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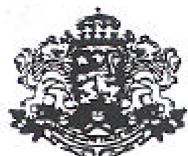

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INTELLECTUAL PROPERTY, TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES
A CHALLENGE TO THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM

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I. DEFINING THE ISSUES

A. The Importance of Traditional Knowledge

The expression "traditional knowledge" is a shorter form of "traditional knowledge, innovations and practices."[2] It includes a broad range of subject matter, for example traditional agricultural, biodiversity-related and medicinal knowledge and folklore. The WIPO 1985 "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions"[3] define folklore as "productions consisting of characteristic elements of the traditional *artistic* heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community."[4] The protection of traditional knowledge ("TK") is progressively taking center-stage in global discussions concerning intellectual property and trade. There are several reasons for the issues' move to the forefront. First, a large number of countries (and peoples) believe that up to now they have not derived great benefits from "traditional" forms of intellectual property yet find themselves rich with traditional knowledge, especially genetic resources and folklore. They would like to exploit these resources, and several major companies share this interest.

The statement issued by the WIPO Inter-Regional Meeting on Intellectual Property and Traditional Knowledge organized in Chiangray, Thailand from November 9 to 11, 2000, makes the point quite clearly:

> "With the emergence of modern biotechnologies, genetic resources have assumed increasing economic, scientific and commercial value to a wide range of stakeholders; traditional knowledge, whether or not associated with those resources, has also attracted widespread attention from an enlarged audience; other tradition-based creations, such as expressions of folklore, have at the same time taken on new economic and cultural significance with a globalized information society."[5]

While pharmaceutical and biotechnological companies are looking at ways to exploit indigenous medicinal knowledge, plants and other resources that are often found in developing countries, the Internet is progressively allowing creators of folklore or folklore-based copyrighted material to disseminate their material worldwide at very low cost.

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[2] Article 8(j) of the *Convention on Biological Diversity*, 1992. The United Nations' draft Declaration on the Rights of Indigenous Peoples (published in SHARON HELEN VENNE. EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS RIGHTS. (Penticton, B.C.: Theytus Books, 1998), at 205) uses the expression "indigenous knowledge, cultures and traditional practices." In its more recent documents, WIPO uses the expression "Traditional Knowledge, Innovations and Creativity." *See* the WIPO Draft Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), July 3, 2000. Not published, but available on the WIPO Web site <www.wipo.int>.

[3] Developed jointly with UNESCO and available at <http://users.ox.ac.uk/~wgtrr/modprovs.htm> (the "Model Provisions"). For a history, *see* Joseph W. Githaiga. *Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge*, 5/2 MURDOCH UNIV. ELEC. J. OF L. (1998). Available at <http://www.murdoch.edu.au/elaw/issues/v5n2/githaiga52_body.html>.

[4] Section 2 of the *Model Provisions*.

[5] Meeting Statement of the WIPO Inter-Regional Meeting on Intellectual Property and Traditional Knowledge held in Chiangray, Thailand, Nov. 9 to 11, 2000, at p. 1. Unnumbered document available at <http://www.wipo.int/eng/meetings/2000/tk/statement.htm>.

B. Criticism of the Current Intellectual Property System

Traditional knowledge is a serious challenge for the current intellectual property system, which some say is unable to respond to the concerns of the traditional knowledge holders.[6] First, expressions of folklore and several other forms of TK often cannot qualify for protection because they are too old and are, therefore, in the public domain[7]. Providing exclusive rights of any kind for an unlimited period of time would seem to go against the principle that intellectual property can only be awarded for a limited period of time, thus ensuring the return of intellectual property to the public domain for others to use and build on freely. That is the way in which it promotes the constitutional objective of progress of science and the useful arts.[8] Second, the author of the material is often not identifiable and there is thus no "rightsholder" in the usual sense of the term. In fact, the author or inventor is often a large and diffuse group of people and the same "work" or invention may have several versions and incarnations. Textile patterns, musical rhythms and dances are good examples of this kind of material. In addition, expressions of folklore are refined and evolve over time.

Apart from the above-mentioned reasons to exclude some forms of traditional knowledge, there is clearly a lot of TK material which is unfit for protection by intellectual property in any form. Examples include spiritual beliefs, methods of governance, languages, human remains and biological and genetic resources in their natural state (without any knowledge concerning their medicinal use).[9] With the exception of these types of material not proper subject matter for protection *per se*, however, most other forms of traditional knowledge *could* qualify for copyright or patent protection if they had been created or invented in the usual sense, though they usually are not. In response, holders of traditional knowledge argue that the current intellectual property regime was designed by Western countries for Western countries. It is true that the main intellectual property agreements, including the Berne Convention, the Paris Convention and the more recent TRIPS Agreement were negotiated mostly among industrialized nations.

In the copyright area, an author (not from the group that created the folklore) may create a *derivative* work using folklore as a basis but with enough derivative originality to benefit from copyright protection. For example, sound recordings using traditional music are very common. Many creators of folklore find this situation doubly unacceptable: While they are unable to benefit (financially and otherwise) from their creative efforts, others are "using" the intellectual property system not only to their benefit but in fact against the creators of the original folklore who may be prevented from using their own material if, as it evolves, it comes to resemble the derivative work.[10] To TK holders, this is a perverse, if unintended, result.

The same set of problems occurs with respect to patents. While discoveries and other forms of traditional medicinal knowledge based on plants or animal parts or fluids generally cannot be patented, either because they are obvious or because they are in the public domain, drugs derived from such plants and animals are generally patentable. These patents will belong to the company that developed and refined the molecule. However, the research and development efforts concerning traditional medicinal knowledge and products is often inspired

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[6] The term "keepers" and "custodians" are also widely used in this context.
[7] *See* M. Brown, *Can Culture Be Copyrighted?*, 49 CURRENT ANTHROPOLOGY, at 193 (1998).
[8] *See* Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 349 (1991).
[9] *See Id.*
[10] *See* the WIPO Draft Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), *supra*, at 7.

by holders of traditional knowledge, who may directly instruct Western scientists or teach them by letting them observe their traditional practices. There have been allegations that using this knowledge, and then obtaining a patent, which will be the exclusive property of the company doing the additional research and efforts to refine the molecule, is unfair to the holders of traditional knowledge.[11] Adding insult to injury, holders of traditional medicinal knowledge often see their knowledge referred to as "primitive," and its practitioners as quacks or witch doctors, when in fact this very knowledge is the source of several important patents in the pharmaceutical and biotechnological fields.[12] Many holders of traditional knowledge are thus adamant about obtaining some form of protection for their creations and innovations.

In sum, therefore, the *negative* exclusionary effect of the current intellectual property system (which generally does not protect traditional knowledge as such for the reasons mentioned above) is compounded by a *positive* exclusionary effect because intellectual property rights are acquired by non-traditional knowledge holders to exclude their pre-existing rights.[13]

These views about the intellectual property system itself have led certain academics to reject the current system in its entirety. They argue that the protection of traditional knowledge requires the establishment of an entirely new system.

> "Intellectual property rights provide indigenous peoples with few legal courses of action to assert ownership of knowledge because the law simply cannot accommodate complex non-Western systems of ownership, tenure and access."[14]

It is true that property rights, as they are understood in Western legal systems,[15] often do not exist in indigenous and other local communities that hold traditional knowledge. In fact, because of its exclusionary effect, they now tend to see the attempt to obtain property rights on derivatives of their traditional knowledge as "piracy." With respect to pharmaceutical, seed and agrochemical industries, they have coined the term "biopiracy" to denote the extraction and utilization of traditional knowledge and/or associated biological and genetic resources and/or the acquisition of intellectual property rights or resultant inventions that derive from such knowledge or resources without provision for benefit-sharing with the individuals or community that provided the knowledge or resources.[16]

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[11] *See Id.*
[12] *Id.*, at 7-8.
[13] J. Tunney, *supra*, at 336.
[14] D. Posey, *Protecting Indigenous Rights to Diversity*, 38/3 ENVIRONMENT, 7 (1996). *See also* J. Tunney, *E. U., I. P., Indigenous People and Digital Age: Intersecting Circles*, 9 EUR. INT. PROP. REV., 335 (1998).
[15] *See* Kamal Puri, *Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action*, INT. PROP. J., 293, at 310 (1995). *See also* Joseph W. Githaiga, *supra*.
[16] G. Dutfield, *The Public and Private Domains: Intellectual Property Rights in Traditional Knowledge*, 21/3 SCIENCE COMMUNICATION, 278 (2000).

C. Assessing the Criticism

Some of the criticism leveled at the current intellectual property system concerning its exclusionary effect is fair but may be dealt with by minor changes to current practices. For example, for applications for patents concerning drugs or other products that are derived from traditional knowledge sources, prior art searches could include TK sources to ensure that the invention applied for is indeed novel and non-obvious as required by patent laws worldwide.[17] That said, cases in which patents should not have been granted are examples of bad patents, not of a bad patent system.[18] Clearly, a dialogue has to be established between holders of traditional knowledge, the private sector and governments in that respect: "Greater awareness-raising may assist to dispel certain misconceptions concerning intellectual property and result in more technical, finely-calibrated and nuanced assessments of the TK/IP nexus."[19]

Arguments used to show that the current intellectual property system cannot protect traditional knowledge are not all convincing either. The fact that a community owns traditional knowledge does not in itself exclude all forms of intellectual property protection. The example of collective marks and geographical indications show that in certain cases rights can be granted to "representatives" of a group or a community.[20] There are also (real) property law concepts that would most closely match the needs of the traditional knowledge community and could perhaps be applied to intellectual property. The best example is probably the concept of "communal property."[21]

There is, first and foremost, a need to explain "Western" property concepts to TK holders who, very often, do not use and are thus not familiar with them. As was indicated by the Four Directions Council, a Canadian indigenous peoples trade association, "indigenous peoples possess their own locally-specific systems of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge, and the rights and responsibilities which attached to possessing knowledge, all of which are embedded uniquely in each culture and its languages."[22] In fact, as pointed out in the above-mentioned WIPO report, "proprietary systems do exist in many traditional societies but, equally, any assumption that there is a generic form of collective/community IPRs ignores the intricacies and sheer diversity of indigenous and traditional proprietary systems."[23] A good example is

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[17] It would be difficult to define what exactly are inventions derived from TK sources, but we believe an appropriate questionnaire/affidavit could be devised which would have to accompany any patent application concerning a pharmaceutical product (or process).

[18] WIPO Draft Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), *supra*, at 11.

[19] *Id.*, at 12.

[20] *See* Shri Sundaram Varma, *Traditional Knowledge: A Holder's Practical Perspective*, Paper Presented at the WIPO Round Table on Intellectual Property and Traditional Knowledge, Geneva, November 1 and 2, 1999.

[21] We found a definition that seems to prove the point. The Communal Property Act, Rev. Stat. Alta. 1970, c. 59, s.2 defines communal property as "land held by a colony in such a manner that no member of the colony has any individual or personal ownership or right of ownership in the land, and each member shares in the distribution of profits or benefits according to his needs or an equal measure with his fellow members."

[22] H. Marrie, The Convention on Biological Diversity, Intellectual Property Rights and the Protection of Traditional Ecological Knowledge, Masters Dissertation, Macquarie University Law School, Australia, July 20, 1998, §5.4.

[23] WIPO, Draft Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), *supra*, at 13. *See also* G. Dutfield, *supra,* at 281.

Indian peoples in Mexico who have struggled to retain a certain form of communal property known as *ejidos*.[24]

Authors analyzing the customs of Indian society have concluded that certain property concepts were "philosophically difficult" to apprehend from their perspective. They say that property rights are inextricably intertwined with self-interest, which, in the Hobbesian political philosophy, had to be restrained by the exercise of authority. This theory of the "unstoppable self-interest" is unknown to many TK holders. According to author Michael Melody, "whereas Western-liberal philosophies define men in terms of individualism, competition, and self-interest, traditional Indian philosophies define men in terms of spiritual unity, consensus, cooperation, and self-denial." [25] As explained by authors Menno Boldt and J. Anthony Long, "the Western-liberal tradition and native American tribal philosophies represent two very different theories of the nature of men kind."[26] Or, as WIPO put it in its report, "the point, therefore, is not that TK holders do not recognize intellectual property concepts, but rather that the formal intellectual property system is a *type* of intellectual property system which they are not familiar."[27] In other words, in rejecting the conceptual origin of the current system, TK holders do not want to reject the entire system. In fact, they believe there is a "fundamental threshold" above which incorporeal property in the nature of copyrighted works or patentable inventions should be protected "in some way."[28]

Interestingly, certain forms of property rights under common law seem to have emerged from sources similar to those of traditional knowledge. Explaining the English common-field system of cultivation, Williams writes, "a common field in its last stage of development may be shortly described as a large open field of arable land, divided into long strips which were held in severalty by different owners. The field was cultivated in a rotation of crops determined by the rules of the community, which were founded on immemorial custom. The earliest form of common-field husbandry seems to have been the common ploughing of waste land temporarily occupied by a tribal community, whose mode of life was pastoral ratter than agricultural, and whose habits were migratory."[29] Would a renewed form of "copyhold" accommodate some of

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[24] *Ejidos* comes from the Latin *exitus* and designated the land at the exit of villages that was used in common by Spanish peasants in the sixteenth century. It has some resemblance to the Anglo-Saxon commons. When the Spaniards came to the American continent, they found a variety of social institutions and lend tenure systems and had no other word but *ejido* to refer to them. The Indian peoples were forced to use that word to deal with the Spanish Crown and trying to reclaim their own physical and cultural spaces. Another term used in this context is "*ambitos de comunidad*". *See* Gustavo Esteva. *The Revolution of the New Commons, in* C. COOK and J D. LINDAU (eds), ABORIGINAL RIGHTS AND SELF-GOVERNMENT (Montreal: McGill-Queen's University Press, 2000), at 186.

[25] Michael Melody. *Lakota Myth and Government: The Cosmos as the State*", 4 AM. INDIAN CULTURE AND RESEARCH, 1-19 (1980).

[26] Menno Boldt and J. Anthony Long. *Tribal Philosophies and Canadian Charter of Rights and Freedoms*, *in* M. BOLDT AND J.A. LONG (eds). THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS. (University of Toronto Press, 1985), 165, 167.

[27] WIPO Draft Report on Fact-Finding Missions on Intellectual Property and traditional Knowledge (1998-1999), *supra* at 14. *See also* G. Dutfield, *supra*, at 287.

[28] *See* Dr. Mongane Wally Serote. *Initiatives for Protection of Rights of Holders of Traditional Knowledge, Indigenous Peoples and Local Communities.* Report prepared for the Roundtable on Intellectual Property and Indigenous Peoples, Geneva, July 23 and 24, 1998. WIPO doc. WIPO/INDIP/RT/98/4C, June 30, 1998. Dr. Serote is the Chairman of the Committee on Arts, Culture, Languages, Science & Technology of the South African Government and author of GODS OF OUR TIME. (Ohio Univ. Press, 2000).

[29] JOSHUA WILLIAMS, PRINCIPLES OF THE LAW OF REAL PROPERTY. 3rd ed. (London: Sweet and Maxwell, 1910), at 451.

the concerns of TK holders? These concepts have not been applied thus far to intellectual property rights, a gap that may prove difficult to bridge, as we will see below.

II. THE NEED FOR PROTECTION OF TRADITIONAL KNOWLEDGE

The above analysis shows that while not impossible, protecting all or most forms of traditional knowledge by copyright or patent would be very difficult under the current system. It is also essential to ask on what basis traditional knowledge should be protected. In the United States, the Constitution gives Congress the power to protect copyrights and patents and states that the purpose is to "promote the progress of science and useful arts."[30] The expression "science and useful arts" could be broad enough to include most forms of traditional knowledge if interpreted liberally. Whether it can be extended to the "collective" subject matter of TK that resembles copyrighted works and patented inventions is unclear, however. In *Mazer* v. *Stein*, the Supreme Court stated that the economic philosophy behind this Clause was the conviction that encouragement of *individual* effort by *personal* gain is the best way to advance public welfare,[31] a very Hobbesian view of the matter, some would say.

The challenge of protecting traditional knowledge forces intellectual property experts to think about what intellectual property actually is. An "intellectual property-like" system could be adopted, but this would beg the question of what it is, if not intellectual property. In other words, why is it not intellectual property? If we look at the constitutional "requirement" that intellectual property promote the progress of science and useful arts, why would certain forms of traditional knowledge not be protected by intellectual property?[32] Put differently, should intellectual property in respect of traditional knowledge be defined according to the common characteristics of the current forms of intellectual property, namely (a) identifiable authors or inventors, (b) an identifiable work or invention or other object and (c) defined restricted acts in relation to the said object without the authorization of the rightsholders--in the absence of a statutory exception? Or are these historical accidents, as it was, stemming from the 19th century world in which these forms of intellectual property emerged? And yet, even if that is the case, how can one protect amorphous objects or categories of objects and grant exclusive rights to an ill-defined (and ill-definable) community or group of people? These are the questions coming from traditional knowledge holders. They are not easy to answer but we can ill-afford to ignore those concerns, if only because the TK community has a clearly stated intention to see an international protection system for at least certain forms of traditional knowledge adopted as part of the next round of global trade talks in the WTO.

TK is already on the draft agenda for "TRIPS II", the intellectual property negotiations that would form part of the next global trade round.[33] There are two items closely related to traditional knowledge, namely biotechnological inventions and the protection of plant varieties according to the UPOV system.[34] Additionally, efforts are underway to try to enforce certain

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30 U.S. CONST. Art. 1, §8, cl. 3.
31 *Emphasis added.* 347 US 201, (1954)
32 The Constitutional Clause referred to is obviously not the only basis for a Congress to act. The Commerce Clause is usually invoked as a proper basis.
33 *See* Paul Blustein. *A Quiet Round in Qatar? WTO's Next Meeting Site Unlikely to See a Repeat of 'The Battle of Seattle.'* WASHINGTON POST, Jan. 30, 2001, at E01.
34 UPOV stands for "Union pour la Protection des Obtentions Végétales", or "Union for the Protection of Plant Varieties".

customary practices and "laws" at the international level[35] and these efforts may also be reflected in proposals to update the TRIPS Agreement in the next round.

III. POSSIBLE WAYS FORWARD

The TK/IP interface forces us to re-evaluate intellectual property fundaments. Can we make the intellectual property a truly global system recognizing various forms of traditional creations and innovations and grant some protection to collective rightsholders? Otherwise, isn't there a risk that intellectual property will continue to be perceived as a collection of 19th century Western concepts that certain nations are forcing others to adopt? Clearly, it is not a valid argument to say that because the protection of traditional knowledge is difficult, it should not exist. We believe there are several ways in which TK could be protected.

A. Existing Intellectual Property Rules

Because it is unlikely that new international norms will be adopted quickly in this area, certain countries will probably take steps soon to protect traditional knowledge in their national intellectual property legislation.

There are two forms of intellectual property that would seem to be adaptable to TK without major changes, namely geographical indications and trade secrets. Because trade secret protection usually depends on the common law or civil law rules of each country, it is relatively difficult to imagine fully harmonized rules in this area. Efforts to protect trade secrets in the TRIPS Agreement resulted in a very limited and loosely worded obligation to offer "natural and legal persons the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices as long as such information is secret, has a commercial value because of the secret and has been subject to reasonable steps under the circumstances to keep it secret."[36] The problem with TK and especially medicinal knowledge is that usually the steps to keep the information secret may not be sufficient under established common law or civil law rules. In fact, secrecy usually follows only from the fact that only few people have access to the information based on customary laws and practices. No contract or other "hard" evidence exists. To protect TK not only in the country of origin but also in foreign countries, rules concerning the protection of trade secrets would therefore have to be reviewed.

In the case of geographical indications, the main difficulty would reside in finding the appropriate rightsholder(s), a problem that stems in part from the absence of "communal" rights grants under current intellectual property legislation. International treaties already accommodate the possibility of creative law making in this field. Article 22(2) of the TRIPS Agreement states, "in respect of geographical indications, Members shall provide the legal

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[35] *See* the International Labor Organization Convention, no. 169of 1989, Article 8; the Draft United Nations Declaration on the Rights of Indigenous Peoples, 1994, *supra,* Articles 12 and 33; and the Principles and Guide Lines for the Protection of the Heritage of Indigenous People, Principle 4 (doc. E/CN.4/Sub.2/1995/26). On the ILO Convention 169, *see* Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention 169 of 1989*, 15 OKLA CITY UNIV. L. REV., 677-714 (1990); and Russel Barsh, *An Advocate's Guide to the Convention on Indigenous and Tribal Peoples*, 15 OKLA. CITY UNIV. L. REV., 209-253 (1990).

[36] *TRIPS Agreement*, Article 39(2).

means for *interested parties* to prevent the use of any means in the designation or presentation of a good that indicates or suggest that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good." The use of the term "interested parties" would seem to be broad enough to allow countries to designate who their proper rightsholder(s) should be. However, current TRIPS obligations only apply to "goods" and this would not cover several forms of traditional knowledge, in particular medicinal knowledge and certain forms of artistic creation.

In the field of copyright, in addition to the application of moral rights to recognize the "authorship" of expressions of folklore, the concept of *droit de suite* (resale right) could be used to implement benefit-sharing obligations on the resale of artistic works that contain traditional knowledge material. A *domaine public payant* (literally "paying public domain") could also be established to collect funds to compensate holders of traditional knowledge. In these two examples, however, the main difficulty would be to identify the proper rightsholders and which uses should be covered, especially in light of the importance of public domain principles[37]. A *domaine public payant* solution would, at least in the eyes of certain groups of users, take the form of a "tax", which may make it politically difficult to establish in certain countries, particularly the United States.

B. *Sui Generis* Protection

There is clearly a temptation to legislate a *sui generis* system to match identified needs of TK holders. We would argue that resorting to a *sui generis* system should be a solution of last resort, because it usually indicates that instead of finding out why the system does not work, a "tailored" system is legislatively put in place without necessarily thinking about its impact on the existing system. For example, what will be the impact of the *sui generis* protection of databases in the European Union beyond the copyright protection of such systems, in spite of all the statements that the *sui generis* protection is supposed to be without prejudice to copyright?[38]

What would be the possible elements of this *sui generis* protection? In the case of artistic and literary creations such as a textile patterns, music, choreographic productions and the like, it may make sense to establish a system similar either to the collective and authentication marks or to the moral right aspect of copyright.[39] A 1981 report[40] on this point prepared by the Australian Department of Home Affairs and Environment mentioned the following:

- A prohibition on non-traditional uses of sacred-secret materials;

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[37] *See* note 8, *supra.*

[38] Databases are currently protected by a mixture of copyright, trade secret and contract. Other legal theories such as unfair competition, conversion, Feist Publications, Inc. v. Rural Telephone Service Co., *supra*, appropriation and pre-emption may apply but may be pre-empted by copyright law. *See* Southern Bell Telephone v. Associated Telephone Directory Publishers, 756 F.2d. 801-810 n.9 (11th Cir. 1985). H. R. 354 introduced in the 106th Congress on Jan. 19, 1999 would have amended U.S.C. Title 17 to provide protection for certain collections of information. It uses the theory of misappropriation as a basis for the protection of certain databases. At the time of this writing, action by the 107th Congress is still pending.

[39] As in the *Visual Artists Rights Act of 1990*, title VI of the *Judicial Improvements Act of 1990*, Pub. L. No. 101-650, 104 Stat. 5089, 5128, enacted December 1, 1990.

[40] Department of Home Affairs and Environment, Report of the Working Party on the Protection of Aboriginal Folklore (Canberra: AGPS, 1981). The recommendations were not implemented.

- Prohibitions on debasing, mutilating and destructive use of folklore;
- Payments to traditional owners of folklore items used for commercial purposes;
- Development of a system of clearances for prospective users of folklore;
- Establishment of an Aboriginal Folklore Board to advise the Minister on policy issues; and the
- Establishment of a Commissioner for Aboriginal Folklore to issue clearances and negotiate payments.

These proposals include a mixture of "intellectual property-like" rights, referred to in the report as "indigenous intellectual property." The first right would be similar in certain respects to the moral right to oppose use that prejudices the author's reputation,[41] but somehow combined with a limitation on expressions that offend, *e.g.*, a particular religious group.[42] The second right on the list is close to the moral right allowing an author to oppose any "mutilation" of his or her work[43]. The other proposal would require direct governmental intervention to impose a collective remuneration system.

Other more recent proposals illustrate even better the intricacies of the TK/IP interface. For example, authors Terri Janke and Michael Frankel[44] suggested *inter alia*:

- A provision recognizing the perpetual duration of indigenous folklore and knowledge; and
- Exemptions of folklore from the requirements of originality and material form.

We mentioned earlier that the fiest proposal (perpetual duration) seems to clash head-on with the public domain component of intellectual property,[45] making its adoption unlikely in a number of countries. It may have a greater chance of success if applied to very specific subject matter (such as sacred land or objects). The second proposal (exemptions with respect to the originality criterion) would in our view denature the very core of copyright: copyright is granted precisely because a work is original. Without originality, copyright dies.[46] What the authors intended is probably more in the nature of a *sui generis* right that, like the EU protection of databases, does not protect works or inventions, but a specific subject-matter (certain compilation) against certain specific acts. In the end, *sui generis* protection may be the

[41] The Ontario High Court, in a rare case dealing with this right in North America, concluded that the words "prejudicial to the author's honor or reputation" found both in the Canadian Copyright Act (R.S.C. 1985, ch. C-42) and the Berne Convention, "involve a certain subjective element or judgment on the part of the author so long as it is reasonable." Snow v. The Eaton Center. 70 Can. Pat. Rep. 2d 105, 106 (1982).

[42] This would of course raise significant First Amendment concerns in the United States. In May 1995, a French court issued an injunction to force a publisher to modify parts of a "revised" Bible that the clergy found offensive. *See* Menahem R. Macina. *Les Intouchables.* 29/8 LES ECHOS DE L'INSTITUT SEPHARADE EUROPEEN. Available online at <http://www.sefarad.org/publication/echos/029/8.html> .

[43] *Berne Convention*, Article 6*bis.*

[44] OUR CULTURE, OUR FUTURE: PROPOSALS FOR THE RECOGNITION AND PROTECTION OF INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY. (Sydney: Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997), at 42.

[45] *See* footnote 8, above.

[46] *See* MELVILLE B. NIMMER and DAVID NIMMER. NIMMER ON COPYRIGHT. Vol. 1, (New York : Matthew Bender, 1993), at 2-6; Jane Ginsburg, *supra.* See also Du Puy v. Post Telegram Co., 210 Fed. 883 (1914) and Feist Publications, Inc. v. Rural Telephone Service Co., *supra,* at 344.

only viable option, and is certianly better than diluting the essense of copyright, but its impact on existing rights still deserves a thorough analysis.

There are other rights outside of intellectual property that may also apply and bridge some of the existing gaps.

C. Communal Property

From the WIPO report, it is evident that the dominant preoccupation of TK holders seems to be not the prevention of the use of their material--although there are cases where this is the intention--, but rather to find a way to let these holders enter into the intellectual property system and to establish, where appropriate, benefit-sharing arrangements consonant with notions of communal, as opposed to individual or private, property. *A priori*, and in light of the discussion above, there is no fundamental conceptual reason to exclude *intellectual* property from the realm of *communal* property. It would, however, represent a major change in the legal regime of intellectual property ownership and possibly also its enforcement.

D. Unjust Enrichment

Could the notion of unjust enrichment be used to obtain the functional equivalent of an intellectual property right? The doctrine has been invoked as the basis for equitable estoppel[47] and could perhaps be used in that context in case of (unauthorized) users of certain forms of traditional knowledge. In many cases, an enrichment by the TK user can be established (*e.g.,* from the sale of textiles, traditional music, pharmaceuticals, etc.). In the United States, the fundamental question is then whether the user's enrichment is justly and equitably retained or appropriated.[48] If, as is the case in English law, a corresponding deprivation of the TK holder and the absence of any valid reason for the enrichment (required) has to be established, the case may be harder to make.

We cannot review here the entire unjust enrichment doctrine to see precisely how it could apply in certain TK cases, but we believe it should be seriously considered as a possible basis for the protection of certain forms of traditional knowledge using existing legal tools outside the scope of intellectual property proper. The doctrine seems to address a number of needs identified by TK holders. In theory, a case can be made when someone derives a benefit from traditional knowledge, appreciates (or knows) the benefit and accepts (or retains) the benefit "under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value." When traditional music, medicinal knowledge or other forms of well identified indigenous science or arts are appropriated by third parties without knowledge or consent by TK holders concerned, would not these principles apply? [49]

E. Misappropriation

TK holders do not (in most cases, at least) want to prevent others from gaining access to their material. They want a recognition and revenue- (benefit-) sharing. The fact that

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[47] Waltons Stores (Interstate) v. Maher , 64 CLR 387 (1988, High Court of Australia).

[48] *See* Everhart v. Miles, 47 Md. App. 131, 422 A. 2d 28; L & A Drywall, Inc. v. Whitmore Const. Co., Inc., Utah, 608 P. 2d 626 and Tulalip Shores, Inc. v. Mortland, 9 Wash. App. 271, 511 P. 2d 1402.

[49] *See* Everhart v. Miles, *supra*, at 136.

something valuable yet incorporeal in nature created by one person or group is used without authorization or compensation by another is perceived to be unfair[50]. It is thus not surprising that equitable remedies come to mind. In this context, the misappropriation doctrine could play an increasingly important role in the protection of TK at the border of IP proper.[51] The doctrine is eminently flexible and would allow "IP-like" protection in cases of unfair exploitation of the creative or inventive work of others, without endangering the canons of the (statutory) intellectual property system.[52] There is, however, a significant hurdle: contrary to physical property, when intellectual property is appropriated by a third party, its owner (or keeper) usually is not deprived.[53]

F. Contracts and Trade Secrets

Contracts are perhaps the most flexible way to protect various forms of Traditional Knowledge, especially the use of genetic resources.[54] Contracts are also the best way to preserve the secrecy of the information, by imposing non-disclosure obligations on all those who come in authorized contact with it. Examples include Material Transfer Agreements (MTAs), the name given to a range of agreements used to transfer genetic resources data for the purposes of conservation (*e.g.,* in *ex situ* gene banks), research & development or commercial exploitation. In addition to imposing the necessary web of non-disclosure obligations that will put in place the protection of the information as a trade secret (under, e.g., applicable civil law or common law rules in the country(ies) concerned), MTAs can determine the scope of authorized exploitation (e.g., only for research or also for commercialization) and who may apply for a patent on research results, which may include certain "benefit-sharing" provisions.[55] Similar arrangements could be made for the exploitation of folklore and other forms of traditional knowledge.

CONCLUSION

While certain forms of intellectual property and contracts clearly apply to certain forms of traditional knowledge--involving minor legislative changes in some cases--, a maximum effort to adapt the intellectual property regime to promote the progress of "science and the useful arts" embodied in traditional knowledge inescapably leads to a re-examination of much more fundamental aspects of intellectual property rights. In order to avoid stretching the current IP canvass beyond what is reasonable, a *sui generis* regime could be established and

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[50] Traditionally, the doctrine applies to the taking or use of another's property for the purpose of making a profit (capitalizing) for the good will or reputation of another. Here, it is argued that it can be extended to apply to the use of the good will or reputation (and hence, the value) of certain forms of TK.

[51] As it may also in respect of databases.

[52] In fact, it may be that, conceptually, the unfair appropriation of the labor of another is the common denominator of all forms of intellectual property, even though it is not often used as such to interpret statutory protection.

[53] "Unlike appropriations of physical assets, the appropriation of information or other intangible asset does not ordinarily deprive the originator of simultaneous use. The recognition of exclusive rights may thus deny to the public the full benefit of valuable ideas and innovations by limiting their distribution and exploitation. In addition, the principle of unjust enrichment does not demand restitution of every gain derived from the benefit of others." RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 38, cmt. b.

[54] *See* the report prepared bt the Secretariat of the Convention on Bio-Diversity, a part of the United Nations Environment Program (UNEP), document UNEP/CBD/COP/5/8.

[55] *See* Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore -An Overview. WIPO Document WIPO/GRTKF/IC/1/3, dated March 16, 2001, at 12-13.

extended through a new international instrument. This could happen much more easily once countries most advanced in the consideration of this issue have adopted and tested certain forms of protection of traditional knowledge and shown that these new forms of protection actually work and meet the needs and expectations of TK holders. But such a system should not be put in place before a thorough analysis of its impact on other forms of intellectual property.

In this author's view, however, the greatest challenge posed by traditional knowledge is the fact that it forces us to ask ourselves what the historically malleable intellectual property concept actually is. If traditional knowledge or certain forms thereof are integrated into the current system, the limits of the current system will be tested. If, on the other hand, a *sui generis* approach is preferred in the medium term, then it will be (negative) evidence that the current IP system was unable to protect these forms of creation or innovation. It is also clear, in the face of mounting international pressure, that the debate on the protection of TK will take place, at least in part, during the next round of global trade talks.

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