

TRADITIONAL KNOWLEDGE (TK)

Traditional Knowledge (aka indigenous knowledge) refers to “the knowledge resulting from intellectual activity in a traditional context, and includes knowledge, practices, skills and innovations. It embodies the traditional lifestyles of indigenous peoples and local communities and is transmitted from generation to generation” (Uganda’s National Intellectual Property Policy 2019). Traditional knowledge is not so-called because of its antiquity. It is a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. As such, it is not easily protected by the current intellectual property system, which typically grants protection for a limited period to inventions and original works by named individuals or companies.

Traditional knowledge (TK) is not limited to any specific technical field, and may include agricultural (traditional farming practices, technologies and techniques), environmental and medicinal knowledge (knowledge relating to the uses of certain biological or chemical resources), and knowledge associated with genetic resources. Traditional knowledge also includes literary, artistic or scientific works, religious or spiritual practices, traditional dances, songs, or rituals. Traditional Knowledge involves verbal expressions such as stories, epics, legends, poetry, riddles; words, signs, names, and symbols; musical expressions including songs and instrumental music; expressions by movement, including dances, plays, rituals or other performances, whether or not reduced to a material form; tangible expressions, including productions of art, drawings, etchings, lithographs, engravings, prints, photographs, designs, paintings, including body-painting, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basketry, pictorial, woven tissues, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments, maps, plans, diagrams, architectural buildings, architectural models; and architectural forms.

The various forms of traditional knowledge may involve different kinds of intellectual property. For example, patent law relates to traditional medicinal knowledge, whereas artistic and cultural practices relate to copyright law, and identifying symbols may pertain to trademarks and geographical indications. With respect to the intersection between traditional knowledge and intellectual property law, it becomes a discussion about equity, fairness, and what is perceived to be an international intellectual property system. Intellectual property rights (IPRs) rose to protect strictly intangible subject matter, and as an intangible category, TK lies within the purview of the subject matter of protection in intellectual property (IP). The relationship between TK and IP became much more apparent with the realization of the effect of IPRs on biodiversity through the phenomenon of biopiracy. The problem of biopiracy manifests itself, not only in the manner the modern IPRs enable individuals and corporations establish rights over TK and TK-related resources, but also in the manner the IPRs system excludes these resources from the realm of protection. The modern IPRs create asymmetric protective regime by letting individuals establish rights over TK, while at the same time, denying indigenous peoples and local communities the opportunity to protect their

TK. The current IP system, therefore, poses challenges to TK through criteria of protection that are mostly alien to the knowledge system of indigenous peoples and local communities.

Uganda is a signatory to a number of international treaties that recognize protection of Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions. These include the UNESCO Heritage Convention (since 1987) and the Convention on Biological Diversity (CBD - since 1993). In 2014, Uganda ratified the Nagoya Protocol on Access to the Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity. Uganda as a contracting party to the African Regional Intellectual Property Organization (ARIPO) is in the process of ratifying the 2010 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.

All these international conventions and treaties, by their nature, do not provide stringent measures for enforcement or adherence to their provisions. Hence the need for a domestic legislation for protection of traditional knowledge in Uganda. Indeed, Objective XXIV of the 1995 Uganda Constitution states, "*cultural and customary values that are consistent with the fundamental human rights and freedoms, human dignity and democracy and with the Constitution of Uganda may be developed and incorporated in all aspects of Ugandan life*". Objective XXV also mandates the State and citizens to preserve and promote public property and Uganda's heritage.

The protection of traditional knowledge involves taking measures to ensure that unauthorized parties do not unfairly acquire intellectual property rights over indigenous peoples' knowledge, innovations, and practices. Protection of TK and biodiversity plays a critical role in healthcare, food security, culture, religion, identity, environment, sustainable development and trade.

How to Protect Traditional Knowledge

Two types of intellectual property protection of traditional knowledge are recognized:

- 1) **Defensive protection** that aims to stop people outside the community from acquiring intellectual property rights over traditional knowledge. Defensive mechanism means steps taken to prevent acquisition of intellectual property rights over traditional knowledge, for example, by way of setting up a Traditional Knowledge Digital Library. Documentation can help protect traditional knowledge, for example, by providing a confidential or secret record of traditional knowledge reserved for the relevant community only. Some formal documentation and registries of traditional knowledge support *sui generis* protection systems, while traditional knowledge databases play a role in defensive protection within the existing IP system.
- 2) **Positive protection**, which is the granting of rights that empower communities to promote their traditional knowledge, control its uses and benefit from its commercial exploitation. Positive protection means protecting TK by way of enacting laws, rules and regulations, access and benefit sharing provisions,

royalties, etc. Recognizing traditional forms of creativity and innovation as protectable intellectual property is an historic shift that enables indigenous and local communities as well as governments to have a say over the use of their traditional knowledge by others. This makes it possible, for example, to protect traditional remedies and indigenous art and music against misappropriation, and enable communities to control and benefit collectively from their commercial exploitation.

Can the current IP System Protect Traditional Knowledge?

While Uganda's present conventional Intellectual Property regimes (such as patents, trademarks, designs, copyrights, geographical indications, trade secrets, and plant variety protection) provide for traditional knowledge protection, they cannot adequately protect TK. Conventional intellectual property rights (IPRs) are inadequate protective tools for TK and TK-related resources for a number of reasons:

- 1) First, most forms of the IP system emphasize, to a large extent, individual intellectual achievement. As a result, the legal identity of right-holders is inherently individualistic or corporeal. Knowledge and innovations derived from TK systems and TK *may* not usually be credited to an individual inventor or author. The modern IPRs do not, mostly, take account of the collective nature of TK, as they are usually granted to a defined individual or group of individuals identified as inventors or creators, although they can be transferred to another by sale or gift.
- 2) Secondly, the subject matter of protection in some IPRs, for example, patents is required to be "new." Patents require that applications for protection describe specific acts of invention, and that the subject matter of protection "involve an inventive step." TK is rather "knowledge built up over time in an incremental fashion." The focus of the extant IPRs on "new knowledge" through the criteria of novelty and originality puts TK out of the realm of protection by patents because TK is built on knowledge accumulated over generations and continues to evolve in response to changing and emerging needs. The challenge of balance and the use of standard IP approaches is particularly large with regard to traditional knowledge, which "cannot be fully or properly accounted for through the Western-oriented prism of patents, copyrights, trademarks and other formal IP outputs." Patents in particular are designed to reward a corporate entity or individual with a temporary monopoly to use a recent innovation that passes standards for novelty. Traditional knowledge is often collaborative and incremental, relying on a community's insights and know-how often built up over generations.
- 3) Thirdly, most forms of IP accord their owners a limited term of protection – based on the "contractarian or contract-based" rationale for intellectual property, which regulates the relation between the inventor and the society. TK frequently show continuity, and is marked by its evolution over time and its cross-generational nature. Indigenous peoples and local communities emphasize that their TK is a heritage that must be protected in perpetuity, for the lifetime of the culture, not merely for some fixed period.

- 4) While IPRs tend to favour corporeal and other non-indigenous interests, they are also mostly subject to economic powers and manipulation. The procedures of registering the rights are, in general, expensive, complicated, and time-consuming for most TK-holders.

The increasing demand of Sui Generis system of Protection for traditional knowledge is justified since IP protection has its own downside and loopholes. A *sui generis* instrument would thus provide legal framework of protection of TK, enforcement of right of indigenous communities, prevent misuse and control of TK, provisions of ABS (access and benefit sharing) system, among others.