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Cultural Heritage and Collective Intellectual Property Rights

Attempts to adapt the conventional patent system – internationally promoted by the World Intellectual Property Organization (WIPO), and, nationally, by the National Institute of Industrial Property (INPI) – do not appropriately consider the characteristics and cultural contexts of traditional knowledge.

Traditional knowledge is commonly generated and accumulated in a collective manner, based on the broad exchange and circulation of ideas and information, and transmitted orally from one generation to the other. The conventional patent system protects individual innovations with potential for industrial use that are documented, while many types of traditional knowledge are not documented and may not have direct industrial application. Patents also have a limited validity; it is impossible to limit the validity of any intellectual right on traditional knowledge, and rarely possible to determine the exact time of its origin. Additionally, one must recognize that its transmission occurs in an undetermined way from generation to generation.

The inventive and creative processes of communities are often collective and the use of information, ideas and resources generated on the basis of such collective processes are broadly shared. Therefore, the concept of property rights belonging to one or more identifiable individuals is alien and contrary to the values and concepts of such societies and its adoption could foster a dissociation of knowledge from the context in which it is produced and shared. A legal regime for 'collective intellectual property rights' would avoid these difficulties. [1]

Legal concept of cultural heritage

The Brazilian Federal Constitution made great progress in the protection of cultural heritage by announcing a modern inclusive and democratic legal concept. The text clearly extends the notion of cultural heritage, appreciates cultural pluralism and demonstrates a spirit of democratization of cultural policies. The state recognizes its obligation to protect the cultures of the various social and ethnic groups which form the Brazilian society. The new cultural heritage concept grants constitutional protection to documents and sites, including carriers of historical reminiscences such as the old quilombo communities[2]. This new concept is the result of a historical process of institutionalisation of

1 The Third World Network proposed a 'Community Intellectual Rights Act', according to which local communities would be the 'custodians' (or 'stewards') of their innovations, securing the free exchange among communities, and prohibiting the concession of any rights of exclusive use of such innovations.

2 Quilombo de Palmares was a real-life democratic society, created in Brazil in the 17th century as a community of freed slaves, becoming a safe harbor for other outcasts of the world, including Indians and Jews.

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cultural preservation policies, which seek to value the 'live' culture embodied in popular expressions and the daily life of societies and their material and immaterial cultural goods.

Article 215 of the Constitution establishes that, goods of material and immaterial nature, including forms of expression, styles of creation, acting and living, and scientific, artistic and technological creations of the various Brazilian social groups, jointly constitute the Brazilian cultural heritage. It foresees the protection of constructions, works of art and other goods of material nature, and the creation of new legal instruments for the preservation of immaterial goods.

Immaterial goods include various forms of knowledge, acts and creations, such as music, stories, legends, dances, culinary recipes, techniques of crafting and managing the environment. They also include the knowledge, innovations and cultural practices of indigenous peoples, quilombos and traditional populations[3], such as forms and techniques of handling natural resources, hunting and fishing methods and knowledge on ecological systems and species with pharmaceutical, nutritional and agricultural properties and traditional knowledge related to bio-diversity.

The legal regime for the protection of traditional knowledge related to biodiversity seeks to prevent appropriation and improper use of genetic and/or biological resources by third parties. It provides greater legal security to the relations between the parties interested in accessing genetic resources and associated traditional knowledge (bio-prospectors and academic researchers) and the holders (*local communities*) of such resources and knowledge by establishing legal parameters to be observed in these relations.

This is a response to the global debate on the protection of biodiversity and associated traditional knowledge and bio-piracy[4], the States' sovereignty over their genetic resources, the prior informed consent of communities, and the fair and equal sharing of the benefits. The Convention on Biological Diversity (CBD) also establishes that access to indigenous or traditional knowledge, innovations and practices should be subject to the approval and participation of the holders of the knowledge, and that benefits arising from their utilization be shared with them.

Elements of a legal regime for collective intellectual property rights

Legal pluralism

The creation of such a legal regime adequate for the protection of collective traditional knowledge has to be based on the concept of legal pluralism and the recognition of the legal diversity existing in traditional societies.

In order to understand the essential elements of such a regime, it is necessary to accept a plurality of legal systems, recognising that our society is pluralistic and has parallel legal systems manifest in the customary laws of *local communities*.

Collective ownership

One of the fundamental pillars of a legal regime should be the recognition of the collective ownership of traditional knowledge. For example, in Brazil, the Temporary Measure no. 2.186-16/2001 in its article 9th establishes that: '… any traditional knowledge associated to genetic heritage can be of the ownership of the community, even if one individual member of that community holds that knowledge.'

The collective nature of the inventive and creative processes of *local communities* can even transcend the limits of one community. Certain medicinal plants are used by numerous communities even in different countries. Hence, attributing intellectual property rights to only one group, or even to a number of communities, would still exclude other holders of the same knowledge, possibly generating rivalries.

However, the acceptance of collective rights raises the following questions: How can such rights be exercised and defended? Who can exercise them, and in which form? Who can authorise the access to traditional knowledge when establishing prior informed consent, and in which form? While access by third parties to local knowledge or biological resources should be governed by prior informed consent and benefit sharing agreements, should exchange of knowledge between them be free? Answers to such questions should build on legal systems developed by *local communities* as well.

Recognition of customary laws

The recognition of the representation and legitimacy of systems of *local communities* is a consequence of legal pluralism, which recognises their informal legal systems as the most appropriate for providing answers to the above questions and to deal with issues related to the legitimacy and representation of these communities in procedures and

3 To facilitate reading, indigenous peoples, quilombos and traditional peoples will be called *local communities* throughout the text.

4 Bio-piracy is understood to be the access to genetic resources of a certain country, and/or to the traditional knowledge associated to such genetic resources, in violation of the established principles of the CBD.

contracts.

Such recognition requires an understanding and appreciation of traditional norms and criteria of *local communities* and their legitimacy. The enormous socio-diversity of Brazil forbids the adoption of a homogeneous norm or single criterion of representation. Some *local communities*, for instance, are represented by their caciques and chiefs, whose attributes for the exercise of power vary according to their age, experience, warrior spirit, aptitude for shamanism, abilities for hunting, fishing and agriculture, while others grant political powers to the councils of seniors. Therefore, the law should limit itself to recognising and granting legality to these forms of representation.[5]

Formalizing representation through the formation and registration of civil society associations has been useful in certain circumstances, since it also facilitates access to funding, the administration of projects, the control over bank transactions, etc. However, such associations are legal entities according to formal law, not necessarily legitimate institutions of *local communities*. Rather, collective representation should be admitted through institutions and forms of organisation as chosen by the *local communities* themselves.

The state: guarantor of collective intellectual property rights

Local communities should have the inalienable, irrevocable right of denying third parties access to use of genetic resources and the traditional knowledge associated to such resources located in territories occupied by them.

The intervention of the state should be committed to guaranteeing respect for the forms of organisation and representation of *local communities*, and to guaranteeing respect for the collective intellectual property rights of these peoples. The state should assist and advise holders of traditional knowledge, and tangible and intangible resources of biodiversity, but not substitute their will and informed consent and should guarantee the adherence to the legal instruments which represents the will of *local communities*.

Prior informed consent is the outcome of a process through which *local communities*, after acquiring and understanding all relevant information, authorise - voluntarily and consciously - third parties to access and use such resources. Prior informed consent is not an isolated contractual action. This process comprises of several phases and stages, with continuous exchange of information, initiated prior to any access to or use of the resources, fully informing communities of risks and benefits.

The state ensures that the legal and procedural requirements for prior informed consent are met. The state carries out consultations *in situ* with the holders of traditional knowledge to ensure legality and legitimacy.

Given the high diversity of communities, types of traditional knowledge and the various ways of using such knowledge, it may not always be possible or even feasible to reach a common perspective. However, some principles should be clearly reflected in the written agreement, including:

1. specific objectives and activities agreed upon;
2. parties seeking access to publicize the nature and objectives of their intended activities, uses of the (research) activities and/or products to be developed and any existing and potential risks;
3. research methodology, geographical area and information on the method, material and information to be collected, and duration;
4. funding sources;
5. approaches, mechanisms and institutions involved in settling conflicts arising in the process;
6. party/ies seeking access to cover the cost of any hiring of independent technical, legal and/or scientific consultants;
7. outline for an eventual benefit-sharing agreement;
8. any additional permissions and amendments to be agreed prior to any respective actions; and
9. agreements in a language which is accessible and comprehensible by *local communities*;

Article 25 of the Temporary Measure no. 2.186-16/2001 foresees that sharing of benefits can be, among others, in the form of profits sharing, payment of royalties, access to and transfer of technologies, licensing of products and processes, and capacity building or human resources, payment of collection and bio-prospecting fees for samples of biologic/genetic material, and the payment of fees for the research.

An effective, equitable mechanism of benefit sharing involves communities in research and development, capacity building and training, and provides access to technolo-

5 An example of an inappropriate representation is the agreement established between a Brazilian University and a local community seeking to validate effectiveness of plants and rituals used in healing. It involved the collection of medicinal plants and the use of traditional knowledge related to their use. Some four hundred species had already been collected, based on the information and recipes of seven shamans, which would have resulted in the identification of 138 probable species with some type of neurological action, only that, at that time eleven of them had been subjected to pharmacological and phyto-chemical studies. The research motivated conflicts and disagreements among the local communities, demanding the interruption of the project, because the researchers had consulted only a fraction of the communities.holding that knowledge.

gies and knowledge. Instantaneous payments, such as fees for collection and bio-prospecting that do not promote a wider and more permanent process of information exchange and benefit sharing are discouraged because of their limited and short-term impact.

The contracts should be formulated in a way that acknowledges traditional forms of social organization and political representation of *local communities* to help limit internal conflicts and cultural fragmentation. Where possible, the benefit sharing contract should be concluded directly with the holders of traditional knowledge . However, since a large part of traditional knowledge is shared by several communities, the exclusive attribution of benefits to a select number may promote rivalries and restrict the exchange and circulation of information itself between the communities, possibly compromising future generation and sharing of knowledge.

One possible response to this challenge would be the creation of benefit sharing funds (e.g. through bio-prospecting taxes, royalties, participation in profits, etc.), which would finance projects related to the conservation of the biological diversity or projects related to the economic, social and cultural sustainability of peoples and communities holding the same knowledge. Such funds should be managed by councils composed of representatives of public agencies, civil society organisations and organisations representing *local communities*.

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