

Third Party Use of Indigenous Cultural Heritage:
Inspiration, Innovation, or Appropriation
By Prof. Aroha T. P. Mead

In discussing intellectual property rights related to traditional knowledge and indigenous cultural expressions, it is assumed by some that the primary concerns of indigenous peoples over the protection of cultural heritage is centered around economic benefits. As demonstrated by a case examined in this presentation, some public comments on French fashion designer Jean Paul Gauthier using indigenous Maoris' tattoo on his model reveal widespread belief that the basic concern of indigenous people was that they did not receive any economic reward for third party use of their traditional knowledge and cultural heritage. However, this presentation calls for a different analytical perspective. The author argues that the misappropriation of indigenous cultural heritage offers an important prism to view inequality in contemporary global political economy, with entrepreneurs in developed countries on one hand and indigenous people on the other. Under Mataatua Declaration, however, indigenous peoples must be the exclusive owner of their culture and intellectual property. The first beneficiaries of this indigenous knowledge must be the direct descendant of that culture. Contrary to the practice of commodifying culture and inserting global capitalist ideology in the application of indigenous knowledge, this presentation argues for conducting intellectual property practice related to traditional knowledge under the principle of reciprocity, that is, giving freely, with good grace, and within an understanding of giving back in equal or more value. The central concern, therefore, is not about money. Instead, it is about the inter-generational responsibility to be guardians and guard our cultural heritage.

US Effort on Protecting Traditional Knowledge, Genetic Resource and
Traditional Culture Expression

Dr. Lin Sun-Hoffman

The protection of traditional knowledge (TK), genetic resources (GR) and traditional culture expression (TCE) constitutes a salient issue in modern intellectual property law, both on the international fora and under the American domestic context. On the international fora, TK/GR/TCE is protected by WTO's Trade Related Intellectual Property (TRIP's) Council, World Intellectual Property Organization (WIPO), and Convention on Biological Diversity (CBD), among others. Under the American domestic context, TK/GR/TCE is protected under patent law, trademark law, copyright law, and unfair competition law with various American governmental agencies involved as well. Initiated in WTO/CBD, it is required to disclose the country origin of the genetic resources used in new inventions. However, the author argues that the new patent disclosure requirement cannot achieve the objectives sought. It is argued that this requirement does not apply to uses of TK/GR that are commercialized, but not patented. Nor it is applicable to information regarding source or origin not generally relevant to patentability. Moreover, it will also create new uncertainties in patent rights including, but not restricted to, reducing collaboration and patent filing, increasing administrative burden, and creating negative effects on innovation and economic development

incentives. Not convinced that proposal in the patent system is the way forward, the author suggests the establishment of an effective national system separate from patent laws that authorizes access and equitable benefit-sharing and may provide civil and/or criminal penalties for misappropriation. The author also suggests a contract-based system and the elimination of erroneously issued patents.

Access to Biodiversity – Brazilian Perspective By Gustavo Morais

Signed in 1992, Convention on Biological Diversity (CBD) is guided by very fair and noble objectives. However, by examining Brazilian legal and policy practice regarding access to genetic resources (GR) and associated traditional knowledge (TK), the author argues that when it comes to the issue of implementation under the Brazilian context, the tools selected for implementing may curb R&D on items of biodiversity at the end of the day. According to the author, although Brazilian constitution provides protection of genetic heritage and related policy arrangements are made to implement CBD with related bureaucratic body established, more industries than expected are impacted. Moreover, the procedure of establishing benefit sharing agreement concerning genetic resources (GR) and traditional knowledge (TK) is quite laborious. Although an incipient legal system is established to regulate IPR activities concerning GR and TK in Brazil, due to the absence of *sui generis* regime for TK and a well established TK database, the procedure to obtain access authorization to GR is very complicated and even more laborious if TK is involved. This results in very few access authorizations, less R&D activities, and less patent applications.

Global Legislative Efforts on Protection for Traditional Knowledge and Cultural Expressions By Shantanu Basu

The principle of IPR protection is recognized in both international treaty and various countries' constitutions. In that spirit, different countries provide certain level of protection of traditional knowledge (TK) and cultural expression (CE) through domestic legislations, including patent law, trademark law, copyright law, unfair competition law, etc. However, in various ways the current legislative arrangements are not always compatible with the objectives of protecting TK/CE. Moreover, the difference between TK/CE and conventional types of intellectual property rights propels existing legislative arrangements to adjust to the more recent trend of development in TK/CE protection. The author argues that intellectual property rights do not have to work against the needs and interests of traditional knowledge holders and that the key to realizing these interests is in understanding how the intellectual property rights system works and the place that TK/CE can have in the system. The author also argues that complex issues need to be considered before enacting protection for TK/CE. Specifically, these issues include, but are not limited to: what kinds of TK/CE qualify as IP right? Who owns rights in TK? How does the society at large benefit if TK/CE is protected by exclusionary rights? How

should national sui generis regimes be harmonized? Can identical TK arise in different parts of the world?

Traditions are the Common Heritage of all Mankind : Not the Stuff of Intellectual Property Protection
By Bob Armitage

There are four key concerns that underlie the author's presentation: the lack of any substantial articulated social, moral, ethical, or economic need, manifest undesirability of imposing costs and complexity of any property rights regime, feasibility and practicality of protecting traditional knowledge (TK) and traditional cultural expression (TCE), and intellectual honesty of the underlying debate. The author discusses the following key issues at stake about protection of TK and TCE: What is a "tradition"? If the right is an IP right, who must own the rights to TK and TCEs? Who defines what is and is not misappropriation? Is prior authorization needed? Is informed consent required? Should unfair competition notions to be introduced? Is "Second bite" compensation regime to be mandated? Etc. The author argues that TK and TCEs are the heritage of all mankind and we are all its heirs; to each it must be made freely available. The author also argues that genetic resources should be treated likewise. Finally, the author calls to action for promoting protection of TK and TCE: Join together, as a co-owner of mankind's extant TK and TCEs, in dedicating ownership rights to the free use of all mankind. According to the author, if we succeed in this great cause for humanity's sake, we can end the need for further consideration of the topic of today's symposium, everywhere and for all time.

Intellectual Property and Traditional Cultural Expressions
By Molly Torsen

Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE) pose imperative challenges to and prompt efforts at legal solutions by international and domestic IPR professionals. Despite international and domestic legislative efforts, existing IPR laws are a poor fit for TK and TCE. The author presents the distinctiveness of TK and TCE as represented in the areas of originality, public domain, fixation requirement, copyright term (duration), communal focus, fair use, moral rights, among others. Moreover, the author also argues that challenges exist over international/domestic distinction: how should TK/TCE legislation be handled with many tribes/groups spilling over jurisdictional lines? How should not-so-uniform customary indigenous law be harmonized? Who would manage the database ideas and related benefit sharing agreement? etc. There are current efforts and approaches targeted at solving these issues. World Intellectual Property Organization (WIPO) is also actively involved in constructing legal frameworks for the protection of TK and TCE, providing legal-technical assistance to States and regional organizations as well as guidance on managing IP issues when digitizing intangible cultural heritage. WIPO also adopts a holistic approach that includes surveys of existing practices/policies, the establishment of database of IP-related codes, guides, policies, protocols for the purpose of setting IP Guidelines for documenting, recording and digitizing intangible cultural heritage. Member states of WIPO have agreed to continue accelerated work on IP and traditional knowledge, genetic resources and folklore/traditional cultural expressions (TCEs), focusing on the international dimension.

Many are calling for a binding international legal instrument as the only fully effective response to the global phenomenon of misappropriation and misuse of TK and TCEs.

Nicolas Gorjestani, Senior Adviser/Consultant, the World Bank outlined the efforts undertaken at that organization to promote the integration of indigenous practices and intellectual capital of the impoverished communities into the development process:

The Indigenous Knowledge for Development Program (IK4D) was launched in 1998. The program was inspired by three propositions. First, though local communities may be poor materially, they are often very rich in the indigenous knowledge systems that help sustain their livelihoods. Second, IK is an under-recognized and under-utilized resource, yet it has the potential to make a significant contribution to achieving the MDGs. Third, utilizing IK in development programs helps empower the communities, promotes ownership and enables them to better manage the activities that impact their lives.

In 2004, the IK4D also published a book ("Indigenous Knowledge: Local Pathways to Global Development") to further raise awareness of the importance of IK in the development process. This publication contains an introduction by the President of Tanzania, a preface by the President of the World Bank, followed by ten lead articles by eminent persons and a collection of 60 "IK Notes", a monthly newsletter of the IK4D. The book relied on several specific cases to argue that IK could make a significant contribution to achieving the MDGs (e.g., reducing maternal mortality in Iganga Uganda reportedly by 50% over three years, prolonging the lives of over 5000 people living with HIV/AIDS in Tanga, Tanzania by on average 5 years, etc.).

The book also envisioned that learning from IK and incorporating successful practices into development programs will become the standard rather than the exception it is at present. To help realize this vision, the book outlined a six-point agenda for action: scale up successful IK practices to help achieve the MDGs; enhance the capacity of local communities to develop, share, and apply their IK; develop innovative protocols for the validation and protection of IK; develop a results framework for monitoring IK and measuring its impact; establish an innovation fund to promote successful IK practices; organize a global effort to promote the above agenda. For more information consult the website of the IK4D: www.worldbank.org/afr/ik

IP Protection for Traditional Knowledge and Cultural Expressions

9 November 2007

By Hannu Wager

In this presentation, the author discusses three important issues on the TRIPS Council's agenda relating to IP Protection for Traditional Knowledge (TK) and Cultural Expressions (TCE): the review of Article 27.3(b) of TRIPS Agreement, the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD) and the protection of traditional knowledge (TK) and folklore. These three issues are closely related to each other. Specifically, different positions exist over whether Article 27. 3(b)

of TRIPS Agreement should be kept as it is or to amend it to prohibit patenting of life forms, including micro-organisms. Competing positions also exist over whether to provide protection for plant varieties. Moreover, there is wide concern over whether or not there is conflict between TRIPS and CBD. National-based approach proposals are also made to reconcile potential conflict between the two. To fulfil this goal, TRIPS Council calls for information on the work of other organizations such as World Intellectual Property Office (WIPO), CBD, among others, and are also informed of this through members. The protection of TK and folklore is also an important issue under discussion. Specifically, both defensive and positive protection of TK and folklore are in place. However, there is still difference between WIPO and WTO's arguments over this issue: WIPO claims to have its own objectives of protection and more expertise while WTO claims that it has its unique way of functioning and therefore any conclusions reached at the WIPO will not automatically become applicable in the WTO.

There are four key concerns that underlie the author's presentation: the lack of any substantial articulated social, moral, ethical, or economic need, manifest undesirability of imposing costs and complexity of any property rights regime, feasibility and practicality of protecting traditional knowledge (TK) and traditional cultural expression (TCE), and intellectual honesty of the underlying debate. The author discusses the following key issues at stake about protection of TK and TCE: What is a "tradition"? If the right is an IP right, who must own the rights to TK and TCEs? Who defines what is and is not misappropriation? Is prior authorization needed? Is informed consent required? Should unfair competition notions to be introduced? Is "Second bite" compensation regime to be mandated? Etc. The author argues that TK and TCEs are the heritage of all mankind and we are all its heirs; to each it must be made freely available. The author also argues that genetic resources should be treated likewise. Finally, the author calls to action for promoting protection of TK and TCE: Join together, as a co-owner of mankind's extant TK and TCEs, in dedicating ownership rights to the free use of all mankind. According to the author, if we succeed in this great cause for humanity's sake, we can end the need for further consideration of the topic of today's symposium, everywhere and for all time.