Intellectual property rights and native communities

If hundreds of thousands of shareholders in limited companies have long benefited from their intellectual property rights, the same cannot be said for the thousands of people from a small country like Tuvalu in regard to their collective creations. The fault lies in the difficulty of defining the objects covered by this right and of authenticating the level of their creativity or originality.

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The first obstacle to the recognition of property rights of communities is one of semantics. Are these the intellectual property rights of native, indigenous or local communities? Are they linked to traditional knowledge, the knowledge of native populations, the heritage of native peoples, skills, innovations and traditional practices, or to folklore or expressions of folklore? Even the expression "knowledge of native communities" gave rise to a dilemma regarding the noun qualified by the adjective "native". Did the adjective refer to the knowledge or to the communities? There was even more controversy surrounding the word "folklore" which has a connotation of something outdated, quaint, antiquated.

However, despite all this, some headway is being made. For example, the World Intellectual Property Organization (WIPO), opted for the expression "traditional knowledge" since it felt emphasis should be placed on the word "knowledge" because it is, above all, the outcome of intellectual activity, while the traditional aspect is determined by the context in which it is revealed rather than by the knowledge itself. Unlike prejudices, traditional knowledge is neither static not unchanging. It generally comprises the activities of a community and is passed on from one generation to the next. However, this is not always so. Traditional knowledge can be codified, although this doesn't always happen! It encompasses many more areas than folklore and may include food, the conservation of architectural heritage, biodiversity, the use of biological resources, and folklore.

Too few or too many legal instruments

Legal resistance to the protection of traditional knowledge centred on the fact that intellectual property rights may be accorded only to physical or immaterial objects that are recorded and authenticated as being original and inventive – characteristics to which traditional knowledge could not lay claim. This perception no longer stands up to analysis and the facts which attest to the dynamism, innovation, and intellectual creativity of popular knowledge.

Is it that popular knowledge is not protected at all? Many experts see no need to create specialised legislation because existing legal instruments may be adequately utilised. For example, the Berne Convention on copyright covers scientific, literary and artistic productions and has a very wide scope since it even considers a computer programme as a literary work. Then there is the Paris Convention on trade and industry, laws relating to industrial designs and models; the rights of composers and performers, trademark rights; the Convention to Combat Desertification and for the protection of biodiversity, to name just a few.

This range of legal instruments has, however, not prevented the illegal appropriation of property from native communities. Even countries like Australia and Canada which are able to record and document the heritage of their native peoples and provide legal assistance, are unable to guarantee a high level of protection.

Protection or safeguard

A number of international conventions designed to protect the heritage of native communities contain safeguard measures to forestall their deterioration or disappearance, but do not offer offensive or defensive protection which would enable the communities with these intellectual property rights to benefit from them and thereby safeguard them from illegal appropriation. Theft of the intellectual property rights of communities is a rapidly developing activity. Traditional medicines are patented by third parties and the names of communities are being registered as trademarks. Sometimes even individuals are deprived of their names. WIPO provides an example of the worst case of piracy: the New Zealand singer Moana Maniapoto is unable to use her first name on her CDs when touring in Germany, because a company there registered her name as a trademark.

WIPO and UNESCO's commitment to this issue, along with the many legal measures taken by states and regions, as well as the increasing involvement of communities in defending their interests – demonstrated by their participation in defining their traditional knowledge – has created a situation which augurs well for future progress. It is therefore with a certain degree of optimism that we can hope that soon Africa, for example, will no longer fit the description given it by Professor Houtondji, i.e. a reservoir of scientific knowledge – excessively plundered – which was a source of raw materials in the colonial era. ■

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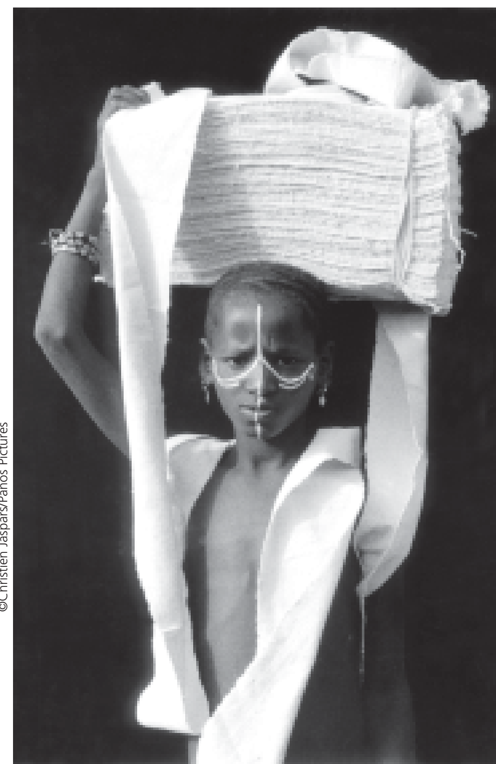
The Bambara people of central Mali practise the craft of Bogolanfini – printing textiles with mud. A girl carries strips of cotton woven by village craftsmen.



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