

### PHILIPPINES: INDIGENOUS NAMES, MARKS AND SYMBOLS

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In response to the need to protect the cultural heritage of the indigenous peoples of the country, the Philippine legislature enacted Republic Act (RA) 8371, otherwise known as The Indigenous Peoples' Rights Act of 1997 (IPRA). Under this law indigenous peoples are those identified by self-ascription and ascription by others, have continuously lived as an organised community on communally bounded and defined territory, and have, under claims of ownership since time immemorial, occupied, possessed and utilised such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or have, through resistance to political, social and cultural inroads of colonisation, non-indigenous religions and cultures, become historically differentiated from the majority of Filipinos.

The IPRA, under the chapter on cultural integrity, provides for the protection of indigenous culture, traditions and institutions, particularly to “preserve, protect and develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs.” The Implementing Rules and Regulations of the IPRA enumerates the following, among others, as part of the indigenous peoples' rights to cultural integrity:

- Protection of indigenous culture, traditions and institutions;
- Recognition of cultural diversity;
- Right to name, identity and history;
- Community intellectual property rights;
- Right to indigenous spiritual beliefs and traditions;
- Right to protection of indigenous knowledge systems and practices; and
- Right to science and technology.

Indigenous names, marks and symbols are among those to be protected under this broad enumeration of rights against the appropriation and exploitation by private individuals and juridical entities not belonging to an indigenous community which owns such names, marks and symbols. The IPRA however, falls short in providing for the mechanism that would prevent third party appropriation of these intangible properties.

On the other hand, the Intellectual Property Code (IP Code) of the Philippines, Republic Act 8293, was not designed to cover indigenous intellectual property (IP) rights. Although some accommodations can be made, these would not fully address the interests of indigenous peoples to its IP rights, particularly to its names, marks and symbols; as, unlike the interests of applicants for the registration of marks, the indigenous peoples' interests are most often non-commercial in nature. The indigenous names, marks and symbols are part of their identity as a people and the exclusive appropriation of such by outsiders, who manage to acquire trade mark registrations, not only blur the distinction that sets them apart from the rest of the peoples of the world, but also restricts their use and hampers their freedom to self-determination.

## **The IP Code**

Marks under the IP Code are visible signs capable of distinguishing the goods (trade mark) or services (service marks) of an enterprise. Collective marks are visible signs capable of distinguishing the origin or any other common characteristics of goods or services of different enterprises. Under these definitions, indigenous names, marks and symbols, may well be protected under the IP Code trade mark registration system for being distinctive visible signs. However, the protection to these names, marks and symbols is limited to the specific and related goods for which these names, marks and symbols will be registered. In addition, the IP Code requires the actual commercial use of a registered mark with regard to the goods or services for which it was registered. Failure to commercialise will lead to the abandonment of the registration.

In addition, the trade mark protection will not cover the protection of these indigenous names, marks and symbols for use by the members of the indigenous community themselves to "preserve, protect and develop the past, present and future manifestations of their cultures", such as the use thereof for the purpose of identifying themselves as members of such an indigenous community.

As laws are territorial, these indigenous communities will also have to register their names, marks and symbols in every country where they wish to be protected. Without the commercial structure that would support such activities, these indigenous communities may not altogether get the protection they need.

## **Third party appropriation**

With regard to the registered names, marks and symbols, no other person or entity other than the registrant indigenous community will be able to use them in the Philippines, or any names, marks or symbols confusingly similar with them, in relation to the goods or services for which they have been registered.

As to the non-registered names, marks and symbols, the indigenous communities or any member thereof, may oppose the registration of these names, marks and symbols by third parties who are not members of their community in the event that these third parties apply for their registration. Under Section 134 of the IP Code, any person who believes that he would be damaged by the registration of a mark may file an opposition to the application within thirty (30) days from the publication of the application in the IPO E-Gazette.

The opposition to the registration of an indigenous name, mark or symbol may include the ground that the IP Code excludes from registrability marks which:

- Falsely suggest a connection with persons, living or dead, and beliefs,
- Consist of a name of a particular living individual, without his written consent, and
- Being likely to mislead the public, particularly as to the nature, quality, characteristics or geographical origin of the goods or services.

It is well established that a trade mark is first and foremost a source-indicator that enables the goods of one manufacturer or seller to be distinguished from those of another. The use of indigenous names, marks or symbols is likely to suggest a connection between the goods bearing these names, marks or symbols and the indigenous peoples or communities who have created, used and are known for these names, marks or symbols for a number of generations. This is especially so when the indigenous community produces identical or similar goods, offers identical or similar services, or is engaged in an identical or similar business as the third party appropriator. The deceptive link would be detrimental not only to the indigenous community but also to the consuming public at large.

On the other hand, when the business, the products or services for which the indigenous names, marks or symbols are used are non-competing, the likelihood of misleading the public is lower; as a connection between the third party appropriator and the indigenous community is unlikely to be conceived by the consumer. This does not rule out, however, the damage sustained by the indigenous community by the mere use of a third party of its name, mark or symbol that forms part of its cultural identity as a people.

## **Future legislation**

The IPRA created the National Commission on Indigenous Peoples (NCIP) to be the primary government agency responsible for the formulation and implementation of policies, plans and programmes to promote and protect the rights and well-being of the indigenous peoples and communities. It is well within the power of this agency to propose relevant laws and policies to address issues pertaining to the conditions of the indigenous peoples and communities.

Legislation may be proposed to implement a comprehensive mechanism for the protection of the indigenous peoples' IP rights, particularly the exclusive appropriation of their indigenous names, marks and symbols. The NCIP may look into an implementation of a national registration system of all possible intellectual property assets of indigenous peoples and communities that would allow the agency for a proper documentation of these assets. The proposed legislation would declare all these IP assets in the NCIP's registry to be outside the public domain and incapable of exclusive appropriation by any person or juridical entity. With regard to indigenous names, marks and symbols, this legislation should then amend Section 123.1 of the IP Code to the extent that a mark cannot then be registered if it is identical to, or nearly resembles an indigenous name, mark or symbol as to be likely to deceive or cause confusion.

The IP Code may then be amended further as to allow an action for infringement, within the IP system, for example an administrative action filed before the Bureau of Legal Affairs of the IP Office, for the use in commerce of an indigenous name, mark or symbol registered with the NCIP without the consent of the registrant indigenous peoples or communities, without need of registering said indigenous name, mark or symbol before the IP Office. Alternatively, the new legislation may provide for a quasi-judicial system within the structure of NCIP for the resolution of cases of infringement of the indigenous names, marks and symbols registered with the NCIP and for unfair competition. The complainant will then have a choice of whether to bring its case before a forum that can have a better appreciation of the nuances of the indigenous peoples' rights and a forum whose expertise is to thresh out IP controversies.

Finally, the new legislation may provide for allowable mechanisms of transfer of the indigenous peoples' IP assets, such as through assignments and/or voluntary licensing. Other modes of transfer may be provided in cases of emergency and for public interest, such as compulsory licensing and use by the government. However, it should be provided that in all these transfers, the rights to attribution and integrity of the IP asset akin to the moral rights in a copyright, shall remain with the indigenous peoples or communities that created such IP asset, with the ratio that the created IP

asset, ie indigenous name, marks or symbols, cannot be truly separated from its creator. In the case of indigenous name, marks or symbols, their distinctiveness is closely linked to the very core of the cultural identity of the indigenous peoples and communities that created them.

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