



## Intellectual Property of Indigenous Peoples (IP of IP): Challenges in Protecting Traditional Knowledge in the Philippines

**Cruz, Christopher E.**  
De La Salle University  
*christopher.cruz@dlsu.edu.ph*

**Abstract:** Traditional knowledge in the form of traditional expressions, practices and beliefs is an important community right of indigenous communities which must be respected and protected. In the Philippines, there are several laws which grant recognition and protection to traditional knowledge. However, the present legal framework has certain gaps in the legal protection afforded to the works resulting from traditional knowledge on one hand and conventional forms of intellectual property like patents, trademarks and copyright on the other. Given this context, the following questions may be asked: (1) Should traditional knowledge be treated in the same way as conventional intellectual property?; (2) If so, how can traditional knowledge be categorized and classified using the conventional categories of intellectual property?; (3) If not, can traditional knowledge have a *sui generis* protection under the law? (4) Does the current Philippine legal framework able to address the need to protect traditional knowledge in the Philippines?

The aim of this paper is to fill in this gap by analyzing the legal framework of the Philippines in the protection of traditional knowledge and whether there are sufficient laws that protect them using the conventional system of protection or a *sui generis* kind of protection, or both. In the end, the paper will present the challenges in protecting traditional knowledge and make recommendations on how to better protect traditional knowledge through harmonizing existing intellectual property protection to traditional knowledge, if this is possible, and having a *sui generis* kind of protection.

**Key Words:** Indigenous people and protecting traditional knowledge; traditional knowledge and intellectual property; traditional cultural expressions and protection; bio-piracy; patents and genetic resources.

### 1. Introduction

According to the United Nations Indigenous People Permanent Forum on Indigenous Issues, there are approximately 370 million indigenous people in 70 countries across the globe.<sup>1</sup> While this number looks staggering, this is still a small

---

<sup>1</sup> Paper on the United Nations Indigenous People Permanent Forum on Indigenous Issues Fact Sheet, p. 1.

Presented at the 10th DLSU Arts Congress  
De La Salle University, Manila, Philippines  
February 16, 2017



fraction compared to the more than 6 billion population of the world. With their unique traditions, cultures and practices, indigenous people have been set apart from the conventional world and as a result have become alienated from the mainstream societies. Indigenous people have been branded as “different” and, as a consequence, neglected by the states that govern them and by society as a whole. They have become aliens to their own homeland. According to a report of World Mission, a Catholic-based missionary group, *“they lag behind in terms of social and economic development, being the most impoverished groups in their countries. They are poor, illiterate and unemployed, making up 15 per cent of the world’s poor.”*<sup>2</sup> In the said World Mission report, they have identified the Lumads of the Philippines as one marginalized indigenous people as they have been fighting for many years now not only for their ancestral land but for their very existence in the face of industrialization and exploitation of natural resources.

Part of the many struggles of the indigenous people like the Lumads is protecting their cultural heritage – their traditional knowledge which includes their own unique way of doing things, their cultural heritage in the form of artistic expressions (writings, songs, designs etc.) and genetic resources (herbal or medicinal plants or animals for food or treating diseases). Examples of traditional knowledge include the use of plao-noi plant to treat ulcers, the hoodia plant of the San people to curb hunger during hunting, and irrigation systems in the middle east to name a few.<sup>3</sup> However, with the advent of industrialization and the digital age, mainstream societies have started to invade the lands of the indigenous people and have discovered their hidden “treasures” in the form of traditional knowledge. While some have forged relationships with the indigenous people to support and help them overcome in their impoverished state, some have taken advantage of the ignorance and weakness of the indigenous people by either stealing or misappropriating their “traditional knowledge”. The following are examples of possible abuses of the “outside world” to the indigenous people enumerated by the World Intellectual Property Office (WIPO):

- *“a traditional remedy could be appropriated by a pharmaceutical company and the resulting invention patented by that company;*
- *an indigenous folk song could be adapted and copyrighted, without acknowledgment of the indigenous community which*

---

<sup>2</sup> World Mission Magazine (August 2016). Struggles of the Indigenous, No. 303, Vol. XXVIII, p. 5.

<sup>3</sup> WIPO Publication No. 933 (E), Box 5, p. 14.



- created the song and without sharing any of the benefits arising from the exploitation of the song with the community;*
- *inventions derived from GRs could be patented by third parties, raising questions as to the relationship between the patent system and the conservation and sustainable use of biodiversity and equitable sharing of benefits.”*

In his work “Biotechnology Patents and Indigenous Peoples”, Dennis S. Karjala refers to such abuses in the biotechnology field as biopiracy. This happens when patent systems “*exploit traditional indigenous knowledge to produce valuable medicinal products.*”<sup>4</sup> In the same work, Karjala introduces another issue in biopiracy which is equally important: “*the question of patenting gene-sequence and gene-product information taken from living organisms, especially human beings – how can we justify patenting naturally occurring substances?*”<sup>5</sup> He adds that allowing third parties to use traditional knowledge might cause depletion of both physical and informational resources of the indigenous community. For Karjala, the problem is not necessarily on the use of traditional knowledge for patent purposes, but the failure to share the benefits derived from developing the information into a product based on traditional knowledge.<sup>6</sup> This shows that the conventional patent system itself may be the cause of biopiracy instead of the one that should prevent such abuse. A more detailed discussion on the biopiracy problem on indigenous people can be the subject of another research.

While the help and support of mainstream society is always welcome, some may wittingly or unwittingly abuse their influence or power over the indigenous people and commit any of the acts enumerated above as it cannot be denied that “traditional knowledge” in the eyes of the indigenous people can be protected as “intellectual property” by mainstream society. To prevent these possible abuses, both the indigenous people and the mainstream society must be informed that traditional knowledge can be a source of rich intellectual property using the standards of the conventional intellectual property system. This will also allow the indigenous people to take control of their own intellectual property in the form of their traditional knowledge.

---

<sup>4</sup> Karjala, Dennis S. (2007), p. 1437

<sup>5</sup> Supra on footnote 4, p. 1437. See US Case of Diamond vs. Charkabarty (447 US 303 (1980) on the analysis of patent issues on microorganisms.

<sup>6</sup> Supra on footnote 4, p. 1452.

Presented at the 10th DLSU Arts Congress  
De La Salle University, Manila, Philippines  
February 16, 2017



Traditional knowledge is now widely recognized as an important community right of indigenous communities which must be respected and protected. The World Intellectual Property Office (WIPO) of the United Nations, through its Traditional Knowledge Division (TKD), has been in the forefront of efforts to protect the traditional knowledge of indigenous people. The TKD serves as the venue for developing an agreement of states for the protection of traditional knowledge through the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).<sup>7</sup> Aside from the IGC, WIPO responds to requests for assistance and technical advice on the rudiments of traditional knowledge and its application to specific countries. It also provides capacity-building programs to all sectors of society to raise awareness on the need to protect and properly administer intellectual property rights arising from traditional knowledge.<sup>8</sup> These activities include IP management of arts festivals, alternative dispute resolution of intellectual property issues involving traditional knowledge, and consultation with the indigenous people themselves through the IGC and other related focus groups.<sup>9</sup> While all these efforts of the WIPO are laudable, it cannot be denied that the existing intellectual property system is unable to fully protect traditional knowledge.

In the Philippines, there are efforts to recognize and protect traditional knowledge by the government through the passage of several laws, the most prominent of which is the Indigenous Peoples Rights Act (R.A. 8371). However, the present legal framework in the Philippines for the protection of traditional knowledge leaves much to be desired as it does not give ample legal protection to works resulting from traditional knowledge. There is a gap in the legal protection afforded to the works resulting from traditional knowledge on one hand and conventional forms of intellectual property like patents, trademarks and copyright on the other. In fact, the present intellectual property code of the Philippines (R.A. 8293) has no provision that is fully devoted to the protection of traditional knowledge. As a result, holders of traditional knowledge in the Philippines are not fully protected and even subject to abuse by people outside the community for financial gain.

The aim of this paper is to expose this gap, if any, by analyzing the legal framework of the Philippines in the protection of traditional knowledge and

---

<sup>7</sup> Supra on footnote 3, p. 44.

<sup>8</sup> Supra on footnote 3, p. 45.

<sup>9</sup> Supra on footnote 3, pp. 46-47.



whether there are sufficient laws that protect them. It will also discuss the efforts in the international arena by the World Intellectual Property Office (WIPO) and its member-states in addressing this gap in the protection of traditional knowledge.

To have a better understanding and appreciation of the issues regarding traditional knowledge and the intellectual property system, there is a need to discuss in more detail the nature of traditional knowledge on one hand and that of the conventional intellectual property system on the other. Thereupon, a discussion of the intersection of both traditional knowledge and the intellectual property system is imperative. A survey of the current state of the intellectual property system in the Philippines will ensue followed by an analysis of the applicability of the Philippine intellectual property system to traditional knowledge. In the end, the paper will present the challenges in protecting traditional knowledge using the conventional intellectual property system and make recommendations on how to better protect traditional knowledge through a sui generis treatment of traditional knowledge.

## **2. Nature of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources**

The World Intellectual Property Office (WIPO) has defined Traditional knowledge (TK) as *“a living body of knowledge passed on from generation to generation within a community. It often forms part of a people’s cultural and spiritual identity.”*<sup>10</sup> This knowledge represents the “volkgeist” or spirit of the people or the community – it is the personality or identity of the community. This is what makes the community unique as it embodies the essence of its existence. In particular, WIPO describes TK as *“knowledge, know-how, skills, innovations and practices that are passed between generations in a traditional context; and that form part of the traditional lifestyle of indigenous and local communities who act as their guardian or custodian.”*<sup>11</sup> Being broad and all-encompassing, this definition only gives us an idea of what TK is and should not limit its coverage and definition. WIPO itself admits that *“there is not, as yet, any generally accepted, formal definition of these terms. Instead, WIPO uses working descriptions.”*<sup>12</sup> Examples of TK found in indigenous communities include knowledge about the

<sup>10</sup> WIPO Website: <http://www.wipo.int/tk/en>

<sup>11</sup> WIPO Publication No. 933 (E), p. 13.

<sup>12</sup> Supra footnote at 4, p. 13.



medicinal properties of plants or animals, traditional techniques in hunting, fishing or cooking food, or even ways of doing things for survival and sustainability of the community.

A sub-class of TK are Traditional Cultural Expressions (TCE). They are the expressions of the people's cultural heritage and identity seen through their *"dances, songs, handicraft, designs, ceremonies, tales or many other artistic or cultural expressions xxx and are seen as integral to the cultural and social identities and heritage of indigenous and local communities, reflecting core values and beliefs."*<sup>13</sup> The historical school of jurisprudence by Friedrich Karl von Savigny (1779-1861) has a similar concept - the "Volkgeist":

*"To followers of Savigny the identification of law with custom and tradition and the Volksgeist, or genius peculiar to a nation or folk, generally meant a rejection of rationalism and natural law; a rejection of the notion of law as the command of the state or sovereign, and therefore a disparagement of legislation and codification; and a denial of the possibility of universally valid rights and duties and of the individual's possession of nonderivable and inalienable rights. In positive terms, historical jurisprudence identified law with the consciousness, or spirit, of a specific people. Law is "found" by the jurist and not "made" by the state or its organs. Law is a national or folk and not a political phenomenon; it is a social and not an individual production; like language, it cannot be abstracted from a particular people and its genius; it is a historical necessity and not an expression of will or reason, and therefore it cannot be transplanted."*<sup>14</sup>

Another sub-class of traditional knowledge are genetic resources (GRs). As defined by the Convention on Biological Diversity, genetic resources *"are parts of biological materials that contain genetic information of value and are capable of reproducing or being reproduced."*<sup>15</sup> As discussed above, genetic resources can be a rich source of patentable material which can be protected by the indigenous community itself or licensed to third parties. Genetic resources from plants and animals can be produced as food or products with medicinal value.

---

<sup>13</sup> Supra on footnote 4, p.16.

<sup>14</sup> <http://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/historical-school-jurisprudence>, p. 1 (accessed January 8, 20-17).

<sup>15</sup> Supra on footnote 3, p. 18.



In summary, traditional knowledge includes:

*“Mental inventories of local biological resources, animal breeds, and local plant, crop and tree species. It may include such information as which trees and plants grow well together which are “indicator plants” (plants that show soil salinity or are known to flower at the beginning of the rains, for example). TK includes practices and technologies, such as seed treatment and storage methods and tools used for planting and harvesting. It also encompasses belief systems that play a fundamental role in people’s livelihoods, maintain their health, and protect and replenish the environment. TK is dynamic in nature and may include experimentation in the integration of new plant or tree species into existing farming systems or a traditional healer’s tests of new plant medicines.”<sup>16</sup>*

Can traditional knowledge be considered as intellectual property using the standards of the conventional intellectual property system? The next part of this paper will help answer this question.

### **3. Nature of the Intellectual Property System**

Intellectual property has been defined as “creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.”<sup>17</sup> From this definition one can find the different kinds of protection of intellectual property. Inventions are protected by patent; literary and artistic works are protected by copyright and related rights; designs are protected by industrial design; and symbols, names and images are protected by trademark. There are other forms of intellectual property like trade secrets, know-how, plant varieties and geographical indications which are also protected by the current intellectual property system. The ownership, use, distribution and control over these kinds intellectual property are generally referred to as the intellectual property rights (IPR). The kind of protection afforded by the intellectual property system depends on the kind of intellectual property created. This system is governed by both international agreements and treaties entered into by states or by individual legislation of states. International agreements and treaties are

---

<sup>16</sup> Hansen SA and JW Van Fleet (2007), p. 1523.

<sup>17</sup> What is Intellectual Property? (WIPO Publication No. 450n (E), p. 2.

Presented at the 10th DLSU Arts Congress  
De La Salle University, Manila, Philippines  
February 16, 2017



administered and monitored by the World Intellectual Property Office (WIPO) while domestic legislation is governed by the individual states in conformity with the international agreements. For purposes of this paper, the definition of intellectual property given above may be referred to as the conventional form of intellectual property. This intellectual property system was developed “*in line with the perceived needs of technologically advanced societies.*”<sup>18</sup>

The intellectual property system (IPS) exists to balance the interests of the inventor or author on one hand and the rights of the public or society on the other. The state through the IPS confers exclusive rights to inventors (patent), authors (copyright) and other creators of intellectual property (trademark, trade secrets, know-how, designs, etc.) to provide incentives to the creators of intellectual property. However, these incentives are only for a limited period because ultimately the IPS should benefit the public. The objectives of the IPS are to stimulate creativity and innovation by providing incentives to the creators. In the case of *Manzano vs. Court of Appeals*, the Supreme Court held with regard to patent rights that:

*“The primary purpose of the patent system is not the reward of the individual but the advancement of the arts and sciences. The function of a patent is to add to the sum of useful knowledge and one of the purposes of the patent system is to encourage dissemination of information concerning discoveries and inventions.”*<sup>19</sup>

Over the past several years, however, a new species of intellectual property has emerged that was not envisioned in the conventional system of intellectual property protection. This new species was taken for granted as something that is not protectable under the conventional system of intellectual property primarily because they were considered to be already part of the public domain. This new species is generally referred to as “Traditional Knowledge”, which can further be categorized as Traditional Knowledge per se, Traditional Cultural Expressions and Genetic Resources. The source of this traditional knowledge would be the works and expressions of indigenous peoples and communities. Left alone, these communities would not bother to seek protection and commercial application of their works. However, when third parties and strangers started to interact and forge relationships with the indigenous peoples, these third parties discovered a

---

<sup>18</sup> Background Brief No. 1 (2015) on Traditional Knowledge and Intellectual Property, p.1.

<sup>19</sup> *Manzano vs. Court of Appeals*, GR No. 113388, September 5, 1997, p. 1





wealth of intellectual property that may be protected and utilized by the “outside world”. For this reason, indigenous peoples and communities have realized the need to have the same kind of protection as that of the conventional intellectual property to level the playing field and prevent misappropriation and abuse of their works. While traditional knowledge is now recognized as a rich source of intellectual property, it does not have the same level of protection as that given to the conventional kind like patent, trademark or copyright. This has created a gap in the protection, regulation and enforcement of intellectual property rights that may arise from traditional knowledge. Recognizing traditional knowledge as a source of intellectual property is a step towards the right direction, but developing a system that protects and enforces intellectual property protection arising from traditional knowledge similar to the conventional types of intellectual property is the next challenge.

With this in mind, the following questions may be asked: (1) Should traditional knowledge be treated in the same way as conventional intellectual property?; (2) If so, how can traditional knowledge be categorized and classified using the conventional categories of intellectual property?; (3) If not, can traditional knowledge have a sui generis (special case) protection under the law or a combination of both conventional and sui generis protection? (4) What are the challenges in protecting traditional knowledge under the current intellectual property system? and (5) From the local standpoint, does the current Philippine legal framework sufficient to protect traditional knowledge in the Philippines?

#### 4. Intersection of Intellectual Property and Traditional Knowledge: Issues and Challenges

The intersection of traditional knowledge and conventional intellectual property is not as simple as it may seem. On the contrary, the intersection is a complex one.<sup>20</sup> **First**, the intellectual property system rewards novelty and innovation while traditional knowledge aims to preserve antiquity and old traditions and expressions. **Second**, the intellectual property system rewards individuals or entities exclusive rights while there is normally no single “inventor”, “author” or “creator” and oftentimes the author or inventor is of traditional knowledge is unknown. **Third**, the purpose of the intellectual property system is for

---

<sup>20</sup> WIPO Publication No. 1001 (E), p. 26.



the inventor to disclose the information to the public so that after the protection expires, the information becomes part of public domain. On the contrary, indigenous people do not generally want their traditional knowledge to be part of public domain as they want to retain exclusive possession of them as this is what makes them unique as a people. **Fourth**, conventional intellectual property is generally tangible and complete so as to know the extent or coverage of protection over the work. On the other hand, traditional knowledge is generally abstract, unlimited and ever-evolving. And **fifth**, conventional intellectual property is protected mainly for commercial purposes while traditional knowledge is protected primarily for preservation and not for commercial application.<sup>21</sup> As aptly put by the WIPO in its Background Brief No. 1 of Traditional Knowledge and Intellectual Property:

*“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 new inventions and original works by individuals and companies. Its living nature also means that “traditional knowledge is not easy to define.”<sup>22</sup>*

In her article *Protection of Traditional Biodiversity-Related Knowledge: Analysis of Proposals for the Adoption of a Sui Generis System*, Eliana Torelly de Carvalho (2003) describes the difficulties in applying conventional intellectual property to biodiversity-related knowledge, which is part of traditional knowledge:

*“At first glance, it is already possible to detect the contradiction between the protection of traditional knowledge associated with biodiversity and the modern legal framework of intellectual property rights. Traditional knowledge of indigenous and local communities has characteristics that make it unsuitable for protection by ordinary intellectual property rights laws. In most cases, traditional knowledge is neither attributable to one individual, nor can it be dated, since it is the result of a work that is passed through generations inside a community. Also, it is usually not*

<sup>21</sup> Supra on footnote 16, pp. 26-27.

<sup>22</sup> WIPO Background Brief No. 1 (2015) on Traditional Knowledge and Intellectual Property, p.1.



*documented in a written form. These characteristics exclude the patentability of traditional knowledge under the legal regime of the United States.*

*The fact that traditional knowledge-especially when associated with biological diversity-is not always amenable to intellectual property rights protection means that such knowledge is easily susceptible to appropriation by those individuals who are able to give a legal format to the traditional knowledge, patent inventions without attributing the origin, or share the benefits with the indigenous or traditional community. The U.S. patenting of the Indian turmeric plant's and the South American sacred Ayahuasca plant are controversial examples of this practice." (emphasis supplied).<sup>23</sup>*

With the philosophical and legal differences between the features of conventional intellectual property on one hand and traditional knowledge on the other, is there a way of harmonizing them and meet on some common ground. Can the conventional intellectual property system be used to protect traditional knowledge without compromising the ideals of the latter? To answer this question, a look at the current state of intellectual property law protection of traditional knowledge in the Philippines is in order.

### **5. Current State of Intellectual Property Law protection for Traditional Knowledge in the Philippines**

The recognition and protection of intellectual property is found in the 1987 Constitution of the Philippines. It provides that *"the State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law."*<sup>24</sup> Through several amendments, this constitutional provision was operationalized through the latest law on intellectual property - the Intellectual Property Code of the Philippines (R.A. 8293) which took

<sup>23</sup> Eliana Torelly de Carvalho, *Protection of Traditional Biodiversity-Related Knowledge: Analysis of Proposals for the Adoption of a Sui Generis System*, 11 Mo. Env'tl. L. & Pol'y Rev. 38 (2003), p. 39.

<sup>24</sup> Section 13, Article XIV, 1987 Constitution.



effect in January 1, 1988. Section 2 of R.A. 8293 on the declaration of state policy provides that:

*“Section 2. The state recognizes that an effective intellectual and industrial property system is vital to the development of domestic and creative activity, facilitates transfer of technology, attracts foreign investments, and ensures market access for our products. It shall protect and secure the exclusive rights of scientists, inventors, artists and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such periods as provided in this Act.”*

It should be noted, however, that there is no mention in the intellectual property code about the protection of traditional knowledge. Nevertheless, traditional knowledge is protected by another provision of the 1987 Constitution. Section 17 of Article XIV provides that:

*“The State shall recognize, respect and protect the rights of the indigenous cultural communities to preserve and develop their cultures, traditions and institutions. It shall consider these rights in the formulation of national plans and policies.”*

This constitutional provision was operationalized through the passage of Indigenous Peoples Rights Act (Republic Act No. 8371) and took effect on 29 October 1997. It is important to note that Section 2 of the said law provides for the declaration of state policies on the protection of traditional knowledge:

*“SECTION 2. Declaration of State Policies. — The State shall recognize and promote all the rights of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) hereunder enumerated within the framework of the Constitution:*

*a) The State shall recognize and promote the rights of ICCs/IPs within the framework of national unity and development;*

*b) The State shall protect the rights of ICCs/IPs to their ancestral domains to ensure their economic, social and cultural well being and shall*



*recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain;*

*c) The State shall recognize, respect and protect the rights of ICCs/IPs to preserve and develop their cultures, traditions and institutions. It shall consider these rights in the formulation of national laws and policies;*

*d) The State shall guarantee that members of the ICCs/IPs regardless of sex, shall equally enjoy the full measure of human rights and freedoms without distinction or discrimination;*

*e) The State shall take measures, with the participation of the ICCs/IPs concerned, to protect their rights and guarantee respect for their cultural integrity, and to ensure that members of the ICCs/IPs benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population; and*

*f) The State recognizes its obligations to respond to the strong expression of the ICCs/IPs for cultural integrity by assuring maximum ICC/IP participation in the direction of education, health, as well as other services of ICCs/IPs, in order to render such services more responsive to the needs and desires of these communities.*

*Towards these ends, the State shall institute and establish the necessary mechanisms to enforce and guarantee the realization of these rights, taking into consideration their customs, traditions, values, beliefs, interests and institutions, and to adopt and implement measures to protect their rights to their ancestral domains.”*

With regard to the protection of the intellectual property rights of indigenous people and communities, Section 32 and 34 of R.A. 8371 provides that:

*“SECTION 32. Community Intellectual Rights. — ICCs/IPs have the right to practice and revitalize their own cultural traditions and customs. The State shall preserve, protect and develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual, religious, and spiritual property*

Presented at the 10th DLSU Arts Congress  
De La Salle University, Manila, Philippines  
February 16, 2017



*taken without their free and prior informed consent or in violation of their laws, traditions and customs.”*

*“SECTION 34. Right to Indigenous Knowledge Systems and Practices and to Develop own Sciences and Technologies. — ICCs/IPs are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.”*

The following are other relevant laws pertaining to access and use of traditional knowledge in the Philippines: (1) The Wildlife Resources and Conservation Act (R.A. 9147) which makes it a state policy to conserve and protect wildlife resources for sustainability; (2) The Traditional and Alternative Medicine Act (R.A. 8423) which mandates a legally workable basis for the ownership by the indigenous knowledge of their knowledge of traditional medicine; (3) The Magna Carta for Women (R.A. 9710) which protects the rights of indigenous women of their traditional knowledge and practices; and (4) The Technology Transfer Act (R.A. 10055) which requires that all universities and research and development institution disclose any genetic or biodiversity resource for possible intellectual property protection.

A reading of these constitutional provisions and relevant laws reveal that the state protects and recognizes intellectual property in its conventional form (patents, trademarks and copyright) and the intellectual property rights of indigenous communities. There is no mention, however, on how to operationalize this protection. Is the protection of traditional knowledge mandated by the constitution and the Indigenous People’s Act (R.A. 8371) through the intellectual property code (R.A. 8293)? Since, there is no mention of traditional knowledge in the Intellectual Property Code, it can be assumed that protection of traditional knowledge can be done through the intellectual property code only if it complies with the conventional requirements of the law. For example, a novel cure for an illness sourced from traditional knowledge of an indigenous community can be protected as a patent



under the intellectual property code if it complies with the all the elements under the law (novelty, inventive step and industrial applicability). However, what if the traditional knowledge cannot be protected under the conventional intellectual property system for lack of novelty and inventive step for example? Surely, the Indigenous People's Act (R.A. 8371) and other relevant laws discussed above will not allow the traditional knowledge that cannot be protected under the Intellectual Property Code (R.A. 8293) to remain unprotected. While there are were already bills passed in Congress that seek to protect traditional knowledge as an intellectual property akin to that protected under the intellectual property code, none of them have become law as of this writing. Hence, the protection of these other varieties of traditional knowledge is still in limbo.

In the international front, there are several international agreements or treaties that deal with the protection of and access to traditional knowledge and genetic resources. Examples are the Convention on Biological Diversity (CBD), Trade Related Aspects of Intellectual Property Rights (TRIPS), Union for the Protection of New Varieties of Plants (UPOV), International Treaty on Plant Genetic Resources for Food and Agriculture, and the Intergovernmental Committee of Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (ICGTR). However, in order to fully implement these international agreements and treaties, local legislation is imperative.

## **6. Analysis of the State of Intellectual Property Protection of Traditional Knowledge in the Philippines:**

According to the WIPO, traditional knowledge can be protected using the conventional intellectual property system (The Intellectual Property Code, R.A. 8293 for the Philippines) by using two angles/approaches: (1) Positive protection; and (2) Defensive protection.

Positive protection is the method by which traditional knowledge is applied for intellectual property protection using the conventional system of protection. It is *"the granting and exercise of rights that empower communities and promote their traditional knowledge, control its uses and benefit from its commercial*



*exploitation.*<sup>25</sup> This means that traditional knowledge that can be protected as patent, trademark, copyright, geographical indication or any other kind of conventional intellectual property can be applied for protection under the said conventional system. In this approach, it is the traditional knowledge that will conform to the requirements of the conventional system. For example, a member himself of the indigenous community who is able to discover a cure for an illness applying the traditional knowledge can apply for a patent for such discovery, bearing in mind the rights of the indigenous community as a whole. Through this approach, the indigenous community itself can acquire intellectual property rights that it can use to prevent exploitation and abuse of others. It can also be used for commercial purposes for the benefit of the indigenous community.

Defensive protection is the method of preventing third parties from having intellectual property rights over traditional knowledge held by the indigenous community. It *“is designed to prevent the illegitimate acquisition or maintaining of IP rights by third parties. Stated otherwise, defensive protection aims to stop people outside the community from acquiring IP rights over TK and TCEs.”*<sup>26</sup> The classic example of defensive protection is the searchable database of traditional medical information made in India. Through this database, traditional knowledge can be considered as “publication” and can, therefore, be considered as prior art for any patent application. This is similar to the method of defensive publication where the inventor will publish his invention so that others cannot anymore file for patent as his publication will be considered as prior art. In summary,

*“In short, a range of IP tools can be used to protect TK and TCEs. For their holders, positive protection means making use of these tools for their own purposes. Defensive protection, in contrast, means preventing anyone else from having access to these tools, when it would go against the interests of TK and TCE holders.”*<sup>27</sup>

Therefore, the first option of holders of traditional knowledge in the Philippines is to use both the positive and defensive approaches under the Intellectual Property Code of the Philippines (R.A. 8293) and the mandate of the Indigenous Peoples Rights Act (R.A. 8371) and relevant laws to protect their traditional knowledge and genetic resources. Admittedly, however, the present

---

<sup>25</sup> Supra on footnote 18, p.2.

<sup>26</sup> Supra on footnote 8, p.22.

<sup>27</sup> Supra on footnote 8, p. 22.



Presented at the 10th DLSU Arts Congress  
De La Salle University, Manila, Philippines  
February 16, 2017



conventional system does not cover all types and situations concerning traditional knowledge. A survey of the legal framework for the protection of traditional knowledge in the Philippines, particularly the two main laws relating to the intellectual property rights of indigenous people (Intellectual Property Code of the Philippines (R.A. 8293) and the Indigenous Peoples Right Act (R.A. 8371)) reveals that while these laws recognize the importance of respecting traditional knowledge and that the holders of the traditional knowledge can use either the positive or defensive approaches for protection as discussed above, there is no sufficient legal framework for the protection of traditional knowledge in the Philippines outside these two approaches for the following reasons: (1) The Intellectual Property Code of the Philippines (R.A. 8293) does not include traditional knowledge as one of the intellectual property rights protected under the code; (2) The Indigenous Peoples Right Act does not provide the legal mechanism for the protection to traditional knowledge in the same way as conventional intellectual property like patents, trademark and copyright; (3) The Indigenous People's Right Act (R.A. 8371) pertaining to traditional knowledge does not address the lack of legal protection afforded to traditional knowledge as they address only specific issues and are, therefore, not comprehensive; and (4) The requirements of legal protection under the conventional intellectual property system (R.A. 8293) are for the most part not consistent with the nature of traditional knowledge. Indeed, there are still gaps in the law in the protection of traditional knowledge as the intellectual property code only protects traditional knowledge that complies with its requirements. If there is any consolation, the problem is not unique to the Philippines but is a global one. As opined by Eliana Torelly de Carvalho:

*“Actually, the issue of protection of traditional biodiversity-related knowledge is a part of history unfolding under our eyes. But even now, there are still many unanswered questions. One certainty has already been established: the predominant intellectual property rights regime-based on the Paris Convention, the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), legislation is not adequate to protect traditional biodiversity-related knowledge.”<sup>28</sup> (emphasis supplied).*

---

<sup>28</sup> Supra on footnote 19, p. 39.



## **7. Conclusion and Recommendations**

Traditional knowledge is as old as the communities that created them and it is continually developing and evolving. The challenge for the conventional intellectual property system is to adapt and keep abreast with the needs and changes of traditional knowledge. While it is true that the characteristics of traditional knowledge do not fit squarely with the requirements of intellectual property protection under the conventional system, protection under the current system is always an option while waiting for changes in legislation or policy. Intellectual property protection of traditional knowledge under the current system may not give complete protection to TK holders, but it is one of the best options for the time being. “Still, for many reasons, traditional Knowledge remains elusive to current IP laws.”<sup>29</sup>

In the meantime, the following are my recommendations:

1. Full implementation of the Indigenous People’s Act (R.A. 8371) and Related Laws. Unlike other countries, the Philippines is fortunate that it has a specific laws that protects the interests and concerns of indigenous peoples and communities. The main law (R.A. 8371) is broad enough to include all possible situations that concern the interests of indigenous communities yet it is specific enough to address the intellectual property rights that may be created or expressed in traditional knowledge. The challenge is to fully implement these laws and devise a mechanisms to operationalize the protection of intellectual property rights arising from traditional knowledge.
2. Full implementation of the Intellectual Property Code (R.A. 8293) as it applies to traditional knowledge: While the intellectual property code does not provide a specific mechanism for the protection of traditional knowledge similar to patents, trademarks of copyright, the holders of traditional knowledge can still use the current system to protect its traditional knowledge. For example, traditional healing methods can be applied for patent or protected as a trade secret while traditional cultural expressions can be applied for copyright or trademark. The existing

---

<sup>29</sup> Supra on footnote 16, p.1537.



- intellectual property system should be effectively utilized to afford immediate protection and prevent abuse in sharing of benefits.
3. Need for Increased Awareness on the nature of traditional knowledge and its potential for intellectual property protection: While the Philippines already has a law on the protection of the rights of indigenous people, there is still low awareness on its nature and its potential for intellectual property protection. Seminars, conferences and dialogues should be organized to increase awareness on the intersection between the two. Local government units should initiate this dialogue between the indigenous communities themselves in their respective jurisdictions and the mainstream society.
  4. Establish a database of Traditional Knowledge and Genetic Resources for the Philippines: The Philippines has a rich culture and heritage that needs to be preserved for the benefit of existing and future generations. Similar to the India model, it is suggested that the Philippines establish its own TK database to properly document, utilize and recognize the ownership of works emanating from Philippine TK and to also serve as defensive protection to those who would like to acquire intellectual property rights over them. This will also provide a record of history of the indigenous people.
  5. The Philippines should participate more actively in WIPO Committees and fora on Traditional Knowledge: To the credit of WIPO, it has been very active in organizing activities that will help promote the protection of traditional knowledge through its Intergovernmental Committee on traditional knowledge (IGC). The Philippines should take advantage of this opportunity by sending delegates to these events. This will definitely help in not only having a better understanding of utilizing the current IP system to traditional knowledge, but it can also provide expert advice on a possible sui generis protection of traditional knowledge in the Philippines. Moreover, the Philippines should participate in the drafting of an international agreement or treaty that would govern traditional knowledge across all nations.
  6. Explore the possibility for a Sui Generis protection for Traditional Knowledge: For traditional knowledge that cannot be protected under the

Presented at the 10th DLSU Arts Congress  
De La Salle University, Manila, Philippines  
February 16, 2017



conventional intellectual property system, it is imperative to explore a sui generis kind of protection for traditional knowledge. There is a no “one-size-fits-all” solution to protecting traditional knowledge and a sui generis system may be the key to addressing most, if not all, the concerns of protecting traditional knowledge.

There are two interests involved in the protection of traditional knowledge – the rights of the holders of the traditional knowledge (the indigenous communities) and the rights of society as a whole. The goal is to strike a balance between serving the interests of the holders of traditional knowledge on one hand and to serve the interests of the society at large on the other. In the words of Hansen and Van fleet (2007)<sup>30</sup>, “*access, development and distribution must be balanced against equitable benefit sharing, sustainable development and conservation*” of traditional knowledge.

---

<sup>30</sup> Supra on footnote 16, p. 1537.



## 8. LIST OF REFERENCES

Background Brief No. 1, Traditional Knowledge and Intellectual Property (2015), WIPO, Geneva, Switzerland.

Daoas, David et. al., (1999). *Efforts at Protecting Traditional Knowledge: The Experience of the Philippines.* WIPO Roundtable on Intellectual Property and Traditional Knowledge, Geneva, Switzerland.

Eliana Torelly de Carvalho, *Protection of Traditional Biodiversity-Related Knowledge: Analysis of Proposals for the Adoption of a Sui Generis System*, 11 Mo. Env'tl. L. & Pol'y Rev. 38 (2003).

Hansen, Stephen and Van Fleet, Justin. (2007). *Issues and Options for Traditional Knowledge Holders in Protecting their Intellectual Property.* In Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices (eds. A Krattiger, RT Mahoney, L. Nelsen et. al) MIHR: Oxford, U.K. and PIPRA: Davis, USA.

Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (2015), WIPO Publication No. 933 (E), Geneva, Switzerland.

Intellectual Property Code of the Philippines (R.A. 8293) (1998).

Indigenous Peoples Rights Act (R.A. 8371)

Karjala DS. (2007). *Biotechnology Patents and Indigenous Peoples.* In in Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices (eds. A Krattiger, RT Mahoney, L. Nelsen et. al) MIHR: Oxford, U.K. and PIPRA: Davis, USA.

Pantalony, Rina Elster, WIPO Guide in Managing Intellectual Property for Museums, WIPO Publication No. 1001 (E), Geneva, Switzerland.

Peria, Elpidio V. (16 March 2015). *5 Reminders concerning Traditional Knowledge protection in the Philippines* (<https://bitsinbits.wordpress.com/2015/03/16/5-reminders-concerning-traditional-knowledge-protection-in-the-philippines/>).

The 1987 Philippine Constitution.

Arts and Culture: Heritage, Practices and Futures

Presented at the 10th DLSU Arts Congress  
De La Salle University, Manila, Philippines  
February 16, 2017

