

**American Folklore Society Statement to the
WIPO Intergovernmental Committee on
Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore
December 9-17, 2002**

My name is Burt Feintuch. I am a folklorist at the University of New Hampshire in the United States. With my colleague, Tim Lloyd, I represent the American Folklore Society, an international organization established in 1888 for the study of, and advocacy on behalf of, folklore, traditional knowledge, and the individuals and communities that create and sustain those aspects of culture. We are an NGO, not part of the US official delegation, and we wish to advocate a number of views that differ considerably from official US policy.

Our statement is in the form of a brief introduction, followed by sixteen recommendations, grouped under four general topics.

In pursuing its mandate, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore of the World Intellectual Property Organization must confront a wide range of issues of interest to the individuals and communities with which folklorists work. These issues range from basic definitions of folklore and traditional knowledge to the rights of traditional knowledge- and folklore-bearers, and from the relationships between folklorists and the people with whom they work and collaborate to the relevance of national and international intellectual property regimes to the ways of life and forms of creativity developed in customary and traditional systems.

Our first four recommendations concern general IGC processes and participation:

AFS applauds the work of the IGC in addressing issues of considerable concern to communities and peoples throughout the world. To best achieve WIPO's objectives in a process that engages from all relevant stakeholders, we recommend the following:

- 1) WIPO should recognize that the needs of member states are not necessarily synonymous with those of the indigenous and traditional knowledge communities that reside within their boundaries, and that the rights and interests of these groups may run counter to those of member nations. WIPO should ensure the equitable and meaningful participation of indigenous peoples and traditional knowledge communities in discussions of the IGC-GRTKF, providing financial assistance when appropriate.
- 2) The people and communities affected by the work of the IGC-GRTKF should have a major role in determining the results of that work. WIPO should take the necessary steps to ensure that conclusions of the IGC-GRTKF and similar bodies incorporate the identified needs of indigenous peoples and traditional knowledge communities who are the primary guardians and interpreters of their cultures.
- 3) WIPO should recognize that traditional knowledge and folklore are part of the culture of both indigenous peoples and non-indigenous peoples. The latter includes groups who, because of population movements, have developed significant traditional knowledge and folklore in locations other than their historical places of origin.

- 4) WIPO must comprehensively communicate the results of this Committee's work, as well as all WIPO determinations concerning intellectual property rights and traditional knowledge and folklore, to indigenous peoples and traditional knowledge communities.

The next two recommendations have to do with traditional knowledge and folklore:

The American Folklore Society is particularly concerned with the impact of intellectual property regimes on traditional knowledge and folklore, especially on individuals and groups who actively maintain the dynamic cultural traditions that contribute to the world's knowledge and diversity. This knowledge has been, and continues to be, a significant source of social, cultural, economic, and political power. AFS believes that the IGC on GRTKF must consistently strive to address the needs of diverse knowledge systems and communities, as well as to attend to issues of social and political justice bound up in diverse forms of expressive culture. We recommend the following steps as essential for maintaining sensitivity to, and respect for, traditional knowledge and folklore and the bearers of these traditions:

- 5) WIPO and other relevant intergovernmental organizations should provide assistance and capacity building to developing nations, indigenous peoples, and traditional knowledge communities through (a) the provision of technical assistance on matters relating to intellectual property, traditional knowledge and folklore; (b) the provision of technical assistance on the documentation and conservation of traditional knowledge and folklore; and, (c) the provision of leadership training to develop increased knowledge of indigenous people and traditional knowledge communities on intellectual property regimes.
- 6) WIPO should undertake cultural impact assessment of existing intellectual property regimes with the goal of examining the consequences of current systems on traditional knowledge, folklore, and the bearers of these traditions. Indigenous peoples and traditional knowledge community members should play central roles in this evaluative effort.

The next six recommendations pertain to intellectual property regimes and their relationship to traditional knowledge and folklore:

Formal intellectual property systems have important and widespread implications for the social, cultural, and economic well-being of individuals and groups. The creation of this IGC indicates general concern for the need to develop intellectual property regimes that are just, accessible, and sensitive to all groups and cultural forms. As the IGC considers the capabilities of current regimes, considers reformulation of existing processes, and looks to the creation of innovative IP regimes, AFS recommends the following:

- 7) WIPO must recognize that present intellectual property regimes serve primarily to protect commercial interests. Current legal regimes are not designed to address cultural interests or integrity and are not necessarily sensitive to the content, processes and holders of traditional knowledge and folklore. WIPO should formulate protection systems that address such issues as cultural integrity, rights of attribution, communal ownership and re-creation, and perpetual protection.

- 8) WIPO must recognize the existence of multiple systems of law and custom in human societies. Current governmental intellectual property regimes constitute one system for protection of rights. Customary and traditional systems also exist to protect cultural rights and to serve core cultural goals. We encourage WIPO to formulate governmental and intergovernmental protection systems sensitive to the needs of both the cultural communities and the individual bearers of traditional knowledge and culture.
- 9) WIPO must strive to develop protection regimes for traditional knowledge and folklore respectful of, and sensitive to, the informal and formal protection regimes developed over time by indigenous peoples and traditional knowledge communities. National or international regimes should not usurp the legal and customary rights of control that have already been developed by indigenous peoples and traditional knowledge communities.
- 10) WIPO should be cognizant of the potential negative consequences of global or international regulatory mechanisms (e.g., development of a world patent system) on local systems.
- 11) WIPO should ensure continuity rights of traditional and customary uses of traditional knowledge and folklore by indigenous peoples and traditional knowledge communities irrespective of national or international IP assignation (e.g., patents) of rights.
- 12) WIPO should support the communication of patent applications that include or are based upon traditional knowledge or folklore to appropriate indigenous peoples and traditional knowledge communities. Reliance on present systems of “prior art” or “prior knowledge” does not provide sufficient awareness of either the traditional knowledge bases, or the consequences, of patent applications.

Our third group of recommendations pertains to prior consent, benefit-sharing, and compensation:

The rights of indigenous peoples and traditional knowledge communities to their tangible and intangible resources is a major global issue. In particular, there has been a great deal of recent controversy over the protection of local genetic and biological resources, as well as the traditional knowledge and folklore associated with the creation, use, and manipulation of those resources. In some instances, individuals, groups, corporations, and institutions from outside of communities of origin have made application for, and in cases received, intellectual property control over these resources without acknowledgment of their origins, consent of local peoples, or agreement on benefits-sharing. In this context, the American Folklore Society recommends the following:

- 13) WIPO must recognize the tangible and intangible values of traditional knowledge and folklore. Any new mechanisms that attempt to place a “value” on traditional knowledge and folklore must include provisions that recognize both tangible and intangible values, as well as recognizing that commodification and privatization of these values may run counter to the rights and desires of holders of traditional knowledge and folklore.

- 14) WIPO should recognize that compensation issues such as benefit-sharing should reflect procedures and criteria acceptable to, and in some cases, required by, indigenous people and traditional knowledge communities. WIPO should support the development of systems and standards to allow indigenous peoples and traditional knowledge communities to negotiate directly the commercial use of their traditional knowledge and folklore.
- 15) WIPO doctrines covering “informed prior consent” should recognize the core right of indigenous peoples and traditional knowledge communities to grant, or not grant, free, prior and informed consent.
- 16) Scholarly research of all kinds—by native and outside scholars, and leading to the creation and communication of artistic, cultural, humanistic, and/or scientific insight—is essential to the increase of human knowledge and to the informed pursuit of the WIPO enterprise. As part of its core mission in regard to traditional knowledge and folklore, WIPO should clearly advocate for responsible scholarship consonant with the needs of indigenous people and traditional knowledge communities. Such research should be carried out in partnership with indigenous people and traditional knowledge communities, and it should be in accordance with institutional codes of ethics and professional practice,

2 December 2002
