

Options for the Future Protection of GRTKTCEs: The Traditional Knowledge Licenses and Labels Initiative

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Introduction

Since 2001, WIPO has convened the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.¹ What began as a committee to address an unresolved problem regarding the issue of “disclosure” within the patent system, and, consequently, the unresolved position of indigenous peoples’ knowledge and interests within the world intellectual property regime, has grown into something much larger.² After 10 years of contested and at times frustrating negotiations about process and definitions, the meetings have moved to text-based negotiations on three new international legal instruments. Generously labelled *sui generis* because of their aim to move beyond the confines of IP categories and classifications, these negotiations feature participation that is bound by the logic, the rules of process and procedure governing WIPO.³ That is, these *sui generis* treaties are being negotiated primarily among WIPO Member States whose delegates are experts in intellectual property law and trade.

In a post-TRIPS world, negotiations over potentially three new international legal instruments have raised the stakes considerably. These negotiations address new intellectual property rights for previously excluded interests—one for each of the three new invented categories: genetic resources, traditional knowledge (TK) and traditional cultural expressions (TCEs). Member States that had a marginal interest in this issue from the beginning (including those that have a tenuous hold on the title “Member State” like the Holy See), and those that insist that they have no indigenous or traditional peoples residing within them (such as Barbados, Vietnam and Bangladesh) are now not only paying attention but in regular attendance, contributing to the text-based negotiations.⁴ The tensions that run throughout the room find different alliances, depending upon which of the three draft instruments are being negotiated.

The most contentious and incomplete of these instruments is the one relating to genetic resources.⁵ The reasons for this are not surprising: the anticipated and increasing value of genetic and biological resources

¹ Established in the WIPO General Assembly in August 2000. “Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore” August 25, 2000, WIPO Doc. WO/GA/26/6.

² Personal communication with Wend Wendland, Head, Traditional Knowledge Division, WIPO. See also Marc Perlman, “From ‘Folklore’ to ‘Knowledge’ in Global Governance: On the Metamorphoses of the Unauthored” in Mario Biagioli, Peter Jaszi and Martha Woodmansee (eds), *The Making and Unmaking of Intellectual Property: Creative Production in Legal and Cultural Perspective* (Chicago: University of Chicago Press, 2011).

³ Convention Establishing the World Intellectual Property Organization 1967.

⁴ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, “Second Provisional List of Participants”, July 11, 2012, WIPO/GRTKF/IC/22/INF/1 PROV.2.

⁵ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, “Options for Future Work on Intellectual Property and Genetic Resources”, October 10, 2011, WIPO/GRTKF/IC/20/5.

lead many powerful interests groups, including especially the pharmaceutical industry, to lobby Member States to maintain core TRIPS-based provisions.⁶ The other key contest within the draft genetic resources instrument involves determining who it is that actually “owns” the knowledge, how that knowledge is or is not transformed, and, inevitably the ownership of the genetic and biological resources on any given territory. This is where a large variety of issues play out: unresolved sovereignty issues, future economic benefits and thus ideas of access and benefit sharing, the connection between knowledge of certain uses and properties of genetic resources and the land that the genetic/biological resources derive from, issues about the disclosure of origin as well as the contestation around free, prior and informed consent.⁷

The treaty with the most partisan support and with the text largely coherent is the one on TCEs. This is seen as the easiest of the trilogy to resolve, because the economic implications are seemingly not as heightened and because the issue is more copyright related than patent oriented, a factor that greatly affects who the interested parties are, as well as their effective lobbying power. Nevertheless, this treaty has its own resistances, which can come from public domain advocates eager to make sure nothing already understood to be in the public domain is brought back under a copyright-style protection. Cultural industries that have historically benefited from the free access and circulation of TCEs (especially those already documented and available in archives and libraries), such as the music and film industries, are also key stakeholders that expect their Member States to act on their behalf.⁸ Within the TCE treaty text, this means deleting provisions for any retroactive protections, making sure the scope of protection for TCE treaty subject matter is limited and providing space for generous exceptions.⁹ Each meeting brings all these and many other issues into the room.

About to enter its 13th year, these IGC meetings could themselves constitute a rich site of ethnographic study, both in terms of shedding light on the network of relationships required for advancing new intellectual property policy, and for understanding the intricate dynamics of intellectual property politics and governance. In the absence of such analysis, what is clear is that through these protracted negotiations two important things have happened: (1) brand new categories for describing indigenous and traditional knowledge systems have been invented (and then naturalised as they have increased in circulation); and (2) an intellectual property legal logic has been reinforced. That indigenous peoples themselves never discuss their knowledge systems through those categories that are now used in this international context should give us a moment to think in whose interests these treaties have been established. Reflecting bureaucratic ease, they were developed as a means of mapping indigenous knowledge systems more easily onto the dominant IP categories of copyright (TCEs) and patents (genetic resources), thus reaffirming the logic and dominance of intellectual property law. In this sense, indigenous epistemological systems have been transformed through division and simplification in order to render them more recognisable and subject to specific “Western” legal frameworks of identification and determination.

The next two years promise to bring the final stages in the epic that has been the production of these legal instruments. Yet the dissonance between what is discussed in the IGC and the urgency and specificity of concerns that indigenous people experience in relation to knowledge protection remains. Over the 13 years of WIPO diplomacy, indigenous and traditional peoples’ needs in respect to protecting their valuable

⁶ For the documented role of the pharmaceutical industry in directing and influencing international intellectual property negotiations, see Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (New York: Earthscan Press, 2002); Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003); Amy Kapczynski, “Harmonization and its Discontents: A Case Study of TRIPS Implementation in India’s Pharmaceutical Sector” (2009) 97 Cal. L. Rev. 1571.

⁷ Within the WIPOIGC since 2011, there has emerged a consistent discussion about the role and status of the UN Convention on Biological Diversity’s Nagoya Protocol on Access and Benefit Sharing 2011 in setting the minimum standards that should also be incorporated into these instruments.

⁸ E.g. “Comments of the Library Copyright Alliance on the February 18 2011, Draft Articles on the Protection of Traditional Cultural Expressions”, available at http://www.librarycopyrightalliance.org/bm~doc/lca_tcecomments21march11-2.pdf [Accessed October 28, 2012]; “Statement from Library Copyright Alliance: WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore—Intersessional Working Group, Geneva, 19–23 July 2010”, available at http://www.librarycopyrightalliance.org/bm~doc/lca_wipo_comments_072210.pdf [Accessed October 28, 2012].

⁹ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, “Like-Minded Countries Contribution to the Draft Articles on the Protection of Traditional Cultural Expressions”, April 27, 2012, WIPO/GRTKF/IC/22/5.

knowledge resources have only escalated. What was already a problem that was overlooked within mainstream IP discourse has worsened as more and more communities find themselves subject to a system that is not only inadequate for their needs, but also facilitates the dispossession of valuable knowledge resources.¹⁰ While increasing attention is directed to WIPO and the discussions taking place there, indigenous communities continue to find themselves in compromised situations in relation to the protection, transformation and access to their knowledge resources. If even one-quarter of the resources that have been poured into the IGC deliberations had been spent on providing access to educational and informational resources on intellectual property, indigenous and traditional communities would be in a different position in regard to making decisions about how to protect and maintain their knowledge systems.¹¹ The capacity for indigenous communities to make informed decisions about intellectual property law is a critical need that remains unaddressed. These decisions include, for example, when it is useful and when it is not, how to assert legal ownership and control over specific knowledge resources used by third parties, how to recognise and do something about exploitative research practices, how to develop decision-making processes in relation to documentation and digitisation projects.

This article seeks to step back from discussions at the international level. Instead its aim is to discuss a new initiative that is designed outside the WIPO discussions to address two key problems indigenous peoples have experienced in relation to the management of their cultural resources. First, how to protect individual, community and familial rights to knowledge according to community-based rules and regulations whilst simultaneously enabling the sharing of that knowledge with others beyond the community? Secondly, how to create a new informational and educational paradigm for documented cultural materials that indigenous peoples can no longer control—for example, the extensive materials produced through the colonial encounter that resides in the public domain? Addressing these two issues constitutes the foundational aims and ambitions of the Traditional Knowledge Licenses and Labels initiative.¹²

Importantly, this is just one initiative that needs to occur and is at an early stage of development. It is also not being designed to provide blanket licenses for all indigenous or traditional knowledge, but rather licenses for very specific contexts and situations, especially where current license options like Creative Commons fall short. There is a diverse range of innovative strategies that need to be developed to adequately protect indigenous and traditional knowledge in ways that accord with the expectations and needs of the owners and custodians of these materials. Moreover, it is not just protection that is required, but mechanisms that facilitate and support the communities from which this knowledge derives and is transformed. It is the hope that the TK Licenses and Labels initiative it will get at these two significant problems and thus also contribute to a shift in attitudes, understanding and behaviour about what indigenous peoples consider to be fair and equitable use of their knowledge resources.

The TK licenses and labels

Licenses are now a common feature of the intellectual property landscape. They have the potential to offer a range of additional economic incentives to the licensor—for example, through patent licenses.¹³ They also offer the possibility to create completely alternative conditions for the use of works and technological innovations, as evidenced in the Free Software License.¹⁴ In the field of copyright, arguably the most

¹⁰ Jane Anderson, “Anxieties of Authorship in the Colonial Archive” in Cynthia Chris and David Gerstner (eds), *Media Authorship* (New York: Routledge, 2012).

¹¹ The capacity building initiatives developed by the WIPO Secretariat have been important, but they have had their limits in directly reaching local indigenous and traditional communities and providing much needed advice.

¹² The TK Licenses and Labels were conceived in collaboration with the author and Kim Christen from Mukurtu.

¹³ Royalties from patent licensing are substantial in the United States. According to Rivette and Klein, “royalties from patent licensing increased from US \$15 billion in 1990 to more than US \$110 billion in 1999”. Kevin Rivette and David Kline, “Discovering New Value in Intellectual Property” (2000) 78 Harv. Bus. Rev. 55.

¹⁴ The Free Software Movement is an example of a different way of using licensing and contracts to alter the intellectual property paradigm. According to Richard Stallman, founder of the GNU General Public License, the “central idea of copyleft is that we [the coders] give everyone permission to run

widely used and circulated licensing framework is Creative Commons. Creative Commons offers copyright licenses that allow creators to “forge a balance inside the traditional all rights setting that copyright creates”.¹⁵ In this sense, working with traditional copyright, Creative Commons offers very specific options for how work can be copied, shared, edited, mixed and redistributed.

The proliferation of licenses has led to a range of unresolved questions about the relationship between contracts and intellectual property.¹⁶ But what has become clear is that licenses do offer new possibilities for creating differentiated sets of rights for the specificity of cultural works. This runs against the traditional assumption that each category of works (literary, dramatic, musical works, for instance) maintains sameness within that category and therefore needs to be treated in the same way. Licenses, like those of Creative Commons, work to create greater specificity because they seek to clarify more clearly the expectations of the creator in regard to how their work is to be shared and used. Thus, this kind of licensing provides important options for innovation, both in terms of making clear the expectations of the “creators” and forging new cultural norms for how works themselves are used and circulated. It is for these two reasons that licenses offer a new range of possibilities for specific kinds of indigenous knowledge resources.

Background

The primary point of departure for the TK Licenses and Labels initiative is not intellectual property law alone but also the 2007 UN Declaration on the Rights of indigenous Peoples.¹⁷ The three articles that are particularly important for this initiative are arts 3, 13(1) and 31(1).¹⁸ As the central international document setting forth the primary rights for indigenous peoples, the Declaration establishes the expectations and standards for the treatment and development of any initiatives that will impact or affect indigenous lives. The Declaration thus forms an integral part of the international legal context in which this strategy has been initiated. The vision of the TK Licenses and Labels initiative is two-fold. First, it ensures that indigenous, traditional and local peoples be recognised and acknowledged as the proper custodians and authorities for making decisions about how their cultures can be shared with others. Secondly, the initiative helps users of TK and TCEs develop and increase capacities for cultural awareness, cultural sensitivity and respect for different rules regarding the access and use of specific kinds of knowledge.

As a compliment to this international legal framework, the TK Licenses and Labels initiative developed as a need-based response to very specific concerns that indigenous and local communities have been experiencing in relation to their expression of culture in an increasingly digital environment. While Creative Commons offers options for indigenous communities to manage their cultural materials, there are certain limitations in the utility of these for all circumstances, especially in regard to dealing with the collective rather than individual ownership of materials, culturally specific rules for access and use of materials and concerns about how these materials will be used and in what kinds of contexts. These issues run alongside

the program, copy the program, modify the program, and distribute modified versions—but not permission to add restrictions of their own.” Richard Stallman, *Free Software Free Society: Selected Essays of Richard M. Stallman* (Boston: Free Software Foundation, 2002), p.20.

¹⁵ Creative Commons, available at <http://creativecommons.org/licenses/> [Accessed October 28, 2012].

¹⁶ There are differences across jurisdictions in how to deal with this. In the United States, *ProCD Inc v Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), produced a range of commentary. Other commentaries on the relationship between copyright and contract include: Jane C. Ginsberg, “Copyright, Common Law and Sui Generis Protection of Databases in the United States and Abroad” (1997) 66 U. Cin. L. Rev 151; Maureen A. O’Rourke, “Drawing the Boundary between Copyright and Contract: Copyright Preemption of Software License Terms” (1995) 45 Duke L.J. 479; James Griffin, “The Interface between Copyright and Contract: Some Options for Reform” (2011) 2 Eur. J.L. & Tech. 1; Australian Copyright Law Reform Commission, *Copyright and Contract* (Canberra: Attorney General’s Department, 2002).

¹⁷ United Nations Declaration on the Rights of indigenous Peoples 2007.

¹⁸ Article 3 states: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Article 13(1) provides: “Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.” And art.31(1) states: “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”

one of the greatest needs in the area of indigenous knowledge protection: how to recognise and embolden already existing local knowledge management strategies? One answer is to look to private law more generally. As Kathy Bowrey has advocated:

“We need a fuller exploration of smaller domains—an investigation of the practical uses of private law at the community level for the protection of custom. This avenue is suggested for pragmatic as well as jurisprudential reasons.”¹⁹

To this end licensing offers new possibilities especially in providing space for acknowledging that indigenous people are not a homogenous group, but rather have the right to designate and maintain their own names for the community. Licenses also provide options to recognize that the significance, integrity and value of knowledge and works created and developed from such knowledge systems are often directly tied to context and locality. What has been missing in traditional copyright and in licensing frameworks that have developed from this legal position is attention to the differentiated needs and concerns of indigenous peoples regarding ownership, access and control of cultural materials and the very specific conditions of circulation that these are governed under. Within indigenous communities, not all knowledge is considered “common” or public. There are a range of complicated governance structures that seek to manage knowledge circulation and use.

The first problem

As noted above, one of the specific issues that the TK Licenses and Labels initiative seeks to address is the development of a framework that can protect individual, community and familial rights to knowledge according to community-based rules and regulations whilst simultaneously seeking to share that knowledge with others. A key dimension to this problem is the management of already existing and circulating digital and analogue materials such as photographs, sound recordings, films and manuscripts that embody and/or represent traditional indigenous knowledge, cultures and practices. There is an urgent need to develop new options for addressing issues of ownership, access and control of TCEs documented and recorded by non-Indigenous peoples and researchers and now residing in numerous cultural institutions worldwide.²⁰ Importantly, a new framework needs to look simultaneously backwards and forwards; it therefore must also address the increased need for new forms of management of materials made by indigenous peoples and communities for community-based archival projects, for cultural heritage preservation purposes and for projects where indigenous communities maintain a leading role in determining what cultural traditions and practices can be shared with multiple audiences outside the community.

In the colonial collecting endeavour, indigenous peoples’ lives and cultural practices were documented and recorded at unprecedented levels.²¹ As technological capacity increased so did the capacity for documentation.²² As the “subjects” of these copyright works, indigenous people and communities, unlike copyright authors and owners, currently have no legal rights to determine how and when these materials

¹⁹ Kathy Bowrey, “Alternative Intellectual Property: Indigenous Protocols, Copyleft and the Juridifications of Customary Practices” (2006) 6 *Macquarie L.J.* 65.

²⁰ Kimberley Christen, “Opening Archives: Respectful Repatriation” (2011) 74 *American Archivist* 185; Jim Enote, “Creating Collaborative Collections”, available at http://sarweb.org/?iarc_lecture_jim_enote-p:past_events [Accessed October 13, 2012].

²¹ For further exploration of this, see David Chambers and Richard Gillespie, ‘Locality in the History of Science: Colonial Science, Technoscience, and Indigenous Knowledge’ (2000) *Osiris*, 2nd Series; Vine Doloria Jr, *Custer Died for Your Sins: An Indian Manifesto* (New York: Macmillan Press, 1969); Walter Mignolo, *The Darker Side of the Renaissance: Literacy, Territoriality and Colonization* (Michigan: University of Michigan Press, 1995); Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Palgrave Macmillan, 1999); Laurelyn Whitt, *Science, Colonialism and Indigenous Peoples: The Cultural Politics of Law and Knowledge* (Cambridge: Cambridge University Press, 2009).

²² One example is Margaret Mead’s collection of materials from her ethnographic work in Indonesia during 1936–1938, where she collected 36,000 photos and 35,000 feet of film. In 1936, photographic and recording technology was really in emergence, yet this is a substantial amount of material to collect. This is just one researcher’s collection produced in a two-year period in the 1930s. One only needs to imagine the documentation and recording possibilities that increased with the technology. Much of this material is now found in cultural institutions around the world.

should be accessed or by whom.²³ As these peoples and communities have increasingly found these (often disparate) collections and demanded legitimate access, cultural institutions all over the world are now facing the task of how to adequately deal with these collections—both in terms of recognising the conditions that led to their creation and establishing new options for renegotiating their access and control. This continues to be a significant concern across many communities worldwide and has resulted in the development of a set of international guidelines and best practices to help museums, libraries and archives respond to indigenous concerns.²⁴ The increase in the use of digital technology has facilitated the beginning of return and repatriation projects. But this return, often in digital form, only deals with the problem of access to the community; it has not yet been able to adequately deal with the problem of who legally owns these materials, or how to manage access by third parties who are also eager to have access to these materials for various commercial, non-commercial and educational reasons.

At the same time as this renegotiation within cultural institutions is occurring, indigenous activists, scholars and researchers, in collaboration with other scholars and technology experts, have been creating community-based documentation and recording projects.²⁵ These projects deliberately position indigenous communities themselves as the owners and custodians of the materials that are being created and thus the central decision makers for controlling and disseminating cultural materials and knowledge. The site-specific digital archives that are also necessarily being developed to store and manage these materials are working to embody culturally specific forms of classification and organisation. Increasingly, important questions about how to provide regulated and culturally specific access to these materials for persons from outside the community are being raised. This is because there are numerous instances where either traditional copyright or Creative Commons does not provide specificity in relation to conveying the expectations of the community in regard to either access of the materials or the responsibility that the user has to respect community rules and regulations for the (re) circulation and use of these materials.

To the extent legally possible, the aim of the TK Licenses is to incorporate key elements of these community-based rules and regulations in the provisions set within the license for use and circulation. For example, central to community-based rules for materials that can be shared outside the community is the necessity for those materials to always be acknowledged as deriving from a specific community and context. The significance of naming and how the community, family or tribal name should appear in relation to the work is imperative for indigenous peoples: the connection between place and people gives a work its life. Thus within the TK License suite is the option for establishing specific naming and culturally appropriate forms of attribution. While this is similar to one of the most popular CC licenses, it establishes more detailed naming and attribution instructions to accord with the expectations of use associated with those materials. Importantly, the TK Label option alongside the License extends this by providing an opportunity for community naming and attribution to occur, even if the community is not recognised as the copyright owner.²⁶

For many indigenous communities, cultural materials that contain cultural information or representations of cultural practices (in the form of photographs, sound recordings, films, videos and manuscripts) need to be managed according to alternative sets of rules to those provided by copyright and Creative Commons license models. These alternate rules derive from the specificity of the contexts from which such materials derive and reflect cultural conditions of circulation and use particular to the materialized knowledge. For instance, some expressions have rules regulating access according to gender, initiation and/or the secret nature of the materials.

²³ Jane Anderson, "Anxieties of Authorship in the Colonial Archive" in Chris and Gerstner (eds), *Media Authorship* (2012).

²⁴ Molly Torsen and Jane Anderson, *Safeguarding Traditional Cultures: Legal Options and Practical Issues for Museums, Libraries and Archives* (Geneva: World Intellectual Property Organization, 2011).

²⁵ Two examples of these projects include: Mukurtu, a digital storage and management system developed by Kim Christen, available at <http://www.mukurtu.org> [Accessed October 28, 2012]; and the Inuvialuit Pitqusiit Inuuniarutait: Inuvialuit Living History, developed through the Inuvialuit Cultural Resource Centre, Inuvik, Canada, available at <http://www.inuvialuitlivinghistory.ca> [Accessed October 28, 2012].

²⁶ More on this feature of the TK Labels can be found below.

From the outset, the TK Licenses and Labels initiative focus on a very specific type of indigenous knowledge problematique—namely, the historical recording and documentation of indigenous and local peoples' knowledge; its historical and contemporary storage in archives, museums and libraries across the world; the unequal terrain of the legal entitlements that make those with the equipment, the privilege and the institutionalised inquiry as the “authors” of much of these materials; and the continued effects of documenting and recording indigenous cultures and cultural expressions in the contemporary present—where many of the historical problems repeat and transform themselves alongside the changing technology.

While thankfully not all indigenous, local and traditional peoples and their knowledge have been recorded and placed either out of reach of the original custodians, or have entered into the brave new world of endless digital circulation and been used by anyone at anytime, there is a significant proportion of indigenous and local knowledge that is found under these conditions. That is, it is either still within the copyright periods of protection or it has expired resulting in enormous collections of indigenous materials being found in the public domain. These materials are the specific focus of the TK Licenses and Labels initiative.

The second problem

The second problem that the TK Licenses and Labels initiative seeks to address flows out of the first: how to create a new informational and educational paradigm for documented cultural materials that indigenous peoples can no longer control—for example, the extensive materials produced through the colonial encounter that reside in the public domain?

In terms of the legal status of the photographs, sound recordings, films and manuscripts that are the primary focus of the TK Licenses and Labels initiative, it is possible to say that these fall into the following four main categories. First, the vast majority of these recorded works fall into the public domain. The second category of materials concerns works authored by non-indigenous peoples. The third category of materials covers orphan works, where the author is unknown or un-contactable. Indigenous authored materials, the fourth category, counts for much less in the proportion of materials.²⁷

One substantial problem for indigenous communities accessing and seeking to control their historical cultural materials is that a significant majority of these materials reside in the public domain. That is, despite the return of the materials, they can also be used, circulated and accessed by anyone at anytime in the institutions from which they are returned. There are no controls that indigenous peoples can assert over these materials, even if, according to the community from which they are derived, they should never have been recorded, were recorded without permission, should only be viewed or heard by women or men or were recorded without any explanation about where they might end up (or what now might be called free, prior and informed consent).

The TK Labels, designed as a compliment to the TK Licenses, aim at addressing this kind of materials especially, since a significant amount of indigenous cultural materials is categorised as existing in the public domain. The TK Labels take seriously the premise of establishing a new paradigm for the fair and equitable use of indigenous materials. They are designed to be educational and informative and to illustrate culturally specific conditions of access and use for certain kinds of cultural expressions. This is especially for materials that are often circulated without reflection and consideration that there might be alternative rules derived from the community whose knowledge it is, but that have not historically been taken into account or treated with legitimacy. The TK Labels provide additional and often missing information about

²⁷ However, this categorisation of material is subject to change as the dominance of non-indigenous peoples making recordings about indigenous peoples is slowly changing. In the future, we can expect a shift in the legal status of materials to move more towards indigenous authored materials.

these materials and help users make an informed decision about the best and most appropriate way of using these materials, especially helping to avoid derogatory treatment.

For instance, if a non-indigenous musician comes across a public domain sound recording at the Smithsonian Institution that has the Community-use Men-Restricted Label explaining that the content has been designated as containing men's secret ceremonial materials, that musician is given information that will help her make an ethically and culturally appropriate decision about the best way of using those materials. With the TK Label, she is given more information about cultural conditions governing use of the materials and is therefore much more likely to respect the conditions of access and use requested by her as a user. The label thus prevents misuse and derogatory treatment of the TCEs.

A TK Label can be generated and independently added to a work by indigenous individuals, family, clans and communities. There will also be an option for institutions and researchers working closely with communities to develop an appropriate label. This recognises that much of the public domain materials actually continue to reside in cultural institutions. When an institution or researcher is working to develop a label, they are asked to work in collaboration and dialogue with communities themselves to develop the most appropriate label for the works. Since the labels seek to provide a space where missing information, including the cultural conditions for use and access, can be added, and since indigenous communities are traditionally the ones having this missing information, the labels are designed in such a way that discourages them from being added to the materials by only institutions or researchers. Since so many institutions are beginning to work more closely with communities, these labels reflect the collaborative environments that are developing between institutions and communities as part of the repatriation and digital return agendas. Fair and equitable TK Labels, almost out of definition and necessity, require mutual dialogue and conversation in order to develop the most appropriate labelling options.²⁸

Dealing with the past, the present and the future status of recorded indigenous cultural materials presents a substantial challenge. To properly deal with the older, public domain materials alongside the new rights that are being asserted by indigenous and local peoples as the rightful owners, custodians, holders and authors of their knowledge, a multifaceted approach that embraces legal and educational strategies needs to be developed. This approach culminates in the combination of licenses with an informational and educational network of labels.

Delivery

At the time of this writing, the TK Licenses and Labels initiative is being developed to be delivered as a stand-alone digital platform. It will include a license and label generator, as well as offering various educative and instructional tools for both indigenous and non-indigenous users of these licenses and labels. For instance, it will provide online tutorials to provide accurate and accessible assistance to indigenous and local peoples in their decisions to use either a license or a label. It will also provide accessible information about relevant intellectual property laws to help facilitate informed decision-making for indigenous users of the site. This is vitally important, as educational resources that adequately address and translate the primary scope and purpose of intellectual property law for indigenous people and communities is extremely limited. The lack of such resources not only precludes full indigenous participation in meaningful discussions about the future of intellectual property policy in this area at

²⁸ The labels centre fairness and equity in access and use at their centre. This is a deliberate critique and augmentation of the concept of "fair", especially how it is deployed within the copyright discourse. What is fair and equitable for indigenous materials derives from indigenous expectations and rules and is focused on how the context from which the materials derive affects their use. This runs against an image of these materials as de-contextualized knowledge objects. For indigenous owners and custodians, regardless of where these materials now are, they can still be bound by the contextual and localized conditions governing their accessibility and use. This was not diminished when the recordings were made, taken out of the community and catalogued in an institution in another country. It was just that this was assumed to be irrelevant. Indigenous peoples insist, especially with public domain works that circulate 'freely', that access and use should still be bound by cultural conditions, and that these should and can be negotiated, rather than assumed that they do not exist or are no longer relevant.

national and international levels, but it also limits the development of informed decision-making frameworks at a local level to deal with the extent of intellectual property issues that arise in any given context.

The delivery of these TK Licenses and Labels must also necessarily include relevant educational materials for non-indigenous people about the initiative, especially in regard to changing social practices and creating new conditions for the respectful treatment and use of indigenous knowledge as well as representations and expressions that draw from this knowledge. It will also contain educational and informational detail for cultural institutions seeking to work with indigenous communities to utilize the TK Labels and thus promoting a new paradigm of fair and equitable treatment of indigenous peoples and their cultures.

Currently in its early development, the TK Licenses and Labels initiative has options if materials are owned/shared between multiple communities. These licensing and labelling options recognise that there are some materials where multiple communities have responsibilities of custodianship and/or ownership. Moreover they recognise that there are circumstances when no singular community has explicit control over the materials. Rather it indicates that the rights and responsibilities for use are spread across multiple communities through already existing community protocols and ongoing cultural relationships.

Testing

Before public release, this initiative will be offered to indigenous and local communities internationally for testing. Communities working with and in the stages of developing their own digital archives with combinations of historical materials from institutions and newly recorded and developed materials will be especially encouraged to test the TK Licenses and Labels. The testing is considered integral to the success of this initiative, as it needs to work first and foremost for indigenous needs, and secondly for those institutions grappling with the digitisation and return of indigenous cultural materials. Important information about what works, what does not and what needs to be further refined will be gathered through the testing phase. This phase will also include a specific component for cultural institutions. The testing will allow for modification and resolution of concerns before it is publicly launched.

Conclusion

Over the 13 years of WIPO's work on the development of new legal instruments, indigenous and traditional peoples' needs in respect to protecting their valuable knowledge resources have only escalated. While the pace of developments at WIPO has increased, and progress has been made to text-based negotiations on three new legal instruments, indigenous communities continue to find themselves in compromised situations in relation to the protection, transformation and access to their valuable knowledge resources.

The TK Licenses and Labels initiative involves the development of an accessible digital platform that will contain a specific set of standardised licenses and labels that can be applied to already existing and future generated content that contains community-recognised traditional and indigenous knowledge. The platform is designed to offer indigenous peoples and communities, as well as those working in collaboration with these communities on the development of digital archives, an opportunity to apply legal licenses and educative labels to cultural content in digital and analogue form.

Importantly the TK Licenses are not seeking to change already-existing national or international copyright law. They are offered as a set of additional agreements that indigenous copyright owners can use to convey culturally specific concerns about the materials that they already legally own and control. These licenses concern general attribution of the source community alongside that of the copyright owner, direct negotiation over the integrity of the work when used in a commercial context and the negotiation over reciprocal benefits from use within an educational context. The TK Licenses can only be used and applied by (or in agreement with) the original holder of the copyright.

The TK Labels seek to inform a misinformed public about what constitutes fair and equitable use and access to indigenous and traditional knowledge for indigenous and local communities. At this stage, the labels are not legally binding and therefore have no basis in formal law. They serve an educative function and are designed to begin the creation of new social norms about the use of cultural knowledge and TCEs. The labels incorporate customary expectations regarding access and use of specifically designated materials.

In combination, the licenses and labels encourage the creation of a dialogue between indigenous peoples and external users of cultural knowledge and TCEs. They place an onus on the licensor to provide accurate information for correct attribution and acknowledgement details and to maintain current contact information for someone wishing to license the materials. These conditions will need to be fulfilled before the license itself can be generated and attached to the copyrighted materials. This will be built into the processes of “creating a license” on the site.

The TK Licenses and Labels initiative is just one of many that need to occur. Currently at an early stage of development, it offers an opportunity to deal with two significant problems facing indigenous communities: first, how to protect community-based rights to knowledge according to community-based rules and regulations whilst simultaneously seeking to share that knowledge with others; and secondly, how to create a new informational and educational paradigm for documented cultural materials that indigenous peoples can no longer control—for example, the extensive materials produced through the colonial encounter that resides in the public domain. For the first time, indigenous peoples and communities will have access to a resource tool that offers specifically tailored license options for TCEs that recognise unique needs in relation to access and control and that incorporates already existing and context-driven customary rules and obligations for sharing the knowledge that the expressions embody.