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INTELLECTUAL PROPERTY, TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES

Document prepared by Dr. Alexandru-Cristian Ştrenc, Deputy Director General, State Office for Inventions and Trademarks, Bucharest

1. PRELIMINARY CONSIDERATIONS

Nowadays intellectual property, traditional knowledge and genetic resources are a challenging topic that covers a great number of elements of legal, cultural, technical, social and historical origin and, in addition, has to take into account various approaches in turn partly dependent on a more specific focusing on one or other element among those already mentioned.

The above title itself gives rise to a basic question deriving from the same large number of aspects. That question may be asked as follows: Are traditional knowledge and genetic resources part of intellectual property, in other words, with reference to the WIPO Convention, do they belong to the categories of intellectual property so well defined in the Convention's Article 2(viii)?

"Intellectual property" shall include the rights relating to:

- literary, artistic and scientific works,
- performances of performing artists, phonograms, and broadcasts,
- inventions in all fields of human endeavour,
- scientific discoveries,
- industrial designs,
- trademarks, service marks, and commercial names and designations,
- protection against unfair competition,

and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

Alternatively, are they merely something else that interferes with or is perhaps related to intellectual property rights?

Although the question might seem superfluous and not at all basic, as traditional knowledge, genetic resources and folklore could clearly be incorporated in other rights deriving from intellectual activity in the industrial, scientific, literary and artistic fields, it does have a great many ramifications towards well-defined categories of intellectual property; for instance, we often speak about intellectual property *and* genetic resources, traditional knowledge and folklore (see the wording of the WIPO Intergovernmental Committee) or indeed about the relationship between intellectual property, on the one hand, and genetic resources and traditional knowledge on the other, which tends to indicate conceptual interference rather than a subordination of the concepts to that of intellectual property.

Another seriously complex element derives from the fact that all the well-defined categories of intellectual property rights, whether copyright or related rights or rights in inventions, designs, trademarks, trade names, geographical indications and so on, include elements that are subject to protection, those elements being in one form or another, generally subordinated to the concept of novelty (or originality) when filed, whereas traditional knowledge by definition has a totally different, historical make-up.

Last but not least of only some of the challenging aspects of the topic that concerns us, intellectual property generally works with one or a limited number of creators, inventors, artists, and so on who actually apply for rights.

Moreover, whenever they are granted such rights, whenever they transfer them to a well-defined legal entity, the common intellectual property laws based on current treaties and conventions grant holders exclusive rights of exploitation which materialize as the right to prevent others from exploiting the intellectual property subject matter without their consent.

Even in the case of collective creations, such as those of teams of inventors or applicants, collective trademarks, geographical indications, teams of designers or creators of literary or artistic works, teams of performers, etc., the key is finiteness and/or precise definition of their number and name with a view to the acquisition of intellectual property rights, consisting of economic and/or moral rights.

From that point of view the concept of traditional knowledge is quite different, lying midway between shared and collective.

The vast majority of international treaties and conventions in and around the intellectual property field, national legislation too, on the one hand, and industrial property theory as dealt with in specialized literature on the other hand, have built up a system that defines intellectual property rights, grants titles of protection and enforces rights based on those basic concepts and values.

International development initiated 20 years ago and vigorously pursued during the past two or three years revealed the need for a complex approach, essentially based on the fact that large communities of indigenous people, all over the world, have undeniable merit in the intellectual, cultural, scientific and artistic achievements of mankind.

And without anticipating the conclusion, which in fact is already known to everybody, namely that the challenging solutions to the problem are to be found in the future, it seems essential to me to make a brief presentation of the current status of that problem.

The delicacy and the scale of the problem for which a strategy and a coherent solution have to be laid down at the international level (and the national level too, of course) are such, unfortunately, that I am left with only a limited capacity for imparting my views on the subject.

2. DEFINITION OF TRADITIONAL KNOWLEDGE (TK) AND GENETIC RESOURCES (GR)

A coherent system of any kind, whether legal, philosophical or scientific, can only be built on the basis of an exact, and if possible, widely or unanimously accepted, definition of the basic concepts that underlie the system. Let us see what the situation is in this field.

2.1 Traditional knowledge (TK)

As has been already pointed out in [1], TK is a working term, a very general one, that covers knowledge in science, technology, agriculture, the environment, medicine, environmental biodiversity, expressions of folklore, and so on, which belongs to a specific people, population or territory, has been transmitted from generation to generation and will evolve in the future as a result of changing circumstances.

The most significant subsection of traditional knowledge is represented by indigenous knowledge, or more accurately by the knowledge of an indigenous people, and, as the case may be, expressions of folklore.

Obviously, as some expressions of folklore have been created by natives, one can expect occasional overlaps between expressions of folklore and indigenous knowledge.

Traditional knowledge is itself a subset of the common heritage of mankind. That heritage should be handled dynamically, that is, as having not only yesterday's validity today but also today's validity tomorrow.

As far as the traditional knowledge concept is concerned, it is worth mentioning that the 1992 Convention on Biological Diversity (CBD), in its Article 8(j), uses the terms traditional knowledge, innovations and practices while the preamble to the UN Draft Declaration on the Rights of Indigenous Populations speaks of indigenous knowledge, culture and traditional practices.

Strictly speaking, the two concepts could be comparable with one another if the word indigenous were given the meaning, which moreover is a perfectly suitable one, of pertaining or specific to a particular place.

I shall repeat myself, however, and say that the meaning attached by WIPO in [1] to the word indigenous has more to do with an indigenous population, making indigenous knowledge a subset of traditional knowledge.

Without making any attempt to present you with an exhaustive list of traditional knowledge, here are some of the most important TK categories:

- methods and technologies in medicine, agriculture and the environment;
- workmanship and handicraft: textile designs, carpets, folk costumes, masks, ceramics, glassware, building, etc.;
- expressions of folklore.

Without risking a definition of traditional knowledge on the basis given in Chapter 4, I shall also say that it encompasses knowledge and practices that have not been systematically written down but transmitted orally, either explicitly or implicitly, and are generally specific to a local or indigenous community.

It is also characterized by the fact that it has historical character on the one hand, through being transmitted from generation to generation, and dynamic character on the other, usually developing under the influence of historical, social, geographical or even political factors.

As for the concept of expressions of folklore, it is actually used exclusively (or at least has been up to now) with the meaning specified in the 1982 UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.

Those Provisions have it that expressions of folklore should be deemed products embodying characteristic elements of the traditional artistic heritage, developed or preserved by a community in the country or by individuals, which mirrors the traditional artistic expectations of that community.

The Model Provisions specify four important groups of creations classified according to the manner of their expression, namely:

(a) verbal expression: folk tales, folk poems and riddles, etc.;
(b) musical expression: folk songs and instrumental music;
(c) expressions of the human body (by action): folk dances, plays and the artistic form of rituals;
(d) expressions incorporated in a material medium or tangible expressions: drawings, paintings, sculptures and carvings, mosaics, jewels, textiles, carpets, folk costumes, etc.

2.2 Genetic Resources

Besides traditional knowledge, the common heritage of mankind includes genetic resources as a basic constituent.

That is clear, for example, in Article 1 of the International Undertaking on Plant Genetic Resources which lays down the universally accepted principle that plant genetic resources form part of the heritage of the mankind and consequently should be available without any restriction.

According to Article 2 of the CBD, genetic resources means genetic material of actual or potential value.

In its turn genetic material means any material of plant, animal, microbial or other origin containing functional units of heredity; in order to give a full definition of the assembly of concepts involved in the notion of genetic resources, the functional units of heredity including whole organisms, parts of organisms and biochemical extracts, tissue samples containing DNA or RNA, such as genes, plasmids, etc., have to be included.

Generally speaking, genetic resources constitute a category of biological resources. As we are at present confronted with fabulous biological diversity, Article 2 of the CBD defines it as variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species and between species, and of ecosystems.

From a conceptual point of view genetic resources have a double nature [2]:

- on the one hand, they are physical materials over which the GR suppliers want the right of control, while ex-situ GR end-users, applying modern biotechnological or reproductive techniques, have succeeded in improving germ plasm, consequently being able and entitled to claim intellectual property rights in the applied technology;

- on the other hand, they are carriers of hereditary information which is capable of self-reproduction and which may itself be the subject matter of intellectual property rights.

Given this situation, the genetic resources concept itself is of no particular relevance because either element of the twofold nature of GR may lead to a claim of IP rights as accepted in the development of modern technology: patents for inventions, varieties of plants or breeds of animals, trade names, etc.

As you will see in Chapter 3, two other concepts are relevant, as they bear a special relation to IP rights, namely access to the genetic resources and the equitable sharing of the benefits resulting from that access.

3. THE INTERNATIONAL CONTEXT OF INTELLECTUAL PROPERTY - TRADITIONAL KNOWLEDGE - GENETIC RESOURCES RELATIONSHIP

I shall use the international context concept to discuss the meaning of the problem before us in terms of any provisions that may have been agreed upon internationally at treaty, agreement or convention level, and also in terms of national legislation in individual countries as a consequence of international enactments.

It is clear that traditional knowledge (TK) and genetic resources (GR), because they are not concepts specific to intellectual property but have been more and more felt by the modern world as playing an important role in it, have caused an unprecedented increase in recent attempts to outline a clear, specific international context for the IP-TK-GR triangle where TK is taken into account explicitly and F (folklore) implicitly.

The essential parameters of the international context, in terms of its first meaning, are summarized below.

3.1 Basic provisions of international treaties and conventions

As has already been mentioned, Article 2 of the WIPO Convention defines explicitly in its first part the categories of rights constituting intellectual property and, implicitly in its last part, any other rights associated with intellectual activity that have not been mentioned in the first.

The Paris and Berne Conventions and the TRIPS Agreement explain the very essence of the listed rights.

Additionally, Article 27.3(b) of TRIPS provides for the possibility of revision four years after the entry into force of the WTO Agreement, and contains remarkable provisions concerning the patentability of genetic resources.

It provides expressly that plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals, other than non-biological and microbiological processes, shall be excluded from patentability.

The Article further provides that Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.

The pillar outside the IP system which permits and requires the establishment of a triangular IP-TK-GR relationship is the CBD, whose Article 1 specifies that the objectives of the Convention are the conservation of biological diversity, the suitable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies.

Article 8(j) of the CBD is essential, as it accords national legislation great freedom of action in the establishment of a coherent policy on the IP-TK-GR triangle.

It provides that, subject to its national legislation, each Contracting Party shall respect, preserve and maintain knowledge, innovations and practice of indigenous and local lifestyles relevant for conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices, and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Access to GR is a fundamental issue for the CBD: the authority to determine access to genetic resources rests with national government and is subject to national legislation.

A detailed analysis of the relation between TRIPS and the CBD is being made in the context of the TRIPS Council discussions on the revision of Article 27.3(b).

Now that TRIPS includes the basic concepts of intellectual property as defined in the Paris and Berne Conventions, we can say that promoting this issue is undoubtedly aimed at bringing the genetic resource concepts, particularly access to resources and equitable sharing, including the traditional knowledge and folklore component, into the purview of intellectual property.

It is highly significant that the Conference of the Parties to the CBD of May 15-26, 2000, called for specific surveys on the relation between intellectual property and CBD objectives, technology transfer and the sharing of benefits inclusively with local and indigenous communities.

Attention is mainly focused on the interference of the CBD with patent law, namely the manner in which the prior art presented in a description referring to or making use of traditional knowledge or a biological diversity issue may and must refer to it, on the one hand, and whether and if so how the exercise of the IP right can have a favorable effect on the sharing of benefits.

3.2 National and/or Regional Viewpoints

While using slightly different shades of meaning in expressing their opinions, the developed countries stated that ([6] and [8]):

- the CBD and TRIPS did not conflict and had different objectives;
- they did not have the same object;
- neither treaty contained an explicit reference to the other;
- the provisions of one treaty did not prevent meeting the requirements laid down in the other;
- there was considerable interaction between both treaties, mainly in the field of inventions concerning biotechnology, plant varieties, the environment and ecology;
- the treaties should not be detrimental to each other; on the contrary, they should be implemented in such a manner as to favor one another.

An essential aspect that had been pointed out was that intellectual property rights, notably invention patents, were highly effective instruments for genetic resources suppliers in securing major benefits from the entities processing those resources in order to manufacture new products and in providing a good basis for the conclusion of equitable contracts controlling access to resources.

Particular attention is paid to the question whether or not the revised Article 27 of the TRIPS Agreement should include a provision on government authorization as mentioned in the patent application, but with reference to the source and origin of the genetic material and the employed traditional knowledge, subject to proof of fair and equitable sharing of benefits and of the prior authorization by the government or local or indigenous authorities of the exploitation of the genetic resources and traditional knowledge specified and incorporated in the description included in the patent application.

That group of countries is decisively against government authorization, but is ready to explore the possibility of finding complementary solutions for the disclosure of information on the geographical origin of the biological material or of the traditional knowledge embodied in the patented solution.

Two other trends are also distinguishable in the countries' position, namely:

- support for the development and enforcement of strong and effective national legislation in TK and GR donor countries which also provides adequate conditions of access and benefit sharing;
- the drafting of guidelines, recommendations or similar approaches to the setting up of a concrete legal basis for access to resources and knowledge and the distribution of the benefits derived from their use.

The developing countries ([5] and [12]) are markedly inclined to favor sui generis TK and GR protection systems.

Without going into detail, this aspect derives from the fact that the principles underlying the grant and observance of IP rights, i.e. applicant, holder, exclusive right to exploit and to prevent others from unauthorized exploitation, are perceived by most of the TK and GR donor countries as means of promoting the interests of end-users and even as restricting the equitable sharing of benefits. The use of traditional knowledge is also perceived in many situations as enhancing the concept of the common heritage, to the extent of minimizing or cancelling the recognition of economic or moral rights, itself based on a guarantee of unlimited access to knowledge and resources.

Most sui generis protection, except for some slight conceptual variations, is based on TK and/or GR registration that clearly specifies the collective identity of the GR and TK supplier, the consent of the supplier or the competent government authority for the use of the TK or GR, and finally guarantee or access contracts providing for an equitable distribution of the benefit deriving from access to the above.

However, there is a strong consensus in favor of forms of TK and GR protection by means of sui generis databases containing knowledge, innovations and practices relevant to the preservation and sustainable use of biological diversity ([5] and [8]).

In that respect, the compilation of a huge digital database of traditional knowledge in India (the Traditional Knowledge Digital Library or TKDL) is highly significant.

This database is aimed first at identifying traditional knowledge of medicinal plants (herbs) as part of prior art, which is therefore public property, with a view to avoiding the grant of patents for solutions that are already retrievable.

Certainly, the mere fact of incorporating TK and GR in a database could make a major contribution for example to knowing prior art, including such knowledge or information as will determine the novelty of the invention to be patented.

As a concept, this is only one side of the problem, however, because in fact it is necessary to create rights in the registered knowledge [5]. The adequate protection of such knowledge is a sine qua non of fair and equitable access to and sharing of benefits.

4. PREDICTABLE EVOLUTION

Intense activity carried on over the past three years under WIPO auspices, including the recent setting up of the Intergovernmental Committee Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore and the start of its work, has made it possible for an action plan to be drawn up for the immediate future, with all the possible options being explored and eventually adequate forms of international standards found for the conceptualization and enforcement of IP in its relationship with TK, GR and F.

4.1. Genetic resources

Four elements of the interface between IP and access to genetic resources have been identified, namely [2]:

(a) contractual agreements for access to genetic resources and sharing of benefits; a possible future task for the Intergovernmental Committee under these conditions may be the working out of a guide to contractual practice, guidelines and model IP clauses for contractual agreements on access to genetic resources and sharing of benefits, with specific interests and conditions being taken into account;

(b) laying down legal, administrative and political measures designed to control access to genetic resources and the sharing of benefits; starting with the identification of two basic sub-elements, namely:

(i) intellectual property rights as possible international measures of support for the giving of prior informed consent;
(ii) record of interest in the invention deriving from access to or use of genetic resources;

it has been possible to decide on the drafting of adequate provisions or guidelines referring to access to genetic resources that are consistent with international standards in the IP field;

(c) development of multilateral systems for easier access to genetic resources and sharing of benefits, those systems being consistent with international IP standards, with special emphasis on plant genetic resources for the food industry and agriculture;

(d) protection of biotechnology: as far as this subject matter is concerned, two major tasks have been identified, namely:

(d_1) revision of the application of legal standards concerning the availability and extent of patent protection for structures and compositions derived or separated from live organisms and for inventions in the field of biotechnology in its early

stages, with a view to devising guidelines on the application of such standards to the field of genetic resources;

d_2) improvement of the administration of genetic resources through exploration of methods whereby genetic resources in the form of protected plant varieties may be integrated in the general plans for effective preservation.

4.2 Traditional Knowledge

Starting from two fundamental issues arising in connection with traditional knowledge, namely:

(A) availability of IP protection for TK holders;

(B) acquisition of IP rights in TK based creations and innovations by parties other than the TK holders themselves,

four main categories of issues were identified, namely:

(a) identification of the terminological and conceptual issues;

(b) design of standards in relation to the availability, extent and use of IP rights in TK;

(c) revision of current and development of new criteria for integrating TK-related documentation in searchable prior art;

(d) enforcement of rights in TK through identification of specific ways in which TK holders may assert their IP rights.

4.3 Expressions of Folklore

Although, as I have already said, expressions of folklore are a subset of traditional knowledge, and as the guidelines devised for TK can therefore be applied, overall, the existence as a positive and distinct fact of the UNESCO-WIPO Model Provisions of 1982, which are to be updated 20 years after their enactment, clearly becomes useful in relation to the identification of specific future areas of concern.

The Model Provisions are expected to be updated with two basic aims in mind [2]:

(i) improvement in the system for the protection of tangible expressions of folklore, particularly handicraft;
(ii) extension of the protection of a certain country’s expressions of folklore beyond its borders.

A particularly significant item for consideration will be the elaboration of recommendations for the legal protection of folklore, based on the development of a form of sui generis legal protection at the international level.

5. PROTECTION OF TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES IN ROMANIA

In my country, Romania, where I carry out my industrial property work, the concepts that we are concerned with are protected from within the intellectual property protection system.

Completely amended after 1990, and to a great extent harmonized with the legislation of European Union Member States, European directives and Community Regulations, the Romanian intellectual property protection system, viewed in relation to our subject matter, has the advantages, and unavoidably also the disadvantages, of a traditional approach within well-defined categories of IP rights.

Before explaining these issues briefly, I want to say that Romania is a country where there is remarkable unity within its diversity of historical, geographical, social and other factors which has led to the development of wealth of traditional knowledge, including both expressions of folklore and genetic resources.

While still having an important agrarian population, which in its turn is grafted on to various geographical areas with important local peculiarities and significant individual characteristics, in Europe Romania can boast a unique indigenous production, an extremely varied folklore and a biodiversity deserving of attention.

To give you one example, the production of pharmaceutical and cosmetic products based on both indigenous genetic resources and also know-how originating in local lore and tradition is enjoying the benefits of enormous expansion.

The network of APLAFAR shops (APLAFAR is our acronym for pharmaceutical plants) has been highly successful in Romania.

I am particularly proud to belonging to a country whose folklore is remarkable from the point of view of its quality and the diversity of its expression.

The fact that Romania ratified the CBD in Law 58/1994 is relevant to the manner in which TK and GR are protected in Romania.

5.1 Protection with Invention Patents

The Patent Law (Law No. 64/1991), as amended in 2001, and its Implementing Regulations, which will soon be passed by Government Decision, have introduced the concepts of patentability of biotechnological inventions in a manner fully consistent with EC Directive 98/44 on the legal protection of biotechnological inventions. Consequently, without going into greater detail, inventions relating to plants and animals are patentable if the technical feasibility of the invention does not relate to a certain plant variety or animal breed, with the corollary that plant varieties and animal breeds, and also essentially biological processes for producing plant varieties and animal breeds, are not patentable.

The following subject matter is likewise not patentable:

(a) the human body in its various stages of formation and growth, or the mere discovery of one of its elements, including a complete or partial gene sequence;

(b) processes for cloning human beings;

(c) processes for modifying the genetic identity of human beings;

(d) use of human embryos for industrial or commercial purposes.

A significant step in creating a direct connection between protection by patent and traditional knowledge as part of the state of the art consists the insertion of a provision in the amended law specifying that the state of the art to be considered shall be held to comprise everything made available to the public by written or oral description, use or any other means before the filing date or, as the case may be, the priority date of the patent application.

It is worth mentioning that the law has hitherto required a written description with a precise issue date.

The Implementing Regulations of the Patent Law, which are now being adopted, will have a provision that reflects item 27 of the preamble to EC Directive 98/44 which, in essence, stipulates that: "Whereas if an invention is based on biological material of plant or animal origin or if it uses such material, the patent application should, where appropriate, include information on the geographical origin of such material, if known; whereas this is without prejudice to the processing of patent applications or the validity of rights arising from granted patents … ".

Until new conceptions and concepts regarding the protection of traditional knowledge and access to genetic resources, and also the sharing of benefits at international level, are complete, the three aspects mentioned are specific steps towards recognition of the role of traditional knowledge as a basic asset of the world state of the art on the one hand, and towards adequate protection for genetic resources by means of invention patents on the other.

5.2 Protection by Industrial Design Legislation

The Law on the Protection of Industrial Designs, (Law No. 129/92) introduces a system of protection, based on filing and substantive examination of our rich traditional knowledge, including expressions of folklore such as folk furniture, folk costumes, handicraft items and so on.

The Law does not preclude protection by means of other intellectual property rights, and so leaves open the opportunity of granting composite protection, not only by copyright and trademark but also by other future, sui generis forms of protection.

5.3. Protection by New Plant Variety Certificate

The entry into force of the Law on the Protection of New Plant Varieties laid the foundations of a sui generis system of protection in Romania, fully compatible with EC Regulation 2100/1994, which replaced the previous system of protection enshrined in Law No. 64/1991.

The conditions for the grant of protection are those that are known for this category of genetic resources, namely novelty, distinctness, uniformity and stability.

The Law provides adequate protection for plant genetic resources by granting the breeder a title of protection that confers on him the exclusive right to exploit in its most specific form, and also the right to prevent exploitation by third parties without his consent.

The definition of novelty within the meaning of Article 5 of the UPOV Convention, which is that "a plant variety shall be deemed to be new if, at the date of filing of the application for the breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety," makes it possible and probable that this form of protection will be relatively widely used for plant genetic resources, including those characterized as traditional knowledge.

5.4 Protection by Trademark and Geographical Indication Legislation

The relatively new Law on the Protection of Trademarks and Geographical Indications (Law No. 84/1998) provides for the protection of the concepts of collective mark on one hand, and geographical indication – with its basic meaning as fundamentally defined by Article 7bis of the Paris Convention and Article 22 of the TRIPS Agreement - on the other.

I am therefore pleased to have noticed real growth in the number of requests for protection from local associations and communities, which, subject to rules to be filed with the State Office for Inventions and Trademarks, agree to acquire exclusive rights in certain signs or geographical indications, as the case may be, capable of representing the products incorporating traditional knowledge in a manner certified in an official document, the protection certificate.

5.5 Protection by Copyright and Related Rights Legislation

Article 7 of the Romanian Copyright and Related Rights Law (Law No. 8/1996) provides that the genuine intellectual creations in the literary, artistic or scientific field, regardless of the manner of their creation, the manner or specific form of expression or their value and destination, such as:

(a) literary and advertising works (...) and any other written or oral works (...);

(b) written or oral scientific works;

(c) musical compositions with or without words;

(d) dramatic, dramatico-musical, choreographic and mimed works;

(e) works of three-dimensional art such as sculpture, painting, graphic art, engraving, choreography, tapestry and ceramics, and glass and metal works as well as works of art applied to intended for practical use.

Article 6 also brings in the notion of collective work, as the work in which the personal contributions of the co-authors form an entity without the possibility, given the nature of the work, of attributing to any one of the co authors a distinct right in the whole work so created.

These provisions thus expressly afford copyright protection to artistic, literary or scientific subject matter, even that of TK holders, whether individuals or members of indigenous or local communities.

Article 95 of the Law also specifies that performers means actors, singers, musicians, dancers or any other persons who present, sing, dance, imitate, recite, play, interpret, direct, conduct or perform a literary or artistic work, a performance of any kind, including folk performance in any other way.

Far be it from me to consider elaborating on particular national aspects at an international forum, so I shall confine myself to saying that, although the outstanding Romanian specialist in IP rights, Professor Yolanda Eminescu, states in her book *Copyright* [10] that, as far as we are concerned, we reject the idea of folklore protection by copyright, my personal view is much more qualified.

According to that view, I plead for recognition of the literary, artistic or scientific qualities of traditional knowledge, including expressions of folklore, at the highest level, with all the legal and administrative consequences resulting therefrom and from another point of view, due regard being also had to performers as far as traditional knowledge is concerned.

5.6 Protection by Trade Name Legislation

Craftsmen, professionals, manufacturers, producers, and tradespeople who belong either to local or indigenous communities holding or producing traditional knowledge, or to the legal entities that represent them, can protect themselves make their products known by means of trade names, which are protected in Romania by the Law on the Register of Commerce (Law No. 26/1990), as amended by Law 12/1998, the Law on Commercial Companies (Law No. 31/1990) and amended and completed by Law 195/1997, the Law on the Repression of Unfair Competition (Law No. 11/1990) and Article 301 of the Criminal Code.

5.7 Protection by Unfair Competition Legislation

The inclusion of some important amendments on trade secrecy in the Romanian Law on the Repression of Unfair Competition (Law No. 11/1990) opens up the highly important possibility of protecting the know-how or the secrecy of the traditional knowledge, if I may put it that way.

In villages, particularly the mountain villages of Romania, there are still large or smaller local communities that know the effect of certain plants or compositions on the treatment of certain diseases, and hold the secret of specific manufacturing processes in local production and so on which, by virtue of a flexible approach to the notion of trade secrecy, may be protected against misapproopriation or abuse.

6. CONCLUSION

This paper is a general presentation of the framework required for the establishment of a coherent relationship between IP rights, traditional knowledge and genetic resources.

As may have already been gathered from the presentation, it is necessary to approach the subject matter cautiously, as it will benefit from international treatment in the short or longer term on foundations that are being laid under the aegis of WIPO.

It is extremely important that the international community is now aware of and has taken decisive steps towards recognizing TK and GR as tremendous assets in the intellectual and spiritual heritage of mankind, either by exploring the extension of the scope of protection of IP rights as defined in the WIPO, Paris and Berne Conventions and in the TRIPS Agreement, by means of sui generis legal structures or by elaborating guidelines and recommendations to assist TK and GR holder countries in granting adequate rights to their local and indigenous communities.

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