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THE JOHNS HOPKINS MODEL UNITED NATIONS CONFERENCE

WORLD INTELLECTUAL PROPERTY ORGANIZATION

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Session XXIII

World Intellectual Property Organization WIPO

Topic A: Striking a Balance between the Rights of Patent Holders Who Produce Medical Innovations and the Public

Topic B: Traditional Cultural Expressions and Intellectual Property

Committee Overview

The World Intellectual Property Organization (WIPO) is one of the 15 specialized agencies of the United Nations (UN). WIPO was created in 1967 “to encourage creative activity, to promote the protection of intellectual property throughout the world” by bringing stakeholders together to develop global intellectual property (IP) agreements, as well as help countries, businesses, and individuals use IP to improve lives.

WIPO provides a “global policy forum, where governments, intergovernmental organizations, civil

society and industry groups come to address evolving intellectual property (IP) issues.”¹

Member states and observers meet regularly in the various WIPO Committees and decision-making bodies. Their challenge is to continuously understand and negotiate the changing landscape of intellectual property and improve the systems, while continuing to encourage innovation and creativity.

This committee is part of the Economic and Social Council (ECOSOC) in the United Nations. ECOSOC is the UN’s central platform for reflection, debate and innovative thinking on sustainable development.²

¹Policy, (World Intellectual Property Organization).

²About ECOSOC, (United Nations Economic and Social Committee).



Topic A:

Striking a Balance between the Rights of Patent Holders Who Produce Medical Innovations and the Public

Introduction

The World Intellectual Property Organization is the global forum for intellectual property (IP) services, policy, information, and cooperation. It is a self-funding agency of the United Nations with 192 member states.³ This means that the WIPO handles the rights to any patents, including within the medical field. Medical innovations are important for the public good for fighting diseases, reducing healthcare costs, and creating a better standard of living for all. However there needs to be some kind of incentive to innovate. So, the WIPO must address this dilemma: trying to incentivize medical producers while also making their product accessible to the greater population.

Historical Background

A medical patent, like other types of patents, prevent competitors from making, using, or selling the patented item or process for a limited time. In the United States, the three categories of patents are utility patents, design patents, and plant patents. Starting in the 1980s, companies are also now allowed to patent living man-made organisms, which led to the boom in patents from biotechnology firms. The United States Patent and Trademark Office grants patents in the United States, and these patents are valid for 20 years.⁴

Unfortunately, there is no “international patent” to protect an innovation globally, which means that even a product that earns a patent in the United States will not be protected from exploitation in other countries. A different patent must be filed in different countries for it to be eligible throughout the rest of the world. However, the WIPO does offer a Patent Cooperation Treaty (PCT) application, which simplifies the application process and allows a single document to be filed across 153 countries who participate in the WIPO.⁵ The PCT assists applicants in “seeking patent protection internationally for their inventions, helps patent Offices with their patent granting decisions, and facilitates public access to a wealth of technical information relating to those inventions.”⁶

A patent is a type of intellectual property (IP). IP refers to anything created in the mind, such as including inventions, literary and artistic works, designs and symbols, and names and images used commercially.⁷ IP is protected by law legally enforceable patents, copyright and trademarks, which enable people to earn recognition and economic benefit from their creation. IP is significant because it must be able to strike the right balance between protecting both the rights and interests of innovators and the needs of the general public, while also fostering creativity and innovation. This is a key driver for biotech

³Inside the WIPO, (World Intellectual Property Organization).

⁴Julia Kagan, *Medical Patent*, (Investopedia, 2018).

⁵Bilal Kaiser, *Does Your US Patent, Trademark, or Copyright Protect You Overseas?*, (Legal Zoom, 2015).

⁶PCT- *The International Patent System*, (World Intellectual Property Organization).

⁷*What is Intellectual Property?*, (World Intellectual Property Organization).

companies to make a profit. Since a patent allows a drug to be protected from competition, biotech firms can earn a large profit from their products. This incentivizes biotech firms to produce medical innovations. However, this limits competition that could drive the price down and make it more affordable for the public.

In the 20th century, patents became extremely common for medical innovations. More and more biotech companies began to enter the market because they knew they were able to create a product, receive a patent, and then be able to earn a large profit on their goods. Biotech is one of the largest industrial sectors in terms of market value because of these patents.⁸ While this is legal to do, it disrupts competition and causes prices to rise exponentially.⁹ Patents are exclusive monopolies to sell various goods and services for a limited time.¹⁰ If you do not have a patent, someone might sue you or reinvent and patent the same idea. If you patent something, people will be less willing to create what you have already created.

Without patents, many companies will not want to produce products because they will earn a smaller profit. It was only with the passage of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) in 1994 that many developing countries began providing any patent protection at all for pharmaceutical products made within their borders.¹¹

The TRIPS agreement is an international legal agreement between all the members of the World Trade Organization (WTO), which sets down

“minimal standards for the regulation by national governments of many forms of IP”¹². TRIPS requires all members of the WTO to provide and enforce copyright with specific enforcement procedures, remedies, and dispute resolution procedures as state within the agreement. Any steps taken will meet the objectives to “contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”¹³ As a result, more companies decided to develop their products for developing countries. This allowed developing countries to gain access to these products, which they were unable to receive prior. But this still gives rise to the fact that many products may be too expensive for people in developing countries to obtain.¹⁴

The TRIPS agreement came about after the AIDS epidemic in the 1980s, when people in developing countries had no access to medicine that would treat AIDS. After the TRIPS agreement, medication was now available for purchase within developing countries. This was because of the visible conflict over AIDS drugs in Africa.¹⁵ Despite the role that patents have played in maintaining higher drug costs for public health programs across Africa, TRIPS has helped lower the price of AIDS drugs. Furthermore, TRIPS allowed for companies to be able to make a profit, but still be able to make drugs a little bit more affordable for

⁸Bishal Khatiwada, *Top 10 Biotechnology Companies in the USA*, (Explore Biotech, 2019).

⁹Jean-Paul Gaudilliere, *How pharmaceuticals became patentable: the production and appropriation of drugs in the twentieth century*, (Routledge, 2008).

¹⁰Stephen Kinsella, *How Intellectual Property Hampers the Free Market*, (Foundation for Economic Education, 2011).

¹¹*Overview: the TRIPS Agreement*, (World Trade Organization).

¹² Ibid.

¹³ Ibid.

¹⁴Bruce Lehman, *The Pharmaceutical Industry and the Patent System*.

¹⁵Charles T. Collins-Chase, *The Case Against TRIPS-Plus Protection in Developing Countries Facing Aids Epidemics*, (University of Pennsylvania, 2008).

those in need. TRIPS has also helped with not just AIDS medication, but other crucial medication that will help with public health epidemics in developing countries. However, medication is still very expensive because of patent laws, and the only way for many people to receive these medical innovations is through donors or public health groups.

Throughout history, patents have incentivized the development of medical innovations.¹⁶ However, it has limited the free market by limiting competition, thereby increasing consumer prices. Patents have been up for debate throughout history and into the modern day.

Contemporary Conditions

WIPO 59th Meeting

In its 59th session, from September to October 2019, the Standing Office on the Law of Patents discussed different ways to utilize patents and ways to motivate patent holders to make their innovations more accessible to those who need it.¹⁷

The head of the WIPO Francis Gurry said the WIPO's global IP services and finances ended with a surplus of 42.6 million US dollars in 2018.¹⁸ He believes that this trend will lead to a healthy surplus in 2019.

The record demand for IP rights, caused difficulties for IP administration in the global economy. In his 2019 report to the assemblies, Gurry claims that users in 127 countries and regions filed applications in 2018.¹⁹

The United States, followed by China, Japan, Germany, and South Korea, led as the largest source of applications, prompting the

creation of new tools to help sort and answer the increase in submissions of IP applications.

WIPO has been developing artificial intelligence to help deal with the massive amounts of IP applications that are being placed worldwide, such as WIPO Translate, which is a brand image search system that helps organize different IP applications, and an improved method to manage records of meetings.

Patent Law Treaty

The World Intellectual Property Organization will also take time to discuss a new Patent Law Treaty (PLT) to try to incentivize manufacturers to make their innovation more accessible for the general public.

The Patent Law Treaty was created to harmonize and streamline formal procedures to make the process more approachable.²⁰ The PLT provides the maximum requirements the office of a contracting party may apply.²¹ All countries in the PLT now also have the same requirements for patent filing, as the formal requirements for national and regional applicants were standardized in accordance with the treaty. Overall, it is now easier to receive a filing date for a patent application, there are less requirements for a patent application, and a framework now exists for digital patent applications.²²

Insulin Price Increase

One way that the raise in medical innovations have impacted the American public, is that of the insulin price increase.

¹⁶Ahmad Siddiqi, *Patents and the Pharmaceutical Drugs*, (2005).

¹⁷*Assemblies of the WIPO*, (The World Intellectual Property Organization).

¹⁸Mu Xuequan, *World Intellectual Property Organization records surplus last year: WIPO chief*, (Xinhuanet, 2019).

¹⁹ Ibid.

²⁰*Summary of the Patent Law Treaty (PLT)*, (World Intellectual Property Organization).

²¹ Ibid.

²²*Patent Law Treaty: Everything You Need to Know*, (upcounsel, 2008).

Patents have not been profitable for companies, so insulin producers have increased the price of their products in order to earn a larger profit²³.

Ten years ago, prices were just under \$100. In 2019, prices have skyrocketed to about \$300. For the 1.2 million Americans living with type 1 diabetes, getting the necessary insulin is an economic burden. This is why some have called for stricter patent laws regarding the price of innovations make patents again profitable for companies, at least in the beginning, as well as better ways to incentivize companies to sell these products at a lower rate.

Globally, access to insulin is beyond the reach of millions of people with diabetes around the world.²⁴ Access to insulin is an essential and non-negotiable need, used in matter of life and death situations.

In many low- and middle-income countries, the availability of insulin in the public sector is often limited. Therefore, people with diabetes are either forced to purchase insulin in the private sector at full price, use less than the prescribed amount so their supply last longer, or go without insulin.²⁵ Complications occur from misuse of insulin, including blindness and amputations, and premature death.

To illustrate this issue, Health Action International (HAI) undertook a one day global “snapshot” of the price of insulin from 60 countries. The lowest average price was in Egypt, India, Iran, Nepal, Pakistan, and Senegal. The highest average price was in Argentina, Austria, Congo, Costa Rica, and Indonesia. Because of the difference in the prices of insulin, it makes those in

countries without sufficient access to insulin worse off than those with access to the needed medicine.

This trend is very common for medicines that are needed in daily life. Because the medicine is a necessity, companies believe they can hike up the price to get a profit.

Currently in the United States, the Senate is trying to pass an act to reduce the price of insulin.²⁶ In the act, it is trying to reduce insulin costs to be of the price that they were in 2006. However, some worry that it does not coincide with free market principles by price fixing a product, creating an obstacle to passage.

Past United Nations and International Actions

Wider Access to Medicine

In 2016, the United Nations issued a lengthy report that urges governments to take steps to ensure greater access to medicine.²⁷

An increasing number of patients are found to be unable to afford the medicine they need. The report suggested that countries should explore creating compulsory licenses, which allows countries to sidestep patents. However, many countries do not agree with this.

In Colombia, the government made plans to issue a license and sidestep the patent process for a cancer medicine. The health minister of Colombia wanted to issue a compulsory license, which would allow a generic company to make a lower cost version of the Gleevec leukemia treatment.²⁸

²³Rachel Gillett and Shayanne Gal, *One chart reveals how the cost of insulin has skyrocketed in the US, even though nothing about it has changed*, (Business Insider 2019).

²⁴*Life-saving Insulin Largely Unaffordable*, (Hai Global).

²⁵ Ibid.

²⁶*The Senate's Insulin Price Reduction Act: What You Need to Know*, (T1D Exchange, 2019).

²⁷Ed Silverman, *UN panel urges wider access to medicines, but pharma slams the report*, (Pharmalot, 2016).

²⁸Silverman, Ed. “Colombia moves to sidestep patent of Novartis cancer drug”. *STAT*. May 2, 2016.

This move would save Colombia about \$12 million annually by allowing generic companies to produce medicine without the need for a patent, thus creating competition and lowering costs for patients. This allows companies to produce new medical products faster and still make money. By bypassing the patent process, it would allow companies to be able to produce less expensive medicine, helping with the process of dispersing medicine to developing countries.

The UN has also suggested delinking the cost of research and development from the price of the drug. Research and development is very expensive and by adding that cost to the price of the drug makes it very expensive.

This report showed that there are strategies available to make medicine more accessible.

SciTech For Development

A committee of the United Nations General Assembly (UN GA) adopted a resolution highlighting the importance of growing science and technology which includes the expansion of intellectual property rights and innovation tailored to countries' development strategies.²⁹ The resolution was titled, "Globalization and interdependence: science, technology and innovation for development".

In this resolution, it highlights the importance of investment in good intellectual property. It states, "Recognizing the importance of the creation of a conducive environment that attracts and supports private investment, entrepreneurship and corporate social responsibility, including an efficient, adequate, balanced and effective intellectual

property framework, while encouraging access to science and technology in developing countries."

It also referenced the WIPO's technology and support centers (TISCs), which provide innovators in developing countries with access to locally based, high quality technology information and related services, helping them to exploit their innovative potential and to create, protect, and manage their IP rights.³⁰

It also states that the committee encourages the UN Conference on Trade and Development in collaboration with the WIPO to continue to undertake science, technology and innovation policy reviews in order to assist developing countries into creating their own IP. To achieve this goal, member states are asked to provide funding to the trust fund for the Technology Bank for the Least Developed Countries, which is dedicated to enhancing the capacity to contribute in the fields of science, technology and innovation for sustainable development in some of the world's least developed countries.³¹

The resolution then calls for a report a follow-up after a year to continue to integrate science and technology policies into national development initiatives.

This resolution further solidifies the UN mission to grow IP and highlight the importance of science and technology to reach that goal.

Alternative Dispute Resolution

The WIPO Arbitration and Mediation Center is a neutral, international and non-profit dispute resolution provider that offers time and cost efficient alternative dispute

²⁹William New, *UN General Assembly Committee Adopts Resolution On SciTech For Development With Nod to IP Rights*, (Global Policy Watch, 2017).

³⁰*Technology and Innovation Support Centers*, (World Intellectual Property Organization).

³¹*Who We Are*, (United Nations).

resolution (ADR) options.³² It uses the strategies of mediation, arbitration, expedited arbitration, and expert determination to enable private parties to settle their domestic and cross-border IP and technology disputes outside of the official national court systems.

The use of ADR procedures to settle disputes between private parties outside of the court has a long tradition in legal systems in the world.³³ While traditionally ADR options have not been widely used to settle IP disputes, the WIPO set out a resolution in order to use ADR to settle such disputes.

IP disputes have distinctive characteristics. They often cover multiple jurisdictions due to recent increases in the globalization of trade and the increasingly international exploitation of intellectual property, and because of that, courts are usually an inappropriate and inefficient method for resolution. The 2013 WIPO International Survey on Dispute Resolution in Technology Transactions revealed that the ability to limit the time and cost of proceedings were top priorities when selecting dispute resolution options in order to create a more efficient way of dealing with disputes.³⁴

Of course, the type of dispute resolution will depend on the unique

circumstances of the parties, the case itself, and their requirements at the time. Each type of ADR can save time and cost which makes them a more affordable and efficient way to solve IP related disputes.

The WIPO Center maintains a database of over 1,500 independent and neutral WIPO mediators skilled in IP and ADR in 70 countries³⁵ who are readily available to help ensure the best and most efficient outcomes in intellectual property cases around the world.

This commitment to settle IP disputes in a timely, and cost-effective way continues to show the UN and WIPO's aim to the international community. Because of this, firms do not need to focus all their time and resources to settling disputes. Rather, they can put that effort into creating medical innovations that are meaningful and can make an impact on the international community.

³²*Alternative Dispute Resolution*, (World Intellectual Property Organization).

³³Heike Wollgast, *WIPO alternative dispute resolution- saving time and money in IP disputes*, (World Intellectual Property Organization, 2016).

³⁴ *Ibid.*

³⁵ *Ibid.*

Questions a Resolution Must Address

1. How Can the UN Make Medical Innovations More Accessible?

Many medical innovations are currently very expensive and/or hard to distribute worldwide. The UN needs to be able to figure out a way to make innovations more accessible because everyone in the world deserves effective healthcare.

2. What are Some Ways to Promote Innovation?

Many ideas have been tried in the past, and failed, to promote innovations. The UN needs creative ways in order to promote innovation for medical innovations.

3. How Can Medical Innovation Costs Be Kept Low?

By creating medical innovations, and being able to distribute them effectively, the UN needs to ensure that the costs will be low in order to effectively create change. Both for the buyer, as well as the seller, keeping costs low is a priority to ensure ease of access for the buyer and the ability to make a profit for the seller.

4. Are There Other Ways to Promote Innovation Without the Use of Patents?

The UN has mainly looked at patents in order to promote and incentivize innovation. Is there another way to do this other than patents?

5. How Can the UN Use Their Resolution to Solve the Rising Prices of Insulin Globally?

Prices of insulin has been increasing worldwide because there is not much legislation to regulate the price of drugs like insulin. Find a way that the UN can help with this.

6. How Can the WIPO Ensure that Its Member States are Following the Rules?

Even if the UN and the WIPO creates resolutions that help with patents and incentivizing the creation of medical innovations, how can the WIPO ensure the rules and regulations are being practiced correctly?

Bloc Positions

- *ASEAN*

The positive shift in the way the countries of the ASEAN region are using IP as a strategic policy instrument to promote economic growth has been shown in the past few years.³⁶ WIPO and the ASEAN have strong cooperation and have shown that IP is used as a key tool to promote development and wealth creation.

- *North America*

North America has been readily using WIPO services, including the PCT, trademarks, emblems, and the Global Design Process.³⁷ North America has seen wide success in their use of IP and have cooperated with WIPO in order to continue to use and follow international rules.

- *The Europe Union*

WIPO, the World Trade Organization (WTO), and the University of Geneva (UNIGE) launched the first IP Researchers Europe Conference (IPRE) at the WIPO.³⁸ The IPRE aims to promote research and dialogue on IP, and to promote innovation within Europe.

- *Latin America and the Caribbean*

The Regional Bureau for Latin American and the Caribbean is responsible for providing technical assistance and capacity programs for the 33 WIPO member states from the Latin American and Caribbean region (LAC).³⁹ This bureau is used to facilitate the use of IP for social, cultural and economic development.

- *Africa*

WIPO's work in Africa has historically been structured around developing and building up basic IP systems and the bureaucratic structures necessary to govern and enforce them, both nationally and internationally. Today, the main question for these countries is how to use these systems to bolster African economies through increased efforts at supporting, protecting, and integrating the innovation and creativity of their citizens.⁴⁰

³⁶*ASEAN and WIPO Review Cooperation Activities*, (World Intellectual Property Organization, 2017).

³⁷*WIPO and North America*, (World Intellectual Property Organization).

³⁸*First IP Researchers Europe Conference at WIPO*, (World Intellectual Property Organization, 2018).

³⁹*Regional Bureau for Latin America and the Caribbean*, (World Intellectual Property Organization).

⁴⁰Gurry, Francis. "Intellectual Property for an Emerging Africa". *WIPO Magazine*. October 2015.

Conclusion

This committee is uniquely positioned to support the needs of patent holders, as well as fostering accessible for medical innovations. In promoting the production of medical innovations, it is important to not only promote accessibility for all countries, but also to do so in a productive manner and be able to incentivize production for producers and make it worthwhile for them.

For all member states, striking a balance between patent holders and the public should be a priority. For developing countries, this is more of a necessity than developed countries. Developing countries are more at a need for that balance, than developed countries, although it should still be a priority in developed countries. To accomplish this task, it is the role of this

committee to promote incentivization for patent holders, while also making the product accessible for all between developing and developed countries. The WIPO is tasked with controlling the flow of decision-making among these actors and has the opportunity here to reverse the narrative about the accessibility of medical innovations in developing countries.

High prices of products lead to the accessibility for developing countries to attain the product. But price control can lose the incentivization of developing medical innovations for patent holders. Being able to find the right balance to make products accessible, but profitable is a very important task for the WIPO. Any resolutions passed by this committee should not be one-size-fits-all, and should account for the unique social, political, economic, and environmental conditions of the location



Topic B:

Traditional Cultural Expressions and Intellectual Property

Introduction

The World Intellectual Property Organization is a global forum constantly adapting to new technological advancements and creations. To foster cultural diversity and preserve cultural heritage, WIPO also serves to protect historical and traditional expressions of folklore, also known as traditional cultural expressions (TCE). TCE's have a broad definition to include integral parts of social and cultural identity and embody core beliefs of specific cultures. Examples include, but are not limited to music, traditional prints or designs, architecture, performances, and many other similar defining features of cultural expression.⁴¹

Traditional knowledge is also referred to as indigenous or local knowledge. This information is intertwined with cultures and often gives defining features about those communities. These cultural identities cover a wide array of concepts, spanning everything from agricultural knowledge on land cultivation to the culture's belief on celestial navigation.⁴² TCEs can be used to individualize communities by portraying their most core beliefs and ideas. Some communities were entirely dependent on

their traditional knowledge to survive, further emphasizing the importance of identification and protection.

Historical Background

The concept of traditional knowledge has a long history in localized communities. These ideas and identities were typically passed down through orally, interwoven in folklore, songs, dances, laws, and other manifestations of culture.⁴³ Many social scientists will study these original communal concepts to learn more about localized biodiversity education. These ideas have been around for centuries and have allowed the cultures to flourish, thus providing evidence to their efficiency and accuracy.⁴⁴

Other communities may have less of a scientific contribution as much as an anthropological contribution. They tend to emphasize more ideals relating to cosmology and religious ties, explaining away the unexplainable. These are stories like why the sun may rise or why they live and cultivate the land that they do.⁴⁵ For many communities, the lines are blurred as to what aspects of culture are and are not protected by the current legal system. Traditional knowledge and methods from past generations should fall under modern

⁴¹"Traditional Cultural Expressions." World Intellectual Property Organization. World Intellectual Property Organization. Accessed November 12, 2019. <https://www.wipo.int/tk/en/folklore/>.
² Ann Marie Sullivan, Cultural Heritage & New Media: A Future for the Past, 15 J. MARSHALL REV. INTELL. PROP. L. 604 (2016) <https://repository.jmls.edu/cgi/viewcontent.cgi?article=1392&context=ripl>

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⁴³Acharya, Deepak and Shrivastava Anshu (2008): Indigenous Herbal Medicines: Tribal Formulations and Traditional Herbal

Practices, Aavishkar Publishers Distributor, Jaipur- India. ISBN 978-81-7910-252-7. pp 440

⁴⁴Posey, Darrel Addison. "Indigenous Management of Tropical Forest Ecosystems: The case of the Kayapo Indians of the Brazilian Amazon" in Dove and Carpenter, *Environmental Anthropology: a historical reader*, Blackwell Publishing, Oxford, 2008, p. 90.

⁴⁵Chamberlin, J.E. (2003). *If This Is Your Land, Where Are Your Stories? Finding Common Ground*. Toronto: Alfred A. Knopf Canada.

protective laws, yet legal issues arise in the debate for protection. Unless specified in local, regional, or national laws, it may not be covered. For example, adaptations of history are subject to copyright, yet performances of historical ceremonies may not be.⁴⁶

Property Rights

In 1992, the Convention on Biological Diversity (CBD) took notice of the importance of protecting traditional knowledge and began to draft regulations of access. It quickly became clear the necessity of international cooperation. This further garnered attention after the passing of the “World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), which established rules for creating and protecting intellectual property that could be interpreted to conflict with the agreements made under the CBD”.⁴⁷

Because of this conflict, an investigation began to solidify the connection between TCE, property rights, and biodiversity. WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC-GRTKF) in 1999 to help create a more concrete and globally accepted definition. During this time period, the fight for human rights within localized and indigenous communities grew, with different agencies and declarations being organized to certify their rights to land. As time passed, their concern morphed to include the misappropriation of their cultures in

addition to protecting their land claims.

Public Domain

“Public Domain” is a term that is designated to objects or information that is no longer protected by copyright or patent laws and is free to use and share.⁴⁸ Within the context of TCEs and indigenous IP, new analyses or interpretations of public domain information are seen as new works and can thus be declared copyright by the author. This includes a revamping of presentation, like digitizing or animating stories. Once these new interpretations outlast their original copyright restrictions, they revert to public domain. Indigenous tribes do not adhere to this understanding of copyright laws and transitions. They believe that the sharing of information and TCEs does not warrant personal use. They see this misuse as an appropriation of their native culture.⁴⁹

Contemporary Conditions

Trademarks and active discussions about protecting these forms of IP has led to the creation of specific treaties and policies such as in the case of Beijing and New Zealand. The caveat here is that the protection has limited jurisdiction. The conversation gets complicated as both traditional and expressive folklore are at risk of not being protected. The international debate about protecting cultural knowledge and TCEs continues. Different countries have different policies, and their own definition for what may qualify for said protection varies. This is a large reason as to why an international consensus has not been

⁴⁶“Traditional Cultural Expressions.”

⁴⁷Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)" (PDF).

⁴⁸“Public Domain Mark.” Creative Commons. Accessed November 15, 2019. <https://creativecommons.org/share-your-work/public-domain/pdm/>.

⁴⁹Graber, Christoph Beat; Nenova, Mira Burri (2008). *Intellectual Property and Traditional Cultural Expressions in a digital*

environment. Edward Elgar Publishing. p. 174. ISBN 978-1-84720-921-4.; Paolo Davide Farah, Riccardo Tremolada, "Diritti di proprietà intellettuale, diritti umani e patrimonio culturale immateriale", (Intellectual Property Rights, Human Rights and Intangible Cultural Heritage), RIVISTA DI DIRITTO INDUSTRIALE (Journal of Intellectual Property Law), Issue 2, Part I, June 2014, ISSN 0035-614X, Giuffrè, pp. 21-47. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472388

achieved.^{50,51} The UNCED has held numerous conferences, and each conference that brings attention to TCEs and IP draws from a different angle. The 1996 Buenos Aires conference focused on indigenous populations and how their sovereignty and information should be protected under state governments, whereas the parties in Brazil set a deadline to negotiate legally binding terms by 2010. These terms were solidified with the conclusion of the Nagoya Protocol. As recently as October 2017, the EU and 100 other nations have ratified this protocol.⁵²

Under the scope of current intellectual property laws, traditional cultural expressions are usually unable to be protected. Due to the wide variety of traditional cultural expressions, there is no one law that efficiently and globally addresses different types of cultures and expressions. According to Molly Torson Stech, the most effective and comprehensive results that satisfy all parties will come from “case precedent from many jurisdictions and deference to specific tribal and aboriginal preferences...at least until there is adequate understanding amongst tribes and jurisdictions on an international level to create a sui generis law that is suitable for a majority of situations.”⁵³

The current work that has been done with TCE protection has shown that no single blueprint or template of law or comprehensive ‘one-size-fits-all’ solution is likely to suit all priorities of every nation, legal environment, the needs of traditional communities in all countries, and most importantly, cultural environment. Instead,

the ‘all in one’ solution, or solution that checks all the above-mentioned boxes, can be found in a mixture of differentiated and multiple options for protection, possibly underpinned by an internationally agreed set of common objectives and core principles.

The options include existing IP systems (including unfair competition), adapted IP rights as well as non-IP options, such as trade practices and labeling laws, use of contracts, customary and indigenous laws and protocols, cultural heritage preservation laws and programs.⁵⁴ Options for individual designers using aspects of their cultural heritage include registering and protecting their symbols through trademarks or invoking their rights as producers through treaties like the WIPO Performances and Phonograms Treaty and the Beijing Treaty on Audiovisual Performances.

Also, important to keep in mind are the policy objectives that countries have expressed as the reasoning behind the protection of TCEs, which can also impact their choice of system and the extent and scope of protection. These objectives include creating wealth and fostering sustainable economic development, promoting and developing aspects of traditional culture and folklore while respecting their original communities and preventing their exploitation and abuse, and promoting overall cultural diversity.⁵⁵

⁵⁰“Protection of Traditional Cultural Expressions and Traditional Knowledge - Key Issues.” World Intellectual Property Organization. World Intellectual Property Organization. Accessed November 12, 2019.

<https://www.wipo.int/tk/en/igc/issues.html>.

⁵¹“Traditional Cultural Expressions.”

⁵²“Parties to the Nagoya Protocol”. Convention on Biological Diversity. Retrieved 19 October 2017

⁵³ Mixing Intellectual Property Law with Other Legal Philosophies to Protect Traditional Cultural Expressions, *American Journal of Comparative Law*, Vol. 54, No. 173, 2006, Molly Torsen Stech

⁵⁴ “Intellectual Property and Traditional Cultural Expressions/Folklore. World Intellectual Property Organization. World Intellectual Property Organization. Published 2005.

⁵⁵*Ibid.*

Past United Nations and International Actions

The first UN action to develop measures to protect TCE and indigenous IP related to sustainability and biodiversity was the Convention on Biological Diversity (CBD) signed at the United Nations Conference on Environment and Development (UNCED). As environmental protection and human rights are becoming growing concerns among countries, more UN nation-states are ratifying and implementing the document.⁵⁶ Additionally, Article 27 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) is also frequently referenced when referring to what biological materials or innovations may be excluded from legal protection.⁵⁷

The main treaty protecting indigenous rights and their intellectual property of traditional cultural expressions comes through the UN Declaration on the Rights of Indigenous Peoples. Specifically, Articles 11, 12, and 13 discuss the rights of indigenous peoples to practice, develop, and transmit to future generations their culture and traditions. The UN requests that states “provide redress through effective mechanisms” and “take effective measures to ensure that this right is protected,”⁵⁸ which highlights the importance of developing appropriate and comprehensive IP laws to achieve those goals.

Over the years, the United Nations has worked on TCE protection in partnership with the Permanent Forum on

Indigenous Issues. In 2005, the International Workshop on Traditional Knowledge was held in Panama City under the Department of Economic and Social Affairs reporting to the Secretariat of that Forum. This workshop reaffirmed the importance of protecting indigenous and traditional knowledge, to form recommendations for agencies “dealing with traditional knowledge with a view to enhancing mechanisms within the UN system for the meaningful and effective participation of indigenous peoples regarding traditional knowledge.”⁵⁹

Also, in 2005, the WIPO published a booklet on the *Intellectual Property and Traditional Cultural Expressions* that discussed the parameters and progress made concerning TCE and culturally specific IP protective rights. The booklet gives a definition to TCEs and then elaborates on how they may be properly used or appropriated and acknowledges both the moral and legal implications of misusing cultural intellectual property.⁶⁰

Since that publication, WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which is tasked with working to “reaching agreement on a text of an international legal instrument, which will ensure the effective protection”⁶¹ of TCEs, has published multiple briefs and studies concerning the current state and proper methods for TCE protection.

In 2008, the Committee conducted a gap analysis on the protection of traditional cultural expressions, which included both

⁵⁶The Convention on Biological Diversity". *The Convention on Biological Diversity*.

⁵⁷Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)

⁵⁸ UN Declaration on the Rights of Indigenous Peoples. General Assembly Resolution 61/295. 13 September 2007.

⁵⁹ Background Note on the International Workshop on Traditional Knowledge. *Department of Economic and Social Affairs*. Secretariat of the United Nations Permanent Forum on Indigenous Issues. 5.

⁶⁰*Intellectual Property and Traditional Cultural Expressions*. Vol. 1. Geneva, Switzerland: WIPO, 2005.

https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf.

⁶¹ “Intergovernmental Committee (IGC)”. World Intellectual Property Organization.

more detailed definitions of TCEs as well as contemporary shortcomings at the international and national level.⁶²

These included the “originality” requirement that limits the number of TCEs eligible for copyright and thus economic rights, lack of protection for works without identifiable individual authors (many TCEs have been collectively developed over time), and the extensive exceptions and limitations that exclude many TCEs currently being exploited for financial gain.⁶³ The analysis also notes problems that impact categories of TCEs that require more specific solutions, such as protections for the performances of TCEs and “secret TCEs”, or confidential information that has been disclosed to museums or anthropologists.⁶⁴

Two additional background briefs from WIPO and the committee are also worth noting: Developing National Strategy

on Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions, which emphasizes the importance of combining policies and legislation with proper infrastructure (databases, IT systems) and tools (contracts, guidelines) in effective implementation of protections⁶⁵, and the Alternative Dispute Resolution for Disputes Related to Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources, which offers a more sensitive alternative for indigenous communities to fight for their intellectual property rights outside of a traditional court system, through negotiation, mediation, arbitration, and collaborative law.⁶⁶

⁶²“The Protection of Traditional Cultural Expressions: Draft Gap Analysis”. *The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*. World Intellectual Property Organization. October 11, 2008.

⁶³Ibid.

⁶⁴Ibid.

⁶⁵“Developing a National Strategy on Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions”. World Intellectual Property Organization. 2016.

⁶⁶“Alternative Dispute Resolution for Disputes Related to Intellectual Property and Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources”. World Intellectual Property Organization. 2016.

Questions a Resolution Must Address

1. *How do we universally define TCEs and traditional knowledge? Is there a difference in how they are defined? Protected?*

The main issue in this debate is the lack of a universal definition of what qualifies as a traditional cultural expression. A proper definition declaring clear criteria for what qualifies as a TCE or what community's information may also fall under that same subheading is necessary.

2. *What are the limitations/restrictions to both the definitions allowed and the protection that can be provided?*

This question touches on a country's definition and perspective on human rights. A more prominent advocate would have a larger definition and allow for greater protection. This dichotomy within the global network is why an agreement has yet to be reached. This question is asking about a country's willingness to compromise for an international consensus.

3. *How long should the policies last?*

This is a question geared towards the protection of TCEs. All copyrights and patents have end terms and limits. Countries must agree upon a universal duration of protection.

4. *What are the consequences of breaking these rules/regulations? Punishable by law?*

These protections are meant to allow for creative diversity without damaging native cultures. The issue is one of information as much as it is one of human rights, so what is the proper consequence for breaking the agreed upon regulations of sharing and protection?

5. *How should foreign rights be protected in these interactions?*

This international agreement deals with domestic information on a global scale. Protecting and securing the rights of foreign actors is important when working in these circumstances. The key is to make an agreement that guarantees protection to TCE and IP without undermining national sovereignty.

6. *What is the proper procedure for overlapping cultures and traditions? Are there specific rights given to the older tradition?*

Many cultures around the world have developed independently of one another yet have very similar characteristics that may be hard to distinguish. There needs to be guidelines or a set procedure to properly designate what culture has its aspects protected and certified as their own. This process needs to happen without the disturbance of other native communities.

Bloc Positions

▪ *TCE Protection:*

This bloc has a smaller definition of what may be proclaimed as a TCE and has stricter regulations as to how they are protected. These countries also draw a strong distinction between TCEs and Traditional Knowledge, emphasizing the importance of protection. These countries are emphasizing the importance of tangible expressions of cultures. Examples consist of pottery methods or original textile patterns. This bloc urges for the protection, clarification, and specificity between different tangible cultural expressions.

- *China*
- *European Union*
- *Japan*
- *Mexico*
- *Norway*

▪ *Traditional Knowledge Protection:*

The bloc, similar to before, also has a stricter definition of the terms in question, yet these countries see the intangible knowledge more worthy of protection than the original definition of TCEs as defined within previous working papers. Knowledge such as origin stories or orally passed down ceremonies are deemed more significant than trying to define a particular fabric pattern to a specific tribe for protective rights.

- *Latvia*
- *Switzerland*
- *Tunisia*

▪ *Traditional Knowledge and TCE Protection*⁶⁷:

These countries have a broad and generous definition of what can be claimed as a TCE and what protection is offered. They are open to having inclusive and adapting policies that accept new cultures as they grow. Countries like the United States of America and Brazil are at the forefront of this debate for more thorough and avid protection and security for these TCEs and indigenous knowledge. These countries emphasize both the tangible and intangible aspects of cultural expressions that native communities are wanting to protect.

- *Brazil*
- *Columbia*
- *Ghana*
- *Guatemala*
- *Hungary*
- *Kyrgyz Republic*
- *New Zealand*
- *Nicaragua*
- *Qatar*
- *United States of America*

⁶⁷* There are countries such as Japan and Norway who have individual viewpoints on both subjects, yet they do not have an

inclusive document that specifies their overall opinion like the US or Brazil.

Conclusion

To conclude, WIPO continues to work with countries and indigenous communities around the world to establish and strengthen systems and measures for the legal protection of TCEs. As it was mentioned earlier, to protect, control, and legislate the wide range of existing traditional cultural expressions, one law or piece of legislation is not enough. To get to the root of the issue, every aspect of TCE protection needs to be examined and understood in a real-world context as it impacts historically marginalized indigenous communities. Work must be

done on an international policy level, through legal analyses like the work done by the WIPO Committees, and on national levels through the development of contracts and guidelines to help folklore achieves, museums, and other institutions understand and manage the intellectual property protections of their collections in respect to the original communities. This continued work will help more adequately protect TCEs as well as improve international responses to past and current failures in respecting cultural heritage and provide consistency in future efforts to ensure their appropriate and equitable usage.

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