Unit 55

Workshop on policy development for Intangible cultural heritage safguarding

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Facilitator’s narrative 5: safeguarding and patenting a cheese-making process (case study 45)

In preparation for this case study participants could be encouraged to read the text of the Convention and Operational Directives para 1-2. They should also be introduced to the concept of a patent.

Why were the cheese artisans in Kassen able to get a patent on their improved method of making traditional cheese?

The cheese artisans in Kassen were the inventors of a new and non-obvious way to achieve one of the steps of the traditional method, meeting the conditions of novelty, inventiveness and industrial applicability. Because they are performing the improved method as part of the broader process of making the cheese in the traditional way, they believe it to be part of this tradition: responding to new circumstances in the environment (for example demand for a more efficient or more effective method).

Would patenting the improved method help to safeguard the traditional way of making cheese (why, or why not)?

The question is whether making the improved method of cheese making public through a patent application, and giving a temporary national monopoly over the new method to cheese artisans in the Fan community in Kassen might encourage or discourage the practice of making it in the traditional way (with old and/or new methods), and teaching new artisans.

Patenting the improved method of cheese making could help to safeguard the traditional way of making cheese if it created greater financial incentives for cheese making and channeled benefits from this into the community of cheese making artisans in Kassen. After 20 years, however, the monopoly rights granted by the patent expire and there would be no further effect. The use of the old method for making cheese would not of course infringe the patent because it is not patented (and cannot be patented because it is not new, and not secret).

Patents have a national scope. This patent was granted in Kassen, so unless the cheese artisans also take out a patent for their invention in another country within a very limited period of time (usually about a year), their monopoly will not be protected in other countries. If there is no patent in Masse, the use of the new method by the Fan community in Masse could not constitute an infringement of the patent granted in Kassen. That means that cheese artisans in the Fan community in Masse can use both the old and the new methods of making their cheese in Masse (or anywhere else not covered by the patent) without fear of legal action. Anyone else could do so too, outside Kassen.

What other kinds of intellectual property protection could they seek? How would these help in safeguarding the ICH?

Here participants could discuss the use by artisan cheese makers of trademarks (perhaps for different families of cheese makers, or the whole group) or geographical indications for the traditionally-made product (indicating the region and method of production). Various kinds of intellectual property protection could be used simultaneously, if the national legislation allows. The new method could be protected as a trade secret, if the artisans kept it secret. The use of trademarks or geographical indications could overlap with, and extend beyond, patent protection for the new method of making the cheese, as the latter forms of intellectual property right can be renewed in perpetuity. This could prevent other undertakings using the same name for the product or a similar product (in the case of trademarks) or, (in the case of geographical indications), prevent anyone using the same or a similar name for the cheese made by other means and/or in other places.

Registering a trademark or a geographical indication with the traditional name of the cheese might help to differentiate the market and thus enable artisans to charge higher prices for the traditionally-made cheese, made by a more complex and time-consuming process than factory products. This might create incentives for artisans to continue using the traditional method for making cheese. The artisans could choose whether to distinguish between products made using the partially new method, and those made using the old method.

Can the nomination of the cheese-making tradition to the Representative List of the Convention go ahead without involving the Fan community in Kassen (and the relevant Ministry in Kassen)?

Yes, although multinational nominations are encouraged.

Could the modified method of making the traditional cheese have been included in the description of the element in the nomination file?

Yes, if the community approving the nomination file thought it was consistent with the tradition, and if they used it themselves as part of the traditional method.

If it had been included, what factors would the Committee take into account when evaluating the compliance of the element with the criteria for inscription on the Representative List of the Convention?

The compliance of the element with the criteria for inscription would hinge partly on whether it is considered an element of ICH, having been passed down from generation to generation. While the traditional way of making cheese clearly has been passed down across the generations, it has also not been static. It has changed over time in response to new conditions in the environment, as the definition of ICH in the Convention allows (Article 2.1).

The Evaluation Body and the Committee may consider the new method of cheese making to be part of the tradition that has changed in response to new conditions in the environment. Their decision will depend on factors such as whether the community that consents to the nomination of the ICH described in the file believe this to be the case, whether they use the new method themselves, and perhaps also the symbolic and practical relationship between the new method and other aspects of the traditional method, as understood by the community(ies) concerned.

Does inscribing an ICH element on the Lists of the Convention confer a patent?

No.

What intellectual property rights does inscription on the Lists of the Convention confer?

None, see Article 3(b) of the Convention.

#### **Further information:**

* Some background on intellectual property can be found in the WIPO Intellectual Property Handbook: <http://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf>
* Facilitators may find this text useful: WIPO, Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (also in Arabic, Chinese, French, Russian, and Spanish): <http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf>