

**INTERGOVERNMENTAL COMMITTEE ON
INTELLECTUAL PROPERTY AND GENETIC RESOURCES,
TRADITIONAL KNOWLEDGE AND FOLKLORE**

**FIFTH SESSION
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**Statement by the Tulalip Tribes of Washington
on Folklore, Indigenous Knowledge, and the Public Domain
July 09, 2003**

Mr. Chairman,

The Tulalip Tribes of Washington would like to take this opportunity to note with great appreciation your leadership in steering this great ship in heavy waters. It will be to your credit if this vessel ever reaches a final port, and we thank you for making it an interesting journey. And we thank the Secretariat for their excellent and thorough work in preparation of the high quality documents for this meeting, and express our deep condolences for the many sleepless nights and lost weekends we have probably brought them.

We would to emphasize and provide some comments on the discussion of the public domain in document 5/3. We believe that these issues are of highest importance in understanding issues concerning folklore, and that the issue permeates all of the issues that are the subject matter of the IGC's deliberations.

We agree with the Secretariat that a "clearer understanding of the role, contours and boundaries of the public domain is vital in the development of an appropriate policy framework for the IP protection of TCEs." We believe that the Secretariat has made a good first start on outlining some of the issues associated with TCEs in the public domain, and in consolidating comments from national representatives and indigenous and local communities.

We would like to point out to national representatives that the concept of public domain is not accepted by many indigenous peoples for their knowledge. It would be useful to have the Secretariat prepare a summary of the history of the concept of the public domain and its relation to the development of intellectual property rights. We believe that it would show that the two developed hand in hand as a historical outcome of Western intellectual movements during the late Enlightenment and the Age of Reason, stemming from the ideas of philosophers such as English political economists John Locke and Jeremy Bentham. As property was wrested from the sole right of Kings, it was carved into two major domains, one which proposed a particular theory of human nature and the private incentives needed for people to perform labor, innovate and create wealth; and another creating the public domain of knowledge and resources for the free and

unfettered use by the public. During this time, Western society also moved from a largely religious world view to a more secular world view.

We would like to emphasize to the delegations represented at this meeting that indigenous peoples do not fit easily into this model. While often presented as a form of natural and universal law, many regard this view, including the American Nobel Laureate economist Douglass North, as a historically constructed worldview that has helped create the kinds of social and political institutions, preferences and tastes that conform to its premises. In other words, the theory is self-reinforcing, and actively constructs the kinds of societies that accept it as natural law. Indigenous peoples have their own sources of natural law, and the values of this secularized, individual property-based model are not the values that commonly move indigenous peoples.

In indigenous cosmology, knowledge is a gift from the Creator. There is no clear distinction between sacred and other kinds of knowledge of the kind made in the Secretariat's paper. Indigenous peoples have collective systems for using the Creator's gifts, and these generally have complex systems of regulating the use of knowledge, in which some knowledge may be held by individuals, clans, or other groups. Although sometimes superficially similar to Western concepts of property rights, they are not the same.

There is no public domain in traditional knowledge. For the Maori, as lawyer Maui Solomon has emphasized, it makes no sense to talk about rights without also talking about obligations for the use of knowledge and resources, and this view is common, if not universal, among indigenous peoples. Although individuals might hold knowledge, their right is collectively determined, and it is rare that individuals have the right to use knowledge in a free and unconstrained manner. They are bound by the laws of their tribe and of the Creator.

In this sense, the idea of "already disclosed" and "non-disclosed" knowledge also is a false distinction. While the Western IP system often makes a distinction between knowledge for which there has been an attempt to keep it secret, and disclosed knowledge which has fallen or placed into the so called "public domain," this distinction is not typically made in indigenous communities. Certainly, some knowledge is held in secret. Other knowledge is shared openly. Open sharing, however, does not automatically confer a right to use the knowledge. Many songs or stories, for example, are held by individuals or families. These songs and stories are performed in public, and may be known by all members of a community. However, the right to sing these songs or tell these stories falls only to the individuals or families who are caretakers of the Creator's gifts.

Even knowledge shared and used widely does not fall into the public domain. When knowledge is shared, it is shared among those who are trusted to know their roles and responsibilities in using the knowledge. Misuse of this knowledge is not only "derogatory, libelous, defamatory, offensive and fallacious," as described in the secular language of the Secretariat's document. Misuse, even when used by others outside of the

tribe, or by tribal members who are outside of the control of customary authority, can cause severe physical or spiritual harm to the individual caretakers of the knowledge or their entire tribe from their failure to ensure that the Creator's gifts are properly used. For this reason, misappropriation and misuse is not simply a violation of "moral rights" leading to a collective offense, but a matter of cultural survival for many indigenous peoples.

This also illustrates the rejection of the use of the term "property" by many indigenous peoples. For them, there are certainly concepts of a kind of ownership, but this is not the kind of relatively absolute ownership often presented in the Western IP system. Indigenous peoples often conceive of themselves more as custodians or caretakers of knowledge rather than absolute owners. Knowledge, lands and resources have been given to them for their collective, and sometimes exclusive, use, but only if they fulfill the obligations to their Creator, their ancestors and their spirits. In this sense, the rights are also not considered to be permanent, and are contingent on their continued stewardship and meeting of obligations by their indigenous custodians. The Tulalip Tribe, for example, like many of the tribes in the Pacific Northwest, have an annual salmon homecoming and renewal ceremony that not only expresses their deep kinship with their totem relative, but also is necessary for the renewal of this relationship. Anything that interferes with their ability to perform this ceremony can lead to great cultural harm.

The "public domain," it should be noted, is only one kind of collective property or commons, in which knowledge or resources are open to all for free and unfettered use. The Tulalip Tribes of Washington will be happy, through their Cultural Stories project, presented to this forum at its third meeting, to provide the Secretariat and interested parties, a database of thousands of studies that document the complex systems of customary law that characterize the commons of indigenous peoples. Major research initiatives, such as those underway through the FAO Forests, Trees and People Programme, the UNESCO/Kew Gardens/World Wide Fund for Nature Plants and People Programme, the Beijer International Institute of Ecological Economics of the Royal Swedish Academy of Science, and summarized in the recent American National Academy of Sciences report "The Drama of the Commons," all demonstrate that the kind of open access commons presented in the public domain are far less common than those that have complex rules for governing the access to and use of knowledge and resources. It is not our intent here to suggest to governments that these studies be used to help define indigenous concepts and customary law, because we believe this to be a matter for indigenous peoples themselves to express in their own terms, but merely as an indicator of the Western scientific awareness of the limits of the application of the concept of public domain to the knowledge, innovations and practices of indigenous and local communities.

It is for this reason that indigenous peoples have generally called for the protection of knowledge that the Western system has considered to be in the "public domain," as it is their position that this knowledge has been, is, and will be regulated by customary law. Its existence in the "public domain" has not been caused by their failing to take the steps

necessary to protect the knowledge in the Western IP system, but from a failure from governments and citizens to recognize and respect the customary law regulating its use.

It should also be noted at this point, Mr. Chairman, that the fears raised in the discussion document about the possible repercussions to cultural innovation are expressed in terms of theories under the Western IP regime, and don't reflect the motivations of many of the world's indigenous peoples. Indigenous innovation, while sometimes associated with a profit motive, more commonly comes as an expression of a deep interrelationship between tribal members, their Creator and their homelands.

In summary, Mr. Chairman, we appreciate the work that the Secretariat has done in opening the exploration of issues surrounding TCEs considered to be in the public domain, and recommend that the Secretariat continues with a more in-depth analysis of the issues in close consultation with indigenous and local communities. We also urge the adoption of language that more accurately reflects indigenous conceptions of knowledge, its use and misuse, and property. We urge the governments to continue seeking ways to protect knowledge currently considered to be in the public domain.

We would like to remind that some of this protection can be achieved without having to wait on international regimes or national law. All nations have examples of activities that, although legal, are considered to be vices, and regulated through public policy. We suggest that governments, through their funding and policy-setting powers, begin to discourage activities that could lead to the misappropriation of the traditional knowledge of indigenous and local communities. In the United States, for example, we have used presidential Executive Orders that, while not setting out new laws, clarify ambiguities of interpretation of existing laws, for example by directing that when such ambiguities occur, they must be interpreted in such a way that are in the tribe's best interests. Under constitutional law, the United States applies the "canons of interpretation" in cases concerning treaty rights, in which the treaty rights are to be interpreted using the concepts that the tribes had of their rights when they signed their treaties. Governments may refuse to fund programs and initiatives that act to disclose traditional knowledge, even if they are currently considered to be legally in the public domain, and promote the adoption of this policy in its agencies and its partners.

Finally, Mr. Chairman, we ask that governments begin to work with indigenous peoples as full and effective partners in recognizing customary law for the use of their knowledge and resources, and the limits of the public domain.

Thank you, Mr. Chairman.

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Web Sites

Food and Agriculture Organization of the United Nations - Forests, Trees and People Program (FAO-FTP)
< <http://www-trees.slu.se/>>

Kew Gardens/UNESCO/WWF International People and Plants Initiative
< <http://www.rbgekew.org.uk/peopleplants/>>