

**INTELLECTUAL PROPERTY AND FOLKLORE:
ON THE WORK UNDERWAY AT THE WORLD
INTELLECTUAL PROPERTY ORGANIZATION (WIPO)**

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In the year 2000, the specialized UN agency responsible for the promotion of intellectual property worldwide, WIPO, established a special body the name of which enumerates the issues for its consideration: The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). The establishment of this committee is the latest in a series of efforts that WIPO has consecrated to the protection of folklore and traditional knowledge by intellectual property regimes. These efforts began with joint endeavors by UNESCO and WIPO in the 1970s; in the three decades for which these issues have now been under consideration, a number of special committees and working groups have been convened. Despite this, concrete results at the international level have been negligible so far. However, in recent years the pressure from developing countries and the nascent global indigenous peoples' movement has been mounting.

The IGC was founded as a result of that pressure and is now the major international forum for the discussion of folklore and traditional knowledge. Seven sessions have been convened so far, with an eighth session scheduled for June 2005. SIEF (Société Internationale d'Ethnologie et Folklore) has been granted observer status in this committee since the fourth session and on its behalf I have attended three committee meetings in Geneva. I'm going to briefly explain the background of this committee, and the politics involved, and then make the case for its relevance to the work of folklorists and ethnologists.

The TRIPS-Agreement in 1994 on trade-related aspects of intellectual property vastly increased the scope and the strength of intellectual property laws in developing countries. This agreement left many states feeling that they got the short end of the stick. A widespread disillusionment with the intellectual property system followed in its wake. Some of the problems with intellectual property are familiar to all of us: the cruelty of the patent system in medicine, for example, which allows a large

portion of the world's children to die when the medicines that would save them could be made available at low cost, but are not.

However, the problems are not all on the side of consumption. The intellectual property system, which is supposed to protect and encourage creativity and innovation, systematically excludes the knowledge and creativity of a large portion of humanity – the same people, in fact, who are denied medicine because of it. In order to qualify for copyright protection, a work of art, a design, or a piece of music, must be original creations of a particular author. Likewise, in order to be granted patent protection, technology and know-how need to pass the test of novelty, to be new and involve an inventive step. By means of such criteria, traditional knowledge and traditional creative expressions are ruled out as a matter of principle.

The notion of the creative process that underpins intellectual property is based on the European Romantic ideology of the individual genius (poet or inventor) whose works are completely original. This Romantic notion, canonized in international law, has no patience with cultural processes and products that are developed in a more diffuse, cumulative, and collective manner, where it is impossible to fix specific steps like invention or authorship at any given point in time.

There are a lot of powerful interests tied up with the intellectual property system. Developing countries recognize this and know that they can't do away with intellectual property. Instead, they have focused their efforts on reforming the system and securing some of its benefits for their own population. That is how WIPO's committee came about. Its creation was a concession that OECD states made to developing countries in the context of other negotiations, especially surrounding the Patent Law Treaty of 2000.

The committee's work has to progress by consensus, since the richer states must willingly adopt any new legislation that it might produce. To begin with, OECD countries, including the European Community and its member states, were firmly opposed to all ideas for reforms at the international level. They suggested that the current regime of intellectual property is for everyone's benefit and that if people in developing countries are not benefiting from it, that is more a result of their lack of understanding of the system than a result of problems inherent in the system itself. Therefore, WIPO has gone to great lengths to raise awareness of the intellectual property system in all parts of the world, it has created special toolkits for traditional communities to help them take advantage of intellectual property rights, and has engaged in other capacity-building projects.

However, there are new developments underway. At the last two sessions of WIPO's committee a new tone has been struck. The OECD states now seem open to developing a new international instrument for the protection of folklore and traditional knowledge. This newfound flexibility comes in response to a move from developing country delegations that have threatened to take these issues out of WIPO and bring them into negotiations in the World Trade Organization. This has been a diplomatic *tour de force*, turning to their own advantage the political importance that governments in OECD countries attach to trade agreements in the World Trade Organization. In order to contain negotiations about traditional knowledge within WIPO, these

governments are agreeing to talk about new legislation and reforms to the intellectual property system.

We have still to see whether this newfound flexibility goes far enough to allow a new consensus to emerge, and whether actual reforms take place in the intellectual property regime. Whatever the eventual outcome, some important developments are already underway in the committee's work. The meeting documents at the seventh session in November 2004 included drafts of policy objectives and core principles for new international instruments. This in itself is a remarkable step forward; as many delegations explicitly acknowledged, it is a turning point in the work of the committee, away from broad, general discussions towards practical implementation. Having said that, however, it should be noted that the committee is stepping down very slowly, very tentatively, and very carefully. Thus, the WIPO secretariat proposed that the committee convene a smaller intersessional meeting of experts to develop the draft of objectives and principles, but that proposal did not find favor before the meeting (it was blocked by a few states, primarily the USA and Germany).

As the committee moves, however slowly, towards more concrete outcomes, two issues in particular are emerging as important points of contention among the delegates. Both have been touched on before, but they are moving from the margins towards the center of debate. One is the role of states vs. the role of communities in any future legal mechanism. It is often assumed that indigenous and traditional communities are the primary stakeholders and would be the main beneficiaries of protection for folklore and traditional knowledge; this fits nicely with the decentralized nature of the intellectual property system, where the primary stakeholders are individuals and corporations, not governments. However, the African group of states now challenges this assumption. Citing national cultures and national heritages, it takes the position that the state should play a central role in any legal instrument for the protection of folklore and traditional knowledge. Needless to say, this does not sit well with indigenous representatives, whose relationship with national governments and dominant cultures is often tense, to say the least.

The other emerging issue in the work of the committee is that of the "public domain". As the possibility of tangible outcomes becomes more real, one of the major sticking points will inevitably be the depth and scope of protection, as well as the extent of exceptions. In copyright and patent law, protection eventually expires, thereby creating a public domain of expressions and inventions that can be freely reproduced. In addition, there are important exceptions to the protection regimes, including exceptions for academic research. In the current system, folklore and traditional knowledge belong for practical purposes to the public domain, which is why pharmaceutical companies and music producers can exploit them for their own ends without sharing any benefits with source communities. If the committee decides to create instruments for the protection of folklore and traditional knowledge, it remains an open question whether this protection will be subject to limitations and exceptions. It is thus conceivable that as a result of this process some traditional culture and knowledge will have legal owners or custodians, whose authorization folklorists and ethnologists will require before conducting research.

Indigenous representatives point out that they never actually placed their knowledge in the public domain. The public domain is not a part of their customary law; rather, the placement of indigenous knowledge in the public domain is the result of expropriation by others. It is not that they are necessarily unwilling to share this knowledge with outsiders, only that they claim the right to do so at their own initiative and on their own terms. These terms generally include prior, informed consent and the equitable sharing of any benefits arising from the use of their knowledge.

More troubling, however, is the possibility that legal protection of folklore will grant state governments increased authority to regulate the representation of their “national culture”, by their own subjects as well as by subjects of other states. The same is true for local community authorities; this process could conceivably reinforce or restore social hierarchies and power relations by enclosing the representation of culture with exclusive rights, silencing other voices, or regulating expression by transforming it into property.

While it is necessary to strike a note of caution, we should not lose sight of the fact that WIPO’s work also holds the promise of greater justice, equity, and consensuality in the appropriation of cultural resources. The work of WIPO’s committee could, at best, level the playing field a little bit, empowering local and indigenous communities by providing a mechanism that forces outsiders who wish to make use of their knowledge and traditions to enter into dialogue with them and to negotiate terms.

It is also important to note that the debates in this committee take place within the larger context of a fundamental dispute over WIPO’s future. At the organization’s General Assembly in September 2004, a coalition of developing states, led by Brazil and Argentina, proposed a “Development Agenda” that poses fundamental questions about the basics of WIPO’s mission. This coalition suggests that WIPO’s purpose ought not to be the promotion of intellectual property worldwide, as it is now defined, but rather the global promotion of creativity, innovation, and development—that intellectual property should, in other words, be a means rather than an end. There were heated debates on this subject at the General Assembly, and at the moment it is anybody’s guess where this will lead.

It is of utmost importance for the academic community to monitor these negotiations and for ethnologists and folklorists to direct critical attention to the issues up for debate. These are matters of grave importance for our fields and possibly of great consequence as well. SIEF is one of many non-governmental organizations that send observers to these meetings. Others include indigenous groups, legal associations, lobbying organizations of owners of intellectual property, human rights organizations, environmental groups, and scholarly associations (including the American Folklore Society). Although SIEF only has observer status, the representatives of non-governmental organizations are given an opportunity to express their views and their concerns during these meetings. The WIPO Secretariat, in particular, encourages observers to voice their opinions, as well as to give feedback on the process between sessions.

In my view, it is important that folklorists and ethnologists contribute to the dialogue at WIPO. We have to look past the international politics, and not let it bother us that many delegations are driven by motives ulterior to the matter at hand, or that alliances are drawn up according to interests and compromises that have nothing to do with folklore and traditional knowledge. Once we accept that, we also have to acknowledge that an important discussion is taking place there, and it is a discussion that is likely to carry important consequences. Many issues near and dear to us are up for debate. Since our words carry no political weight, what we say will be evaluated only according to its usefulness to the task at hand (and not based on our claims to expertise). Our voice will not be privileged, our advice not automatically adopted, but we will be given a hearing. And if we approach this not from an angle of resistance and opposition, but instead make an effort to give constructive advice, then some of our points will get across. In order, however, to make useful contributions, it is essential that we really begin to discuss these issues in all seriousness among ourselves.

The eighth session of the WIPO's Intergovernmental Committee will take place in June 2004. A wealth of information on the process is available online at: <http://www.wipo.int/tk/en/index.html> . In addition, links to key documents, related websites, and background information can be found on SIEF's homepage: <http://www.siefhome.org/>.

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