

Promoting the Culture Sector through Job Creation and Small Enterprise Development in SADC Countries: The Ethno-tourism Industry

Steven Bolnick

International Labour Office (ILO)

Box 2. Intellectual property and traditional knowledge

The intellectual property (IP) system is dynamic, characterized by its ability to evolve and adapt. Current technological advances, especially in information technology or biotechnology, as well as the evolution of society itself, necessarily call for constant re-evaluation of this system. Changes rarely take place without first being discussed - and often disputed - at national and international levels.

“Traditional knowledge” itself has a number of different subsets, some of them designated by expressions such as “indigenous knowledge,” “folklore,” “traditional medicinal knowledge” and others. Contrary to a common perception, traditional knowledge is not necessarily ancient. It is evolving all the time, a process of periodic, even daily creation as individuals and communities take up the challenges presented by their social and physical environment. In many ways therefore, traditional knowledge is actually contemporary knowledge.

Traditional knowledge is embedded in traditional knowledge systems, which each community has developed and maintained in its local context. The commercial and other advantages deriving from that use could give rise to intellectual property questions that could in turn be multiplied by international trade, communications and cultural exchange.

The emergence of a global information society in recent years, characterized by the advent of modern information technologies, has also given rise to increasing awareness of traditional knowledge. The role of IP in the protection of traditional knowledge is currently being considered in several of these policy contexts, in addition to discussions taking place in IP circles.

The World Intellectual Property Organization’s (WIPO) past work in this area dates from 1978 and focused mainly on expressions of folklore. Three meetings of experts were convened jointly by WIPO and the United Nations Educational, Scientific, and Cultural Organization (UNESCO) which led to the adoption in 1982 of the Model Provisions for the National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (the “Model Provisions”).

More recently, in 1998 and 1999, WIPO also undertook a series of nine fact-finding missions (FFMs) to identify and explore the intellectual property needs and expectations of the holders of indigenous knowledge and innovations, in order to promote the contribution of

the intellectual property system to their social, cultural and economic development. These missions were intended to enable the study of current approaches to, and future possibilities for, the protection of the intellectual property rights (IPR) of holders of indigenous knowledge, innovations and culture. From the FFMs, WIPO learned that traditional knowledge is a rich and diverse source of creativity and innovation. It further revealed that traditional knowledge systems are frameworks for continuing creativity and innovation in most fields of technology, ranging from traditional medicine and agricultural practices to music, design, and the graphic and plastic arts. WIPO also learnt that the intellectual property (IP) issues related to traditional knowledge cut across the conventional branches of intellectual property law, such as copyright and industrial property. In general, the FFMs showed the richness and diversity of traditional knowledge on a global scale, both in terms of its inherent creativity and as potential subject matter for IP protection.*

In 1998–99, four regional consultations on the protection of expressions of folklore were held. Each of the four regional consultations adopted Resolutions or Recommendations which include proposals for future work addressed to WIPO and UNESCO, on the one hand, and to national governments of the respective regions on the other. The recommendations unanimously specify four activities for further work in this field, namely, (i) the provision of legal and technical assistance on the protection of folklore; (ii) specialized training in identification, documentation, conservation and dissemination of folklore; (iii) the provision of necessary financial resources to relevant national and regional centres and institutions; and (iv) the development of a effective international regime for the protection of expressions of folklore.

At the 26th session for the General Assembly of the Member States of WIPO, held in Geneva in 2000, the Member States established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore for the purposes of discussions on these subjects. The Intergovernmental Committee is open to all Member States of WIPO. As is usual in WIPO bodies, relevant intergovernmental organizations and accredited international and regional non-governmental organizations are invited to participate in an observer capacity.

The Intergovernmental Committee held its first session in April 2001, where the WIPO member states considered an overview document which indicated possible tasks for the Committee in each of the three themes, namely: (i) access to genetic resources and benefit-sharing; (ii) protection of traditional knowledge, whether associated or not with those resources; and (iii) the protection of expressions of folklore. During the second session of the Intergovernmental Committee which took place in December 2002, the Committee discussed possible activities for the implementation of certain tasks of the work programme adopted at the first session. With regard to expressions of folklore, the Committee considered a Preliminary Report on National Experiences with the Legal Protection of Expressions of Folklore. A final report has been prepared by the Secretariat for the third session, which summarizes and analyses the responses received by Member States (64 responses were received), draws conclusions and suggest tasks and activities on expressions of folklore which the Intergovernmental Committee may wish to undertake. One of the suggested tasks includes the possible updating of the Model Provisions of 1982. The third session of the Intergovernmental Committee took place from 13 to 21 June, 2002.

Additional information available at <http://www.wipo.int/globalissues/index-en.html>.

*See WIPO Report, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, *WIPO Report on Factfinding Missions on Intellectual Property and Traditional Knowledge (1998-99)*.

Box 9. Exploiting the intellectual property of indigenous people

Historically, in Namibia many of the San people were farm labourers. With the boom in tourism, many farms were converted to guest lodges and game farms. The presence of foreign guests created a demand for seeing “Bushmen”. The San farm labourers therefore became involved in tourism – exhibiting their traditional crafts, music and culture. On some farms there was also rock-art and the San labourers conducted tours to these art works. They were thus burdened with two jobs – tourism as well as their normal farm work, without being adequately compensated. Many of these farms have an excellent tourism infrastructure but the San play no role in deciding on the tour input. They are not partners and are perceived as farm labour.

On one particular farm a contract was drafted by WIMSA, recognizing the Bushmen as owners of the intellectual property that was being marketed and promising to compensate them accordingly.

This contract stipulated:

- guaranteed living space;
- good salary and working conditions (better than those for farm labouring);
- guarantee that families could move with employees and live together with them in a mock-village;
- guaranteed additional income of 5 per cent of bed levy (N\$5 – 6 000/month) to invest in development for remote families as well as in future independent tourism developments for security of selves.

This worked well until management of the operation changed and the San were again required both to cater for tourism and also work as farm labour. In addition, the lodge owner reneged on paying the agreed bed levy. The matter is now going to court for arbitration. It remains a clear example of how the intellectual property of indigenous people may be exploited.