

UNCTAD Expert Meeting on Systems and National Experiences for
Protecting Traditional Knowledge, Innovations and Practices

Geneva
30 October – 1 November 2000

Protecting Traditional Knowledge: An Industry View

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PROTECTING TRADITIONAL KNOWLEDGE

An Industry View...

Some may assume that industry will take a position against protecting traditional knowledge. That is not necessarily so. But there is a vital preliminary question. What do we mean by ‘protecting’ this knowledge? Do we mean:

Preserving it (because of its intrinsic value, to its owners, to the world, and to future generations)?

Promoting its widest dissemination and use (for the benefit of the human race as a whole)?

Controlling its use (so as to prevent misuse, e.g., in ways which its owners would object to, or which would constitute ‘biopiracy’)?

Ensuring a proper share of benefits from the use of such knowledge goes to its originators?

There may be other possible meanings. Some objectives are fully compatible: others not completely so. Our objectives, and how we rank them, will determine what we mean by ‘protect’: and hence shape any system that is put in place.

It is not for industry to decide such questions. In industry's view, however, there is an important general principle:

Knowledge should (as far as possible) be free to all

Before being accused of blatant hypocrisy, I hasten to add that this general principle is of course subject to many specific exceptions, including:

Intellectual property, such as patents, copyright, etc.;

Privacy requirements

and many others. It may well be appropriate to make such an exception for traditional knowledge. The point however is that all exceptions from the general principle must be made carefully and not go beyond limits that can be properly justified.

Almost as important as principle is practice. If traditional knowledge is to be protected, industry seeks a **simple, coherent and practical** system. It is better to have a system that meets most of its objectives and works in practice, than one which meets all its objectives and is inoperable. As so often, the best is enemy of the good. A practical system will probably include the following characteristics

1. It will not restrict knowledge already in the public domain.

Industry recognises that this is a point of contention. In some cases, traditional knowledge has come into the public domain without the consent of its owners - indeed in the face of their determined opposition. Nevertheless, once information is in the public domain, there are great difficulties in controlling it, so any exceptions need careful thought.

2. It will not be retrospective.

Again, this will be contentious - and exceptions may be necessary. But a retrospective scheme would impose obligations on existing users which they would perceive as unfair, and might find difficult to meet. Also a fully retrospective scheme (without limit of date) could set some difficult historical puzzles (a particular element of knowledge may today be in the sole possession of People A, but did they develop it themselves or receive it from others, perhaps thousands of years ago?)

3. It will be consistent with other forms of intellectual property.

This too is contentious, and is not an obvious priority for proponents of protection of traditional knowledge. I suggest, however, that it is both easy to meet, and politically essential. There is no great enthusiasm in industrial circles for any form of traditional knowledge protection. But neither are there currently strong objections against it. However, if a traditional knowledge protection system is seen as displacing or damaging the intellectual property rights (patents, trademarks, copyright, trade secrets) that the industries of the developed world set great store

by, those industries will undoubtedly mount a powerful lobby with their governments against it. That would be both undesirable and unnecessary, as I argue below.

My final point therefore is a purely technical one, on the interface of traditional knowledge rights with other forms of intellectual property. Most **IP rights are negative**, not positive. They are not rights to make patented things, or carry out patented processes. They are rights to **exclude others** - to stop others making the things, or working the processes, without permission. Often, a specific article will be subject to more than one IP right - for example, a bottle of soft drink may be subject to a patent on the method of forming the container, a registered design for the bottle shape, a trade secret in the ingredients of the drink, copyright in the label text, and trademark rights in the label logo. Frequently all these different rights are owned by different people - all of whom have to agree before the product can be sold. In the same way, it would be perfectly possible for traditional knowledge rights to exist in such a product - if the soft drink were re-formulated to contain a traditional herb, say. The traditional knowledge owners could then have the same rights to prevent sale of the product that the other IP owners have. Traditional knowledge rights need not interfere with any currently recognised IP rights, any more than such rights interfere with each other. The mistake would be for legislators to think that any effective protection of traditional knowledge must require restriction of existing rights.

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12 December 2000