Annex 3| ***Relavant Articles***

- An IP System that Protects & Nurtures Traditional Knowledge
- Issues in the Protection of IP

An IP System that Protects & Nurtures Traditional Knowledge - An IP Philippine Challenge

Atty. Andrew Ong, Proceedings, Experts Meeting on the Recognition and Protection of ASEAN Communal Intellectual Property Rights,
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HOW WE SEE IT. Traditional Knowledge, as we know it, is an all encompassing term that refers to and captures virtually all kinds of **creations of the human mind**, may it be in the form of basic information or as applied to practices, systems and other expressions, so long as it is developed since time immemorial and continues to evolve up through a community-whether local, indigenous groupings or as a nation-contributing to the identity and culture of the community.

This is not to say that there is a precise definition for the term –as there are many, but whatever the definition, it boils down to the same universe of "creations of the human mind" of which the intellectual property system seeks to protect, govern and nurture. Thus, it is from this perspective- TK as a creation of the mind – that I would like to discuss TK – through the lenses of the IP Office.

We are taking great interest in TK as an office because it is an opportunity for us to shape and apply the IP system to fit our culture, social context and heritage. It is the vehicle by which IP system will find greater relevance and meaning in our national life.

From where the IP Office stands, TK can be broken down into the following:

(a) **expressions of folklore** (to borrow the term used in the Model Provisions for National Laws provided by both WIPO & UNESCO)
(b) **traditional or tradition-based scientific knowledge** in terms of, and such as, medicinal, agricultural, biological, ecological or ethnobotanical knowledge and the likes; and
(c) **symbols or marks** of the community that are used to distinguish products or services or provided information on the **origins** of said products or services.

It is no coincidence that the three categories resemble the 3 major and most recognized IP rights of copyright, patents and trademarks.

Some people consider this as forcing a square TK peg into a round IP hole, ant to a certain based on past experiences, it is. However, the experience can change as the IP paradigm can evolve and be re-shaped to support the development agenda of a country.

WHERE WE WANT TO GO. In shaping the IP system or adopting and IP regime to fit better TK, IP Philippines advocated a **dual response**. First, the IP regime should be able to protect TK against the operation of mainstream IP rights. Others call this negative protection. Second, the IP patadigm should include a framework for IP rights to protect TK. This is the positive protection.

The ultimate goal for both positive and negative protection of TK are (a) to preserve the **cultural integrity** of the community, prevent its erosion or stagnation caused by it unauthorized use; and (v) to allow the community **tobenefit** from the use of tis culture, including the commercialization of its TK.

The goal of preserving cultural integrity needs no further elucidation but let me explain the importance of the second goal-that of benefit sharing in the commercialization of TK. This desire springs from the fact that TK is dynamic and capable of continuously developing and improving. With it, new and useful knowledge is generated and adapted to modern life. Thus, it has potentials for economic value.

For example, studies have shown that up to 75% of the plant derived human drugs finds its source from TK and at least 7,000 medical compounds used in mainstream medicine are derived from plants. Thus, biological resources, finding its way to patent documents worldwide, is increasing. Through patent protection, the use of TK can lead to commercial success. As such, the goal of allowing the community to share in the earnings from their TK should, at the very least, be considered.

PRESENT LEGAL ENVIRONMENT. We are cognizant of the fact that, at present, there is yet no international binding instrument on the subject matter. For years, the WIPO and UNESCO, has jointly endeavoured to provide models lwas or provisions to facilitate the “harmonisation” and acceptance of a global standard on the protection of TK. In fact, a special body has been established since 2000 to cradle the IP issues relating to TK. Through this venue, the ASEAN was able to put forward a common view on the path forward on the legal and policy options for the protecting TK, which includes (a) the better use of the existing IP system; while not discounting the option of (b) adapting, expanding and refocusing the

system to fit TK; and lastly (c) the creation of a new legal instrument, nationally, regionally and internationally, to govern TK.

In the Philippines, we are proud to be one of the first in the world to provide a legal and regulatory framework for the protection of TK, setting the trend in other developing countries to do the same, as we are contry with roughly 10-15% of the population comprising of indigenous cultural communities, and with much of our biological resources patented in various countries.

The provision of TK is guaranteed by no less than the constitution of the land. Articles XIV, Section of 17 of the 1987 Constitution provides "The State shall recognize, resect, and protect the rights of indigenous cultural communities to preserve and develop their culture, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies."

As early as 1995, Executive Order No. 247 of the President Fidel V. Ramos, prescribes the regulatory framework for bioprospecting, which was later strengthened in like provisions of the Indigenous People's Rights Act (IPRA) encated in 1997. There are other laws complimenting IPRA on TK protection such as the Traditional and Alternative Medicine Act (TAMA), Wildlife Resource Conservation and Protection Act (WILDLIFE ACT), Plant Variety Protection Act, and the pending Community Intellectual Property Rights Protection bill.

WHAT CAN WE DO. So with the present legal and regulatory framework in the Philippines, where does IP Philippines stand and how does it contribute to the protection of TK. Consistent with the regional and international legal experience on TK protection., IP Philippines has the following broad stroke directions available to it.

On patent rights and Traditional or traditional-based scientific knowledge (medicinal, ecological or ethnobotanical knowledge and the likes)

1. To avoid wrongful patenting of TK (negative protection):
   - Amending patent rules to require disclosure of TK in accordance with IPRA and WILDLIFE ACT as well as compliance with "prior informed consent" provisions of said laws as a formal requirement in patent applications.
   - Rejecting patent applications or cancelling questioned patents that are in violations of IPRA and WILDLIFE ACT on the ground that the same is "contrary to public order or morality" under Section 61(c)

- Creating a searchable database of prior art to include TK but separating the undisclosed TK for protection as a trade secret
- Assist in building the institutional capacity of entities that may function as TK wathdogs to enable them to effectively challenge patent covering TK

2. To afford rightful holders of TK to avail of patent & other protection (positive protection):
   - Overcoming the novelty problem of TK in patents with a narrower definition of prior art
   - Help build a TK technology transfer management system where TK can be shared under certain terms and conditions including payment of royalties

On trademark rights and traditional symbols or marks used to distinguish products or services or origins of said products or services.

- (Negative Protection) Being watchful and preveting the registration of TK marks that falsely suggest a connection with the community (as a non-registrable mark under the IP Code) & invoking unfair competition provisions of the law to enjoin other fraudulent and tortuous acts involving TK
- (Positive Protection) Protecting TK through a certification, collective mark or appellations of origins registry (as a way to authenticate an prevent unauthorized use of the TK mark)

On copyright rights and expressions of folklore

- Protecting TK in copyright as anonymous or pseudonymous works pursuant to the IP Code and Berne Convention with a term of 50 years from the time the work is first published.
- Working towards the enactment of the enabling laws for the WIPO twin treaties to protect TK in the digital media and performance of TK (against unauthorized recording, broadcasting and communication to the public).
- Applying the benefit-sharing provisions of IPRA as a form of remuneration right for TK already in public domain.

CAVEAT. Having said all that, we are also mindful that the extent of protection of TK should be balanced. It is also to best interest of society to "promote the diffusion of knowledge and information for the promotion of national development and progress and the common good." Besides, over-protection leads to "freezing" traditions. In as much as we should fight against cultural erosion, we should also avoid cultural stagnation. As fewer and fewer works become accessible in the public domain to build new ones with, the dynamism and evolution of TK is hampered. However, although we can see this extreme, the

realities are that we are very much on the other extreme lack of protection. Thus, there is a lot of space to go for TK protection.

PATH FORWARD. One of the key success factors in effectively protecting TK is for institutions like NCCA (National Commission on Cultural and Arts), NCIP (National Commission on Indigenous Peoples", PITAHC (National Institute of Traditional and Alternative Health Care, DTI, DOST, DENR and state universities to collaborate with IP Philippines, through partnerships and institutional alliacnes, to implement policies and laws that will strengthen the protection of TK and increase awareness among its constituents on IP and TK. While in the interational scene, IP Phlippines will continue to work with WIPO, ASEAN and the various inetellectual property offices in coming up with new legal instruments to support TK worldwide. For this purpose, IP Phlippines will establish a special support unit within in organisation to work on TK.

Issues in the Protection of Intellectual Property

Dr Jesus Peralta

Intellectual Property Rights refers to the rights entitled to an individual and/or community for the protection of creations of the mind which is also known as intellectual ownership. – Intellectual property includes rights relating to literary, artistic, an scientific works, performances of performing artists, phonograms and broadcasts, inventions, scientific discoveries, industrial designs, trademarks, service marks and commercial names and designations, and all other rights resulting from intellectual activity in the industrial, scientific, literary and artistic fields.

Intangible cultural heritage is not stagnant but rather continuously recreated by a community, group or an individual. Accordingly this poses the question of who owns the intellectual property rights of intangible cultural heritage. Intangible cultural heritage is passed down by a community apart from a few isolated cases. Therefore, what the Convention emphasizes is that those surrounding intangible cultural heritage, including communities, groups and individuals, should acknowledge the value of their intangible cultural heritage and participate in its safeguarding activities.

It is difficult to apply existing intellectual property system since communities are the main actors in the ICH field.

Conceptual Definition of Ownership of Property
UNESCO Experts Meeting definitions'Who can own cultural property?'

1. Community

    a. "…Networks of people whose sense of identity or connectedness emerge from a shared historical relationship that is rooted in the practice and transmission of, or engagement with, their intangible cultural heritage…"

    Very Vague – membership not clear; not a corporate body, not a legal person

2. Group

    a. "…Comprise people within or across communities who share characteristics such as skills, experience and special knowledge, and thus perform specific roles in the present and future practice, re-creation an/or transmission of their intangible cultural heritage as, for example, cultural custodians, practitioners or apprentice…e"

    Clearer – question of different degrees of characteristics; not legal person

3. Individuals

    a. "…Those within or across communities who have distinct skills, knowledge, experience or other characteristics, and thus perform specific roles in the present and future practice, re-creation and/or transmission of their intangible cultural heritage as, or example, cultural custodians, practitioners and, where appropriate, apprentices…"

    Clearest – but….

Define tradition

Major issue: Traditional Culture is in the public domain. Can it be owned? Technically, can anyone, any entity claim that culture or any segment of it be owned by any entity considering:

The UNESCO World Conference on Cultural Policies (Mexico, 1982) defines culture, in its widest sense, as *the whole complex of distinctive spiritual, material, intellectual, and emotional features that characterize a society or a social group. This includes not only the arts and letters but also modes of life, value systems, traditions, and beliefs*.

Culture, however, can also be looked at as "*an aggregate and internally inconsistent body of knowledge and meanings, unevenly distributed among individuals of a community, and acquired by these individuals through their experiences and transactions in everyday life*" (Karl Anonsen, 1998).

Anthropology, in general, also defines culture as *those things that human beings learn and/or teach to other human beings*.

Being so, establishing legal ownership of culture or components of it is difficult to prove. Unless the original *owner* can be established first.

Culture: two main components:

1. large elements, such as spiritual, materialistic, intellectual or emotional forms exist in public domain, whereas:
2. individual components of culture that contain large complexes of culture can be a proprietary subject, if a certain culture can contain, absorb, circumscribe or embrace art, Literature, lifestyle, and tradition, then these components lie on private sectors rather than exclusively in public domain.

Proprietary rights can be granted to people who create culture as art or tradition.

Intangible Cultural Heritage: may be contradictory to the concept of intellectual property since the latter is tested by novelty in patent, distinctiveness in trademark, and originality in copyright.

Heritage means inheritance of a proprietary right or value from a person who has already passed away. When communities or individuals inherit intangible assets from their ancestors, these cannot be protected by substantive laws or precedent case laws. Elements of intangible heritage do not have the practical prerequisites to get under legal umbrella since it does not identify the owner of it, and even if the ownership is recognized, it lacks basic legal conditions to be a heritage since there does not exist an expressed devise, bequest or familial relationship. It is a rhetoric that does not have a legal meaning – it is a kind of public good that is in the realm of public domain – unless exclusive right s are obtained through patent application.

In sum, culture itself is in the public domain and cannot be part of private property. But individual pieces of work that consist of overall culture and be private property, even though it consists of a part of public domain, if it is consistent with legal conditions to be an element of private property: it must be novel, distinctive and original in order to have intellectual rights.

Ownership of an intellectual property rights rests on the person who insists it until it is declared by court. A person can only be an owner of intellectual property along with ownership of any other property regardless of whether the person is natural or legal.

Issue becomes complicated when two different concepts: ownership of intangible cultural heritage and intellectual property rights are mixed in one place.

Intangible with tangible representation…

Question:

1. Is it possible to own intangible culture?
2. Who can own intangible culture?

This requires a proper definition of "community" to ascertain the elements of a community.

The most effective way to preserve, maintain and develop intangible cultural heritage is to obtain the status of a legal person by:

1. legislative action;
2. judgment thru the interpretation of a relevant law;
3. right of attribution or acknowledgment;
4. forming a corporation or organization by themselves.

Common ownership by all members of a specific community, e.g. an ethnic group, is complicated and will involve legal issues. Legal status may be acquired. First issue is to recognize members of a community.

Even if a community gains legal person's status, it is difficult to maintain this legal status, e.g. corporate work, meetings, membership, etc.

Obtaining ownership by an entity

1. There are no legal barriers for an individual to be an owner of intellectual property, the only question being whether an individual can be an owner of a specific intangible cultural heritage by negating characteristics of the public goods in the heritage. Ownership of an intellectual property rights rests on the person who insists it until it is declared by court. A person can only be an owner of intellectual property

along with ownership of any other property regardless of whether the person is natural or legal.

2. The next issue is how to satisfy necessary conditions to be a legally viable intellectual property. –
    a. Patent : there must be an application of intangible cultural heritage in order to convert it to a certain “product” or “process”;
    b. Trademark : registration is required;
    c. Copyright : should be fixed in any tangible medium of expression.

Otherwise, the intangible cultural heritage will not be protected by law even though an entity such as a community or individual has ownership of it.

3. Involvement of Intellectual property: - to be recognized as a right of an element of intellectual property, novelty in patent, distinctiveness in trademark and originality in copyright are required.

However, intangible cultural heritage is a traditional culture hat has been generated generation by generation. By nature of traditional culture, it is hard to have characteristics of novelty or originality. -- This question can be resolved by legislative action in part while trying to re-create the culture in another part.

4. Another consideration – the misappropriation of exclusively granted rights of intellectual property in intangible cultural heritage. Such misappropriation can possibly be made by a community, a group or individual as an entity of ownership of the intellectual property rights as well as by some member of an entity. The basic idea to give an entity intellectual property rights to effectively safeguard intangible cultural heritage rather than grant someone privileges that can be misused for a specific entitiy’s own interest before the heritage is widely enjoyed by the public. – there should be a policy established by relevant authorities.

5. Duration of ownership
    a. once an intellectual property right is granted over the specific intangible cultural heritage, sometimes 20 years of exclusive ownership is granted to a patentee (American Law) from the filing date.
    b. For a copyright holder, the right endures for a term consisting of the life of the author and 70 years after the author’s death. If a copyright is made for hire the right endures for a term of 90 years fraom athe

year of its first publication, or a term of one hundred and twenty years from the year of creation.

c. The same term is given to an anonymous or pseudonymous work.
d. For the case of intellectual cultural heritage, there is a huge question on how to set the terms of endurance for respective traditional heritage elements since the traditional culture has been descending for generations, and it will relaying on to the next generations incessantly – thus it is not possible to grant property rights for a limited period.

Intangible cultural heritage and intellectual property share a similarity in that they are both creative products which do not have fixed forms. Intangible Cultural Heritage differs from intellectual property because it developed throughout generations and continues to be used and evolves within the society it originated from. It is inadequately protected by existing legal forms and can be exploited.

Two ways to protect

1. to make intangible cultural heritage inventories and to conduct research;
2. to protect it under an intellectual property system. This is due to the strong sense of ownership by indigenous peoples.

Factors to be considered

1. ICH represents historical information collected from time immemorial in an incremental fashion. It is not new and is said to be in public domain; as the common heritage of humanity;
2. before being commercialized and developed by western science and industry, ICH is just state-of-the-art. Without adding innovative or inventive steps it cannot create any monetary benefits;
3. to preserve ICH source countries and their local communities must maintain a certain amount of control over the use of their ICH. If these are unused by indigenous populations, the bearers might abandon their traditional practices – thus the need for safeguarding.

B. Copyright Law

1. The simplest way to protect ICH as intellectual property is by copyright, since any work containing creativity can be protected.
2. On the other hand, ICH has aspects that are difficult to protect thru copyright – verification of the author, the creator of the ICH is complicated to identify; the existence of creativity in the work is also challenging since it is developed thru time. The limited duration of

protection under copyright law is also problematic. Copy righted works can also be used under certain conditions by others than the practitioners, e.g. education, news reports, research, etc.

C. Moral Rights

The right granted to the creator to maintain the consistency of the contents, format, title of his work, and to seek remedies from any distortion ro degradation of the work. But this has limitations in protecting ICH : coppy right is based on individual ownership, while ICH is based on collelctivism.

D. Patent Law

Among the different domains of ICH, the 4th – knowledge and practices regarding nature and the universe can be protect by patent law.(grants exclusive right for a limited period of a time to the inventor who created new, useful and non-obvius products or methods and who is at the same time, the first applicant of the patent registration of the product.

Four Obstacles:

1. patent law recognizes an invention as the product of an individual, while ICH is usually created and owned collectively
2. to obtain a patent, inventive step and non-obviousness of a product must be proved;
3. the patent application should include the technical description of the invention;
4. registration and maintenance of a patent is costly.

While it is possible to protect ICH as a patent, in practice it is difficult for communities to obtain this.

E. Trade Secret Law

This is another form of protection. Two requirements:

1. reasonable efforts should take place in order to maintain the secrecy of the contents of ICH;
2. economic benefits should be generated by using the fact that ICH contents are not well known to the public.

The secrecy aspect makes it impossible for ICH to be protected under Trade Secret Law.

F. Trademark and Design Protection Law

1. in order for ICH to be protected by trademark and design Protection law, ICH must be compatible with the concept of trademark/design – a trademark is a distinctive sign, word, or logo used by people who produce, process, identify and sell products; while design refers to the shape, form, color, etc. that need to be expressed on a product and produced massively.
2. lack of innovation make ICH protection here difficult.