
  70. See document WIPO/GRTKF/IC/5/8.
  71. See document WIPO/GRTKF/IC/5/10.
  72. See document WIPO/GRTKF/IC/5/3.
  73. See document WIPO/GRTKF/IC/5/8.
  74. For a further review of the IGC's work to date, see documents IPO/GRTKF/IC/5/INF/3;WIPO/GRTKF/IC/5/INF/4;and WIPO/GRTKF/IC/5/8.