Traditional Knowledge Rights and Wrongs

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After years of effort, WIPO delegates are poised in Geneva to put the finishing touches on a pair of ambitious treaties to mandate global protection for traditional knowledge (TK). WIPO's treaty-drafting efforts has bifurcated along subject matter lines between (a) cultural expression and (b) technical know-how. Despite this formal distinction between cultural and technical realms, the two treaties overlap considerably in the legal protections they would afford.

This Article argues for a sharply differentiated approach. Just as copyright and patents received different protection in conventional IP regimes, so too, the WIPO TK treaties should contour the protections they offer according to the distinct interests and values that TK protection seeks to advance in each realm. What would emerge is a more modest package of rights, not all of which requires transnational regulation. A baseline comprised of expanded international norms on unfair competition would supply a shared starting point. Beyond that, however, protection afforded to TK should vary according to the subject matter.

A strong case exists for a global benefit-sharing mechanism applicable to technical traditional knowledge. The shared global interest in the efficient exploitation of ethnobiological knowledge combined with the asymmetrical nature of protagonists' interests makes such a mechanism desirable from a game-theoretical standpoint. Moreover, the distributional inequalities associated with the status quo are particularly skewed. Benefit-sharing can be implemented through a relatively streamlined liability regime minimizing the need for global governance. Indeed, such benefit-sharing is already required under the Convention on Biodiversity. Thus, TK norm-development here can build upon existing implementation efforts.

By contrast, the case for robust multinational protection of traditional cultural expression/ folklore is far less convincing. The North-South capacity gap is less acute in copyright industries as compared to patent, reducing distributive justice concerns. Instead, concerns over cultural integrity predominate. Yet, because the dilutive harm from cultural appropriation largely springs from local uses, there is less need for a global approach. Moreover, the "thick governance" required to regulate authenticity militates toward localized solutions. Eschewing global solutions would allow more contextualized tailoring of the rights, of particular importance here given the constitutional implications of speech regulation.