

## Question Q232

**National Group:** Dutch Group

**Title:** **The relevance of traditional knowledge to intellectual property law**

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### Questions

#### I. Analysis of current law and case law

The Groups are invited to answer the following questions under their national laws:

On a general note, in accordance with the Dutch group's understanding of the working guidelines, this report does not deal with genetic resources (point 10 working guidelines).

1) Is TK defined in your national law?

No

2) If yes to question 1, what is the source of the definition?

3) If yes to question 1, how is TK defined?

4) If TK is not defined in your national law, is there any 'working definition' described in any draft law or regulation, policy document or other discussion material?

No

5) Does your national law provide for any protection (whether positive or defensive) for TK?

Dutch national law does not provide for any specific (positive or defensive) protection for TK. There is however an extensive framework for the protection of IP rights which is in principle

available for the (defensive and positive) protection of TK. Examples are the Dutch Copyright Act, under which works bearing a unique, original character as well as the personal imprint of the author are protected, the Dutch Neighbouring Rights Act which protects performances of works of literature, science or art or of an expression of folklore, various trademark and design laws, plant variety and patent laws. Such laws offer not only protection to the proprietor of an exclusive IP right, but also provide defensive protection in certain circumstances (note e.g. the valid reason exception resp. prior use defence that can be invoked as a defence against certain trademark resp. patent infringement allegations). Also, the provisions on geographical indications and the TRIPs provision on know-how are relevant, as are the provisions of general (tort) law. As mentioned, in the various IP laws, there are no specific provisions that apply to TK. In other words, TK is subject to the same eligibility criteria for protection as other objects of IP protection.

- 6) If yes to question 5, is the protection found in:
- a) existing IP laws or regulations;
  - b) adaptation of IP laws or regulations through sui generis measures for TK protection; or
  - c) wholly sui generis laws or regulations relating to TK protection?
- 7) If yes, to any part of question 6, please provide details of the law(s) or regulation(s), including where such detail exists:
- a) criteria for eligibility for protection;
  - b) beneficiaries of protection;
  - c) scope of protection;
  - d) sanctions, remedies and exercise of rights;
  - e) administration of rights;
  - f) exceptions to and limitations on rights;
  - g) term of protection;
  - h) formalities to which protection is subject;
  - i) transitional measures;
  - j) consistency with other laws;
  - k) national treatment and foreign interests; and
  - l) trans-boundary cooperation.

Note: the items in this non-exhaustive list are taken from the IGC draft articles relating to the protection of TK dated 20 May 2011: WIPO/GRTKF/IC/19/5. Groups may benefit from referring to this document in answering question 7, but should also add any additional criteria, which exists in their national law.

- 8) Are the protections described in response to questions 6 and 7:
- a) referable to TK alone; or
  - b) related to or linked to the concepts of protection of:
    - (i) genetic resources; or
    - (ii) TCEs?
- 9) If yes to question 8(b), please provide details of any linkages.
- 10) Please identify any shortcomings in any protection of TK in your country by reference to the matters in questions 6 to 9 above.

The Dutch group is of the opinion that the current framework of IP right protection applicable in the Netherlands is adequate to satisfy the practical needs for the protection of TK.

11) Please identify any significant case law in connection with protection of TK in your country.

The Dutch group did not identify any significant case law relating to protection of TK in the Netherlands

## II. Proposals for harmonisation

The Groups are invited to put forward proposals for the adoption of harmonised rules in relation to the role of TK in relation to IP law.

11) Is a harmonised definition of TK desirable?

Yes

12) If yes to question 12, please propose a definition of TK, or the concepts that should be included in any proposed harmonised definition of TK.

The Dutch group acknowledges that there are different possible definitions of TK. For the purposes of finding a harmonised definition it is proposed to adopt the WIPO definition:

'[C]ontent or substance of knowledge resulting from intellectual activity in a traditional context, [including] the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, all contained in codified knowledge systems passed between generations.' (WIPO/GRTKF/IC/19/IMF/8)

13) Is it desirable to have only one form of protection for TK, either positive or defensive, or both forms? Please state reasons.

The Dutch group acknowledges the need for defensive TK protection, in particular the traditional users of TK should not be hindered in enjoying and using their existing TK. However, the Dutch group is not convinced of the need for positive protection exceeding the options to obtain exclusive rights normally available under applicable IP laws.

15) Should TK be protected by:

- a) existing IP laws or regulations;
- b) adaptation of IP laws or regulations through sui generis measures for TK protection; or
- c) wholly sui generis laws or regulations relating to TK protection? In your answer, please identify which and state reasons.

See answer to question 16.

16) If yes to any part of question 15, is a harmonised approach to protection desirable? In your answer, please state reasons.

The Dutch group is of the opinion that the requirements for effective (defensive) protection will largely depend on the specifics of a given TK and further depend on the given cultural/geographical context. The Dutch group is in favour of a harmonised definition of TK and acknowledges the need for some form of defensive TK protection.

17) If yes to question 16, how should that approach be implemented

- a) at an international level; and
- b) at a national or regional level?

18) Having regard to WIPO/GRTKF/IC/19/5, please provide any proposals you have as to a harmonised approach concerning:

- a) criteria for eligibility for protection;
- b) beneficiaries of protection;
- c) scope of protection;
- d) sanctions, remedies and exercise of rights;
- e) administration of rights;
- f) exceptions to and limitations on rights;
- g) term of protection;
- h) formalities to which protection is subject;
- i) transitional measures;
- j) consistency with other laws;
- k) national treatment and foreign interests; and
- l) trans-boundary cooperation.
- m) any specific measures for facilitating protection of TK, eg, systems for recording TK, specific mechanisms for benefit-sharing, or collective or reciprocal systems of administration on behalf of indigenous people or local communities.

National Groups are invited to comment on any additional issue concerning the relevance of TK to IP law.

**NOTE:**

It will be helpful and appreciated if the following points could be taken into consideration when editing the Group Report:

- kindly follow the order of the questions and use the questions and numbers for each answer
- if possible type your answers in a different colour
- please send in a word document
- in case images need to be included high resolution (not less than 300 dpi) is required for good quality printing

## ANNEXURE A

### Resolution

#### Question Q166

#### Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

##### AIPPI

**Observing** the struggle of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to come to final conclusions on the topics;

##### Noting that

- the Convention on Biological Diversity accepts the sovereignty of states over their genetic resources and traditional knowledge connected with it, and puts forward the concept of prior informed consent and access and benefit sharing when utilising such resources;
- many member countries of the Convention on Biological Diversity have not yet set up mechanisms how to access genetic resources under their control and how to get prior informed consent;

##### Mindful that

- the patent system is intended to encourage inventors to disclose their inventions to the public in return for a monopoly period in which patent owners may prevent others from practising the invention, and that an invention is a solution to a technical problem;
- patents should only be granted for inventions which are new, not obvious and capable of industrial application, and should contain disclosure of the invention sufficient to enable the skilled person in the art to work the invention;
- the patent system cannot prevent unlawful use of genetic material or traditional knowledge in research, development, marketing of products, or trade;

**Supporting that** users of genetic material and traditional knowledge connected with it comply with the requirements of the Convention on Biological Diversity and national laws in this respect.

##### Resolves:

- 1) Traditional knowledge in the public domain should be treated as other information in the public domain for the assessment of patentability of inventions.
- 2) The patent system is not suitable to control whether the requirements of the Convention on Biological Diversity are met, in particular since research results and products in commerce and trade need not be covered by patents.
- 3) If national laws require a declaration of the source of genetic material and traditional knowledge in patent applications, such laws should:
  - only require that the patent applicant to the best of his knowledge identifies the source from which the inventor obtained the genetic material or the information based on traditional knowledge;

- entitle the applicant to rectify any failure to indicate the source or add any later information obtained on the origin of the genetic material.
- 4) Ways and means other than patent applications should be developed to deal with prior informed consent and access and benefit sharing concerning genetic resources and traditional knowledge connected with it.