

a foreign country is no bar to obtaining a patent in America.¹⁵ This is clearly in order to encourage US business and industry, but according to critics, it has devastating effects on the TK of other nations.¹⁶

Patents are a well established feature of the pharmaceutical industry. They can be used to protect TM, though they are not ideal.¹⁷ While many TM traditions are based on imprecise mixtures, scientific techniques can be used to isolate active ingredients that can in turn be modified subsequently. The end product, which may be wholly or partially synthetic, would be subject to patent protection. How this derived use of TM should be compensated is an open question. Before going further with the subject, however, it would be best to define terminology, starting with traditional knowledge (TK).

I TERMINOLOGY OF TRADITIONAL KNOWLEDGE

TM is a branch of TK, and both lay at the intersection between biology and culture. The increasing use of biotechnology and the exploitation of genetic resources has engendered a polarized debate about how to acknowledge and compensate the holders of TK. In some cases, TK may be considered intangible, such as a dance sequence.¹⁸ TM as it is considered here is in another category. It is tangible and involves the knowledge and the exploitation of natural resources. For example, the information that a certain plant, prepared a certain way, is used to treat a particular disease is specific. Aspects of traditional medicine are therefore subject to patent protection, depending upon national legislation.

1. WIPO Model Provisions

The World Intellectual Property Organization (WIPO), is a specialized branch of the United Nations. WIPO, in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO), began work on defining TK in 1978. This led to the adoption in 1982 of Model Provisions.¹⁹ These model provisions were designed to be a template for national and further international legislation. They treat cultural property not as part of the international IP system, but rather define a new *sui generis* system. Article 1 of the Model Provisions states that folklore is a: “living, functional tradition, rather than a mere souvenir of the past.” By inserting the word

15 35 U.S.C. §102.

16 A good example from Ecuador is the US patent on Ayahuasca that was later revoked. See Leanne M. Fecteau, *The Ayahuasca Patent Revocation: Raising Questions about Current U.S. Patent Policy*, 21 B.C. THIRD WORLD L.J. 69-70 (2001).

17 See Liz Hanellin, *Protecting Plant-Derived Drugs: Patents and Beyond* 10 CARDUZO ARTS & ENT L.J. 169 (1991).

18 It is very difficult to protect intangible TK. See Daniel J. Gervais, *Spiritual but not Intellectual? The Protection of Sacred Intangible Traditional Knowledge*, 11 CARDZO J. INT'L & COMP L. 467 (2003).

19 WIPO-UNESCO Model Provisions for the National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982, available at <http://www.wipo.int/tk/en/documents/pdf/1982-folkllore-model-provisions.pdf> (last visited Sept. 5, 2006).

‘functional’ here one may understand that this covers folklore as broadly understood. The main method of protecting folklore is copyright (Articles 5-10) and neighboring rights (Articles 11-14). Section 2 of the Model Provisions defines protected expressions of folklore as: “... characteristic elements of traditional artistic heritage ...” The term folklore clearly encompasses artistic expressions, but it is not precisely defined. The framers of the Model Provisions apparently did not assume patent protection was an option. Recent international agreements do not use the term folklore.

2. *The Convention on Biological Diversity*

The 1992 Earth Summit in Rio de Janeiro led to the agreement entitled the Convention on Biological Diversity (CBD). The primary goal of the convention is to conserve biological diversity, promote sustainable use of its components, and promote a fair and equitable sharing of benefits from the use of genetic resources. Previously assumptions were that biological diversity was the common heritage of humankind. The CBD established that sovereign nations have ownership of their TK and biological resources. The preamble of the CBD states:

Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.²⁰

This statement can be divided into two parts. The first part deals with the dependence on certain lifestyles on biological resources. The second part of the statement deals explicitly with rights. Instead of using the broad term ‘traditional knowledge’ alone, the document qualifies it with the terms ‘innovations and practices.’ TM is not specifically mentioned in the 1982 model provisions, but there is little doubt that it is included in the CBD as a ‘practice.’ The CBD also draws a distinction between indigenous and local communities. However, TK from either source is considered equivalent. The use of the term ‘traditional’ however, carries with it a major assumption. It suggests that there has been a period of cultural transmission that remains faithful to the past.²¹ The CBD, in including local communities in the same formulation, effectively sidesteps the issue of faithfulness to the past.

Article 8 of the CBD, is titled ‘In-situ Conservation.’ Provision (j) states that each contracting party shall, as far as possible and as appropriate, subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge,

20 The Convention on Biological Diversity came into force on 29 December 1993. Text available at <http://www.biodiv.org/doc/legal/cbd-un-en.pdf> (last visited Sept. 5, 2006).

21 See Tony Simpson, *The Protection of Cultural and Intellectual Property Rights of Indigenous Peoples* INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS 18-22 (1997).