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Hearing Indigenous Voices, Protecting Indigenous Knowledge

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Abstract: In a rapidly globalizing world, indigenous knowledge is in mortal danger, and it will require new forms of intellectual property protection to save it. There are fundamental incongruities between Western intellectual property law and indigenous knowledge that prevent the current international intellectual property framework from fully comprehending or addressing the contexts and needs of indigenous knowledge. This article will review the history of international and regional initiatives to develop protection for indigenous knowledge. It will consider the geopolitical context that has informed discussions about protecting the intangible wealth of indigenous peoples, including the recent addition of articulate and impassioned indigenous voices to the conversation. Finally, this article will discuss some of the concerns that have been raised about subjecting indigenous knowledge to a system of formal legal regulation.

Protection of cultural diversity, protection of human rights, safeguarding the knowledge of indigenous societies, and a more just distribution of revenues related to the use of indigenous knowledge are some of the rationales advanced for the belated, but essential, consideration of how to stem both the encroachment and the eroding of the traditions of indigenous peoples. Although the goals are broadly endorsed and encouraged, however, the means to achieving them remain elusive. Indigenous knowledge often embraces values or meanings that appear undermined or threatened by Western-style legal structures. Knowledge itself, as tacitly or explicitly defined in nonindigenous societies, often presupposes rational, empirically based learning, and excludes significant categories of

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indigenous knowledge. There are basic differences in the fundamental assumptions made in indigenous and nonindigenous societies, as well as sharp discontinuities in how knowledge is transmitted, encoded, and shared. Although *indigenous knowledge* is a term used in contrast to the categories and types of knowledge systems of the developed world, the term covers vast and multiple categories. Knowledge is intrinsically local, and different cultural systems choose to protect, reveal, and transmit their many species of knowledge in culturally specific ways. As noted by Rosemary Coombe: "Traditional knowledge is clearly social, innovative, dynamic and often tacit in nature. It is often uncodified or codified in forms that may be culturally specific and difficult to access."[1]

The movement to protect indigenous cultural knowledge cannot be separated from its social and political contexts. Generally speaking, indigenous peoples tend to be materially poor and politically powerless. Until—and, to a certain extent, despite—the recent international initiatives to try to provide a framework to protect indigenous knowledge, the intellectual property law system was perceived by many as "a tool used by 'rich' nations to protect and monopolise the exploitation of new technologies and products, while valuable genetic resources, traditional knowledge and folklore accumulated over generations in 'poor' communities remain incapable of legal protection and are open to unrestricted exploitation."[2] Recognition of and respect for the traditional knowledge of indigenous communities and developing nations is a first step toward bridging the huge gulf in power between these communities and the industrialized nations.

The World Intellectual Property Organization's (WIPO's) Revised Objectives and Principles recognize the far-reaching importance of protecting indigenous knowledge:

> [T]he protection of expressions of traditional cultures touches also upon other important policy areas. These include the safeguarding and preservation of cultural heritage; freedom of expression and religious freedom; respect for the rights, interests and claims of indigenous peoples and other traditional communities; recognition of customary law, protocols and practices; access to knowledge and the scope of the 'public domain'; addressing the challenges of multiculturalism; and promoting cultural diversity, including linguistic diversity, and access to a diversity of cultural expressions . . . Traditional music, designs, rituals, performances, oral narratives, symbols and signs communicate a community's beliefs and values, embody skills and know-how, reflect a community's history, and define its cultural identity.[3]

As has been extensively documented elsewhere, the existing intellectual property framework, codified in both national laws and international treaties, contains rules and assumptions that prevent it from offering effective protection to most forms of indigenous knowledge. The challenge is to recognize, respect, and safeguard indigenous knowledge within a framework of protection that respects its meanings and presumptions.

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INTERNATIONAL EFFORTS TO PROVIDE A FRAMEWORK TO PROTECT INDIGENOUS KNOWLEDGE

Sustained and formal initiatives to provide an international framework to protect traditional knowledge and expressions of culture began to acquire momentum in the 1970s. In 1972, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) adopted the Convention for the Protection of World Cultural and Natural Heritage, and developed the World Heritage List, a directory of cultural and natural properties nominated by individual states party to the Convention and deemed to have outstanding universal value. In 1976, the Tunis Model Law on Copyright for the Developing Countries was adopted, which was designed to offer a framework for developing states to follow to provide international protection for their intellectual property within the ambit of the two major multilateral conventions, the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention. In attempting to meet specific needs of developing nations that are not echoed in the developed world, the Tunis Model Law provides protection for "works of national folklore," specifies that works of folklore shall not be subject to the requirement of fixation in material form that governs all other protected works, and stipulates that their protection shall not be limited in time.[4]

In the late 1970s, WIPO and UNESCO agreed to work together to develop an approach for the international protection of traditional knowledge and folklore. While WIPO took responsibility for considering the feasibility of applying existing intellectual property (IP) laws or principles to the protection of *traditional knowledge* (TK), UNESCO was charged with developing a framework for protecting cultural heritage.[5] This bifurcation formalizes a conceptual division that is comfortable for Western legal experts but artificial with respect to indigenous knowledge. It may be thought of as a distinction between the types of technical knowledge protected by patent or trade secret law in the Western legal framework—denominated *traditional knowledge* in WIPO documents—and the expressions of culture that used to be called *folklore* and WIPO labels *traditional cultural expressions or expressions of folklore (TCE)*. Initial work resulted in the 1982 set of Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions. WIPO and UNESCO developed a draft treaty based on the Model Provisions, but when they convened a group of experts to consider the protection of *expressions of folklore* by intellectual property laws, most experts determined that it was premature to establish an international treaty. The draft treaty was abandoned in 1985.

The next round of activity began in 1989. In that year UNESCO adopted its *Recommendation on the Safeguarding of Traditional Culture and Folklore*, which defines folklore as "the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expec-

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tations of a community in so far as they reflect its cultural and social identity . . . .”[6] It characterizes folklore as “part of the universal heritage of humanity,” which “is a powerful means of bringing together different peoples and social groups and of asserting their cultural identity.”[7] On a policy level, the Recommendation “stress[es] the need in all countries for recognition of the role of folklore and the danger it faces from multiple factors.”[8] This document for the first time explicitly interrelates intangible heritage and the preservation of cultural diversity—an analysis that has since become a focus of UNESCO policy and initiatives. Although it makes a recommendation to member states to raise awareness and develop mechanisms to protect traditional knowledge, it is an abstract document, without either a concrete agenda or the power of enforcement.

The landscape began to change in the early 1990s. In 1993, Erica-Irene Daes, reporter for the United Nations Subcommission on the Prevention of Discrimination and Protection of Minorities and its Working Group on Indigenous Populations, produced The Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, which set protection of indigenous knowledge into the context of human rights. It was around this time that indigenous people became more vocal and visible in arguing for protection of their knowledge and cultures. In 1993—the United Nations’ Year for the World’s Indigenous Peoples—more than 150 indigenous representatives from 14 countries in Asia, the Pacific, and the Americas gathered in the Bay of Plenty region of New Zealand and produced the Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples. Among other things, the Mataatua Declaration set out an intention for indigenous peoples to define their own cultural and intellectual property and develop appropriate mechanisms and administrative bodies to protect it. Richard Kurin, director of the Smithsonian Institution Centre for Folklife and Cultural Heritage explains why these initiatives seemed to coalesce and acquire urgency in the 1990s:

> By the mid-1990s, international awareness of and discourse about the consequences of globalization had increased dramatically. Many cultural observers around the world believed that local, regional, even national, traditions were devalued or endangered or both. The onslaught of global mass culture raised the question of whether valuable traditions, practices, and forms of knowledge rooted in diverse societies would survive the next generation.[9]

By the late 1990s, indigenous representatives were working with WIPO and UNESCO. The April 1997 World Forum on the Protection of Folklore, which was held in Phuket, Thailand, adopted a “plan of action” to achieve protection.[10] In February 1999, the UNESCO/Secretariat of the Pacific Community Symposium on the Protection of Traditional Knowledge and Expressions of Traditional and Popular Indigenous Cultures in the Pacific Islands convened in Noumea. Representatives of 20 Pacific Island nations participated in the Symposium and submitted national reports about the status of legal protection for traditional

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knowledge and cultural expressions. Although experts in Western intellectual property law presented reports outlining the possibilities of using elements of existing IP laws to protect indigenous knowledge, it was noted that "a large number of participants, representing indigenous peoples, were not always amenable to the arguments put forward."[11]

During this same period, WIPO conducted fact-finding missions to 28 countries

> to identify the IP-related needs and expectations of traditional knowledge holders . . . For purposes of these missions, 'traditional knowledge' included TCEs as a sub-set. Indigenous and local communities, non-governmental organizations, governmental representatives, academics, researchers and private sector representatives were among the more than 3000 persons consulted on these missions.[12]

WIPO also organized regional consultations regarding the protection of TCEs. Each consultation recommended that WIPO and UNESCO intensify their work in the field of folklore protection and develop an effective international regime for the protection of TCEs.[13] The regional consultations led to a 1999 conference at the Smithsonian Institution in Washington, DC, which

> found the UNESCO Recommendation to be a somewhat ill-construed, 'top-down,' state oriented, 'soft' international instrument that defined traditional culture in essentialist, tangible, archival terms, and had little impact around the globe upon cultural communities and practitioners. The conference and a subsequently published book—*Safeguarding Traditional Cultures*—called for a more dynamic view of cultural traditions as 'living' and enacted by communities.[14]

In late 2000 WIPO established its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). As of October 2009, the IGC has met 14 times, generating voluminous documents at each session. It is an international forum that includes representatives of developed and undeveloped nations, non-governmental organizations, indigenous communities, and multinational corporations; and comments are wide-ranging and diverse. Although it produces separate documents about TK and TCE, both categories of indigenous knowledge are included within its purview. Initially, the IGC saw itself as a consultative or advisory body, setting out broad policy objectives while leaving the difficult business of designing specific frameworks of protection to regions or individual nations. Over the past several sessions, however, with the addition of a larger and stronger indigenous voice, the IGC has addressed the possibility of developing a legally binding international instrument.[15] In comments to the 11th IGC on behalf of the Māori community of New Zealand, Maui Solomon argued that "an internationally sanctioned regime for protecting TK is a vital and necessary adjunct to any domestic *sui generis* framework of protection in order to ensure the effective compliance and enforcement of acts of misappropriation of TK[16] by foreign based entities."[17] Even without such an instrument, however, the declarations of the IGC have a significant effect.

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> The elaboration of international standards, guidelines and principles that have a powerful "moral" (and political) force behind them, could provide an effective tool to persuade potential "pirates" of TK to either stop illicit use or conform to appropriate international standards of conduct . . . [I]n the absence of specific legislation in New Zealand, the WIPO Objectives and Principles would provide assistance in either preventing or challenging misappropriation/misuse of Māori TK/TCEs.[18,19]

Over the past several years, UNESCO has similarly ratcheted up its level of activity in connection with indigenous cultural knowledge. In 2003 UNESCO member states adopted the International Convention for the Safeguarding of the Intangible Cultural Heritage. No one voted against the document, but several large and wealthy nations—including the United States, Canada, the United Kingdom, and Australia—abstained. By February 2006, 30 state parties had ratified the Convention, which gave it the force of international law.[20] A separate UNESCO initiative began with its 2001 Universal Declaration on Cultural Diversity, a document focused on promoting cultural diversity in the cause of world peace, which contains two paragraphs referring to the need to respect and protect indigenous knowledge. Paragraph 13 of the Action Plan of Article 12 discusses the need to formulate "policies and strategies for the preservation and enhancement of the cultural and natural heritage, notably the oral and intangible cultural heritage," and paragraph 14 speaks to the need for "[r]especting and protecting traditional knowledge, in particular that of indigenous people; recognizing the contribution of traditional knowledge, particularly with regard to environmental protection and the management of natural resources, and fostering synergies between modern science and local knowledge." The October 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions expands on the 2001 Declaration and explicitly draws the link between protecting cultural diversity and safeguarding expressions of culture.[21] Although the objectives of the Convention on Cultural Diversity thus dovetail with those of the Convention for the Safeguarding of the Intangible Cultural Heritage, they are separate initiatives with distinct agendas.

Two additional international initiatives should be mentioned. Both are treaties addressing global environmental issues such as resource management and sustainability. Their explicit recognition of the special place of indigenous knowledge underlines the current understanding of the importance of protecting indigenous knowledge at the international level. The first is the 1992 Convention on Biological Diversity (CBD), a multilateral treaty developed and administered by the United Nations Environment Programme, which "recognizes the dependency of indigenous and local communities on biological diversity and the unique role of indigenous and local communities in conserving life on Earth."[22] Article 8(j) of the CBD addresses issues of traditional knowledge, directing that each member state shall,

> (j) [s]ubject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local commu-

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> nities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

There is an active working group on article 8(j), whose agenda includes, inter alia,

> the development of elements of *sui generis* systems, developing indicators for the retention of traditional knowledge and methods and measures to address the underlying causes of the loss of such knowledge, [and] the development of an ethical code of conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities relevant to the conservation and sustainable use of biological diversity . . .[23]

In 2001 the International Treaty on Plant Genetic Resources was adopted by the Food and Agriculture Organization of the United Nations (FAO) to promote "[t]he conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity . . ."[24] Several provisions deal explicitly with the contributions—and vulnerabilities—of indigenous communities and traditional knowledge.[25]

REGIONAL AND LOCAL INITIATIVES TO PROTECT INDIGENOUS KNOWLEDGE

As indigenous populations have become more sophisticated about intellectual property protection and more aware of its limitations, advocacy of *sui generis* forms of legal protection have advanced to the forefront. Although WIPO-IGC's initial meetings addressed the question of whether IP protection could be adapted to serve the needs of indigenous knowledge, documents from the more recent sessions suggest that Western IP law is inadequate to the task. New forms of protection must be developed. For example, most of the participants who submitted written comments to the eleventh session of the IGC support this conclusion, with the notable exceptions of Japan, the United States, Canada, Australia, and the International Publishers Association.[26]

Regional and local initiatives to develop workable frameworks for *sui generis* protection have been undertaken at numerous points around the globe. The Pacific Islands Forum has developed a Model Law for the Protection of Traditional Knowledge and Expressions of Culture. Borrowing a Western style of legislation to create *sui generis* rights in indigenous knowledge, this document is designed to provide a resource for Pacific Island countries wishing to enact legislation to protect traditional knowledge and expressions of culture from "being appropriated and commercialized by non-indigenous interests."[27] The Pacific Model Law has

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been both inspired by and inspiring to the work of the WIPO-IGC. Some other notable *sui generis* laws are the U.S. Indian Arts and Crafts Act of 1990 and its Enforcement Act of 2000, which is a truth-in-advertising law setting out criminal penalties for misrepresentation in the marketing of Indian arts and crafts products[28]; the Philippine Indigenous Peoples Rights Act of October 1997, a comprehensive document dealing with the "recognition and promotion" of "all the rights of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) hereunder enumerated,"[29] with one of the enumerated sets of rights consisting of "the rights of ICCs/IPs to their ancestral domains to ensure their economic, social and cultural well being;"[30] and the Panama Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama, passed in 2000 and revised in 2001. The Panamanian law is a complex statute exclusively for the protection of indigenous intellectual property.

INDIGENOUS APPROACHES

Indigenous societies have a rich and varied history of protecting both tangible and intangible heritage. A substantial body of literature that details the use of secrecy and other restrictions on knowledge considers, among other things, the intersection of knowledge with power and status,[31] the preservation of cultural practices,[32] and commerce in intangible items.[33] Indigenous groups often take a holistic, comprehensive, and pragmatic view of the importance of their cultural knowledge. Unaisi Nabobo-Baba, who published a study of indigenous Fijian "knowing," observes that "[h]ow people view the world influences their beliefs and philosophies as well as the nature of their knowledge and their way of knowing (epistemology) and vice versa."[34] The roles played by knowledge are integrated into and representative of an indigenous society's world view, and they may serve political, economic, social, or religious objectives. Cosmic and earthly matters are intertwined with the knowledge created and perpetuated in indigenous communities.

Indigenous societies have developed complex strategies to promote transmission and protection of their distinctive knowledge. Often the dominant strategy is limited access and use rights to various types of knowledge. In societies without written documentation, restriction of transmission and use rights mitigates problems of imperfect transmission of ritual and other forms of knowledge. Political and social objectives are also frequently served by rules governing ownership, transfer, and use of traditional knowledge. For example, in Fiji, exclusive rights were recognized in pottery designs. Because pots were *prestige goods* exchanged in long-distance trade, restriction of access to designs helped identify and record the identity of a group's allies and trading partners.[35] In most such cases in Fiji, a village or clan owned the rights to the intangible property, but instances of individual ownership and control of intangible knowledge are not unusual. Although it is

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both too simplistic and too romantic to conclude that indigenous groups regard interests in indigenous knowledge as always shared for communal benefit, the emphasis in indigenous societies is frequently on group ownership and control of intangible cultural resources.

In the contemporary context, however, many indigenous societies are adding the language and objectives of Western intellectual property law to claims to protect their cultural patrimony. In the enterprise of reclaiming and defending their cultural heritage, indigenous peoples recognize intellectual property protection as a potent vehicle for advancing claims of cultural identity and integrity. There is an irony here: The intellectual property system was expanded and developed in the nineteenth century by the European imperial powers, who used it to preserve for themselves the resources of their colonies. Developing countries have been aware of the disadvantages to them of the Western-created and -imposed system of IPRs (intellectual property rights) and have unsuccessfully opposed its extension on many occasions.[36] The hegemony of the northern industrialized countries, however, and their overarching economic dominance makes it senseless for the developing nations to stamp their feet and refuse to join in the game. As "the metaphors of possessive individualism . . . have become the dominant metaphors of world political culture . . . [s]ubaltern groups and less powerful nations must articulate their political claims in 'a language that power understands.'"[37]

Although the rhetoric and tools of IP law may be useful to indigenous groups, there are risks to defining traditional knowledge as a legal category. Once indigenous knowledge is subsumed into a Western legal system, which delights in drawing boundaries, creating categories and enforcing rules, the "law" will seek to "define and manage the boundaries of Indigenous knowledge."[38] Moreover, developing countries must execute a delicate balance when seeking to apply intellectual property laws to their countries: They must protect traditional knowledge holders, whether individual or communal, against the invocation of IP rights by outsiders who appropriate aspects of indigenous knowledge, while simultaneously attempting to use IP rights to protect the indigenous holders of that knowledge.

Despite the risks, indigenous groups and smaller countries are finding ways to employ the rhetoric and the institutions of the intellectual property system to advance their own agendas. Global IP law has finally bumped up against traditional knowledge systems and indigenous activists. In some cases, the engagement is reactive: After several successful, but extremely expensive lawsuits preventing or overturning the granting of patents for turmeric and basmati rice in the United States and *neem* in the European Union, India developed an online inventory of traditional knowledge—the Traditional Knowledge Digital Library (TKDL)—which is intended to prove the *prior art* that it hopes will defeat any further patent applications for traditional Indian knowledge. As described in the *Economic Times* of India:

> After years of helplessly watching Westerners plagiarise its traditional knowledge—from yoga poses to ayurvedic medicine—India has de-

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> cided to put an end to generous free lunches people have been helping themselves to. The government is in the process of translating millions of ancient transcripts on traditional knowledge areas to create an exhaustive database in English and other foreign languages, hoping that patent offices abroad would refer to them before granting applicants the right to use what is not theirs.[39]

Although documentation such as the TKDL may legitimate indigenous ownership in accordance with Western IP law, it makes available to mass international audiences what previously was held as local and often restricted traditional knowledge. The conundrum is a result of the application of inapposite legal rules to indigenous knowledge.[40]

There are by now numerous examples of local efforts to protect indigenous knowledge that combine elements of IPRs with local laws and customs. Jane Anderson discusses her project in Australia, which relies on

> sustained and ongoing discussions with Indigenous people … [to develop] community specific strategies for the negotiation of ownership rights to material—increasing the capacity of Indigenous individuals and communities to utilize elements of copyright law in pragmatic ways as well as augmenting copyright with locally developed systems of control and knowledge management.[41]

In New Zealand, the WAI 262 claim brought to the Treaty of Waitangi Tribunal in 1991, which, on its face, refers to indigenously owned flora and fauna "is deemed to include all rights (including intellectual and property rights) past, present and future in relation to taonga o te Iwi Māori" (treasures of the Māori tribes).[42] In this case, the six Māori tribes prosecuting the claim (now at the report writing stage, after closing submissions were made in June 2007) seek to use the Waitangi Tribunal's authority and the publicity garnered from reporting the claim to establish a broad basis of protection for indigenous knowledge.[43]

The Yekuana people of the Amazon and Orinoco Basins have developed a cultural archive that is used as a pedagogic tool in a school they have established to teach their children ceremonies and traditions as well as to defend Yekuana IP in the contemporary global context.[44] Efforts by and on behalf of the Kuna people of Panama to protect the designs of their *molas* led to the constitution of a "Department of Collective Rights and Forms of Folkloric Expression to grant and administer collective ownership copyrights for indigenous groups and to prevent registration by any outside party,"[45] and there are initiatives in Peru, Bolivia, Colombia, and Venezuela to develop national registries of crafts. These latter four nations, as well as New Zealand (with respect to the *toi iho Māori made* mark) and the United States (with respect to Alaskan and other Indian crafts) have developed marks of authenticity to distinguish indigenous crafts from copies or imposters in commercial markets.

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THEORETICAL AND PRAGMATIC CONCERNS

When discussing protection of indigenous knowledge, certain terms are ubiquitous. Their invocation sets the framework for any ensuing conversation. Terms that regularly crop up include *property, traditional, culture*, and *indigenous*. Although any discussion necessarily presupposes an understanding about the implications and import of these words, such consensus is present neither among commentators, nor between indigenous and nonindigenous populations. On the most fundamental level, the attempt to describe and categorize knowledge using terms such as these is a quintessentially Western, post-Enlightenment exercise. For instance, one can trace the philosophical justification for the creation of private property in the European consciousness to John Locke:

> According to Locke, private property is created when the individual removes materials from the state of nature and mixes his labor with them, thereby producing an item of personal property . . . A work of literature belonged to an individual because it was, finally, an embodiment of that individual.[46]

Moreover, the very use of terms such as these as defining markers suggests clear, bounded categories susceptible to the imposition of rules and rights. Indigenous knowledge does not reside in such categories.

Each term is problematic. In a contemporary global society largely fashioned in a capitalist mold, it seems to be *property* that makes the world go 'round. It is also a troubling analytic:

> For the social scientist, property has become a dangerously interesting term to use . . . it . . . has its own life within the politics of the nation-state, the industrial revolution, and the economies of empire, in addition to disciplinary histories within the sciences of human behaviours, including anthropology.[47]

Embracing property as understood in such a framework means imputing nonindigenous values about ownership and the rights appended to property. Compounding the problem is the fact that *property* is a term of art in Western law and jurisprudence.

While use of the word *property* recharacterizes indigenous materials, the use of terms like *indigenous* and *culture* import a troubling essentializing. Who are the *indigenous people* entitled to claim rights in their *cultural properties*? The definition of *indigenous* is neither clear-cut nor universally accepted. "[T]here is no singular definition of indigenous peoples under international law, and it is increasingly accepted as a norm of customary law that indigenous people identify themselves"[48]—an enterprise that is overlain with questions of politics, identity (and identity politics) and human rights.

The terms *traditional* and *culture* also generate more questions than they resolve. Is something *traditional* if it is a recent addition to an evolving cultural repertoire? What parameters control designation as *traditional*? While culture is

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dynamic, the very act of labeling and defining it changes its nature. We create a snapshot when we compile an ethnography; we create a similar, two-dimensional representation when we try to delimit a cultural unit or practice that would be amenable to legal rules for protection. "[C]ulture is not a bounded, static entity but a dynamic, constantly renegotiated process."[49] When Michael Brown titled his 1998 article "Can Culture Be Copyrighted?" then, he begged the question he was posing. In the first place, *copyright* is an inexact and inadequate term to use for all the instances of proposed protection or preservation of indigenous materials. Moreover, although some policy documents adopted by intergovernmental organizations make reference to *culture* as though it were a discrete entity (and not necessarily the same entity is imagined in each of the documents),[50] others speak in more specific and less abstract terms. For example, WIPO does not speak about protecting *culture*, but about protecting *traditional knowledge* and *traditional cultural expressions*. WIPO's Revised Objectives and Principles for the protection of traditional cultural expressions (set out at the 9th IGC and reaffirmed more recently), provide the following definition:

> TCEs/EoF include tangible and intangible forms in which traditional culture and knowledge are expressed, communicated, appear or are manifested. They may be verbal expressions or symbols, musical expressions, expressions by action, such as dances and other performances, and tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms.[51]

UNESCO's "intangible cultural heritage" is defined as:

> the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage … manifested, inter alia in the following domains:
> (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
> (b) performing arts;
> (c) social practices, rituals and festive events;
> (d) knowledge and practices concerning nature and the universe;
> (e) traditional craftsmanship.[52]

The phrase "copyrighting of culture" is catchy, but it is both unfortunate and inappropriate. As Rosemary Coombe noted in a comment to Brown's 1998 article: "As a lawyer and an anthropologist I think that the debates around intellectual property are neither sufficiently careful in their articulation of the law nor ethnographically sensitive to the contexts in which intellectual property assertions arise as rhetorical claims."[53] Although a unitary culture cannot be identified, let alone protected, objects and items of knowledge produced within cultural configura-

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tions can and should receive protection. The fact that indigenous intellectual products do not always follow the rules set out by nonindigenous philosophy and jurisprudence should not deprive them of their right to protection from uncontrolled access by individuals within or outside their indigenous context, or from unfair and uncompensated use by others. Likewise, the fact that developing workable frameworks for protecting traditional knowledge and expressions of culture might be a difficult and extensive task is not an acceptable reason for avoiding it.

WHAT ABOUT "THE COMMONS?"

The *public domain* is a term that grows out of the English common law governing real property, and its contemporary meaning results from its importance in Western intellectual property law. Because indigenous groups do not categorize property or ownership in the same way that nonindigenous societies do, the notion of the public domain is inapposite. The argument that, because indigenous knowledge has not been protected under Western-sanctioned laws up to now, it has fallen into the public domain, and that its *recapture* by indigenous owners will upset some set of presumed rights of new users, is permeated with Western legal and policy assumptions and biases.

Commentators often interchange the terms *public domain* and *commons* and express concern over the erosion of the commons. What is critical, however, is denoting whose commons we are discussing. There is not a unitary commons, but many, each with local norms and institutions. Each cultural commons derives from, and operates for, distinct social groups. Kimberly Christen poses the related questions of where the lines of the commons are drawn and by whom.[54] Implicit in these two questions are two more: For what purpose is the commons defined in a particular way, and who speaks for the commons? All these questions are shot through with questions of power, dominance, and human rights.

Neoliberal notions of individual property coupled with the overarching dominance of industrialized, developed nations has resulted in a situation where what flows freely is what comes, unmodified, from indigenous societies, while what flows out of industrial societies is protected by Western intellectual property laws.[55] The idea of the commons has protected this flow of information from nonindigenous societies at the expense of indigenous ones. A clear example of this may be seen in the 1994 Trade-Related Aspects of Intellectual Property Agreement (TRIPS). Passed by the World Trade Organization as part of the General Agreement on Tariffs and Trade (GATT) to protect the commercial interests of the developed world in intellectual property exported around the globe, TRIPS requires developing nations to create and enforce Western-style intellectual property laws to retain trading privileges. This has resulted in the extension of Western-biased intellectual property systems into communities that do not equally reap the benefits of their protections. Because developing nations tend to be net importers of intellectual

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property, the extensive enforcement regulations cause expense and hardship,[56] while offering no reciprocal protection to the traditional knowledge generated by indigenous communities. Moreover, the intellectual property laws provide a comfortable framework for foreign individuals and corporations to use to acquire intellectual property rights in unprotected indigenous knowledge by, for example, claiming patent or copyright rights in indigenous knowledge products deemed by Western IP law to be in the public domain until *fixed* or adapted by these new claimants.

It is undeniable that there has been an alarming expansion of the scope of intellectual property rights, particularly in the United States, in the past few decades. Some legal scholars have eloquently and persuasively expressed their concern about the "fate of the commons" in a world where so much information is deemed to be private property.[57] Their worries have been fueled by the attack on public access and use by corporate interests in the United States. For example, it was largely the lobbying efforts of the Disney Corporation—as Mickey Mouse was about to fall into the public domain—that led to the 1998 passage of the Digital Millennium Copyright Act, which expanded both the scope and duration of copyright protection. These issues and arguments, however, relate to the use—and arguably abuse—of intellectual property protection within industrialized settings. They should not be transposed into the world of indigenous knowledge.

> We cannot deny a need to protect the public domain from overzealous and sometimes inhumane intellectual property enforcement, particularly when driven by corporate interests. Unfortunately, however, in the words of legal theorists Anupam Chandler and Madhavi Sundar, this newfound 'romance of the public domain' sees all forms of cultural protection as equivalent forms of nefarious censorship, according little respect for the distinctive rights of indigenous peoples and other minorities to their intangible cultural heritage.[58]

CONCLUSION

The United Nations' Declaration on the Rights of Indigenous Peoples recognizes, among other things, that "[i]ndigenous peoples have the right to practise and revitalize their cultural traditions and customs,"[59] while UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions echoes earlier documents in affirming "that cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples and nations."[60] In a world where information and knowledge constitute currency of the highest value, and where industrialization and globalization threaten the survival of indigenous knowledge in all corners of the shrinking globe, the imperative to fashion effective frameworks to protect indigenous knowledge is clear.

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Recognizing the need for such protection, however, is a far cry from providing it. Numerous representatives to WIPO's IGC have been meeting since 2000 but have yet to craft any meaningful blueprint for protection. Although there is overwhelming international support for the goals outlined in the Declaration on the Rights of Indigenous Peoples, the document still lacks the support of the United States, Canada, Australia, and New Zealand. Numerous theoretical and practical issues persist, in addition to geopolitical ones. Some relate to the strategies needed for developing and enforcing protection; others impinge on the nature of indigenous knowledge itself; and still others threaten prerogatives that have been taken for granted in the industrialized world. The first category is the one currently being addressed by WIPO and UNESCO, as well as regional bodies, in their search to develop suitable instruments of protection. Many questions need to be answered: What is to be protected? How can it be defined and categorized? Who owns or possesses the protected rights? Under whose authority should proprietary rights be enforced? How can indigenous systems of categorization and attribution be incorporated into new frameworks for protection? How can customary practices of ownership, transfer, and control be integrated with introduced methods of protecting knowledge? Should protection be limited to control over the use of traditional knowledge—something akin to the *moral rights* provisions of IP laws—or should it regulate the commodification and commercialization of traditional knowledge? None of the questions is easily answered, and all demand local contextualization and application.

Stepping away from operational issues, questions linger about the effect of devising Western-based protection frameworks, wrapped in nonindigenous assumptions, to protect indigenous knowledge. Will importing nonindigenous notions about *property* and *rights*—by transposing IP language into a world for which it was not intended and to which it does not readily apply—alter or impair the knowledge that is the subject of protection? A certain level of fixation or definition of indigenous knowledge is inevitable if it is to be made susceptible of Western-style protection. Does such an artificial assignment of boundaries betray the diversity and values that the protection is intended to serve? Does protection necessarily entail *preservation*, which belies the dynamism of living cultural groups?

A third general concern is how protection of indigenous knowledge will interdigitate with existing bodies of knowledge and property. For example, "native design styles have become part of the warp and weft of mass culture and visual expressions of national identity" in settler societies like the United States, Australia, and New Zealand.[61] Will protection of indigenous knowledge require that nonindigenous uses and users purge such imagery? If not, how can one design coherent and consistent rules of ownership and protection that would exempt such uses? The easy—and heretofore unrestricted—flow of indigenous ideas and imagery has created a kind of porousness that defies easy stoppering.

With all of that, however, the imperative for providing effective protection of indigenous knowledge trumps the difficulties and concerns it engenders. Provid-

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ing protection to indigenous cultural knowledge is necessary to preserve cultural diversity, ensure human rights, and protect storehouses of accumulated human wisdom and technology in a rapidly homogenizing and globalizing world. However rocky and treacherous the paths to protection, it is a journey worth taking.

ENDNOTES

1. Coombe, "Protecting Cultural Industries," 1.
2. Karet, "Q166—Intellectual Property," 10.
3. WIPO, *Reproduction of Document WIPO/GRTKF/IC/9/4*, 5, paragraph 14.
4. UNESCO/WIPO, Tunis Model Law, Section 1 (5) (bis) and Section 6.
5. Strathern and Hirsch, "Introduction," xi.
6. UNESCO, *Recommendation on the Safeguarding*, Section A.
7. UNESCO, *Recommendation on the Safeguarding*, Preamble, clause 2.
8. UNESCO, *Recommendation on the Safeguarding*, Preamble, clause 6.
9. Kurin, "Safeguarding Intangible Cultural Heritage," 68.
10. WIPO, "Consolidated Analysis of the Legal Protection," 23.
11. UNESCO, Symposium on the Protection, paragraph 8.
12. WIPO, *Intellectual Property and Traditional*, 3.
13. WIPO, *Intellectual Property and Traditional*, 4.
14. Kurin, "Safeguarding Intangible Cultural Heritage," 68.
15. Language setting out this objective was argued for by the African group during the eleventh IGC, and strongly disapproved of by the United States, Canada, and Japan. Gerhardsen, "WIPO Committee Extends," 2.
16. Solomon uses the term *TK* at some points in his comments but appears to be speaking generally about what he terms "cultural, biological and intellectual rights and obligations" (*Peer Review Report*, 4) rather than the more narrow category of TK defined by WIPO.
17. Solomon, *Peer Review Report*, 4–5.
18. Solomon, *Peer Review Report*, 4, 9.
19. The IGC's mandate was set to expire at the end of 2009, and much of the 14th session, which concluded July 3, 2009, centered on trying to achieve consensus as to the shape of its future work. The African Group circulated a proposal which called for future work to focus on "text-based negotiations" aimed at the adoption of an "internationally legally binding instrument/s," and to commit to "a clearly defined work program and timeframe" (WIPO, *Proposal of the African Group*, page 1 of Annex). Although most indigenous representatives supported the African proposal, five did not, stressing in their comments that it was premature to talk about a legally binding document before full and effective participation of indigenous groups had been achieved (Tsioumani, "Meeting Review: WIPO IGC-14"). Among the developed member states, Canada, the United States, Australia, and New Zealand did not support language endorsing a legally binding agreement. The 14th session ended without agreement, and the future of the IGC was deferred to the September 2009 meeting of the WIPO General Assembly. On October 1, 2009, the WIPO member states renewed the IGC's mandate for two more years. The consensus decision calls for the IGC to "undertake text-based negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments) which will ensure the effective protection of GRs, TK and TCE's." (WIPO General Assembly, *Matters Concerning the Intergovernmental Committee*, paragraph (a), 2009).
20. UNESCO, *Intangible Heritage Messenger* (February), 1.
21. UNESCO, Convention on the Protection, Preamble.
22. UNEP, *Working Group on Article*.
23. UNEP, *Working Group on Article*.
24. FAO, International Treaty on Plant Genetic Resources.
25. See, for example, FAO, International Treaty on Plant Genetic Resources, articles 7.2(a), 9.1, and 9.2(a).

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26. See WIPO, *Protection of Traditional Cultural Expressions/Expressions of Folklore: Collation*, 48–54; and WIPO, *Protection of Traditional Cultural Expressions/Expressions of Folklore: Addendum*, 22–26.

27. Raikadroka, "Paper Presented at 6th Session," 4.

28. The Māori *toi iho* mark, instituted in 2002 to designate Māori-made products is an initiative along the same lines, but without the imprimatur, and resultant enforcement power, of the government.

29. Philippines Republic, Philippine Indigenous Peoples Rights Act, ch. 1 sec. 2.

30. Philippines Republic, Philippine Indigenous Peoples Rights Act, ch. 1 sec. 2(b).

31. Lindstrom, "Doctor, Lawyer, Wise Man" and *Knowledge and Power*; Weiner, *Inalienable Possessions: The Paradox*; and Harrison, *Stealing People's Names*.

32. Harrison, "Anthropological Perspectives on the Management."

33. Harrison, "Ritual as Intellectual Property" and "The Commerce of Cultures;" Weiner, *Inalienable Possessions: The Paradox*; and Morphy, "Myth, Totemism and Creation."

34. Nabobo-Baba, *Knowing and Learning*, 37.

35. Tuqea, personal communication.

36. Patel, "Can the Intellectual Property," 310.

37. Coombe, "The Properties of Culture," 281; quoting Handler, "Who Owns the Past," 71.

38. Anderson, "The Making of Indigenous," 349.

39. Economic Times (India), "Made in India."

40. If the objective of the database is preservation, rather than protection against economic exploitation by outsiders—IP used as a "positive" rather than a "defensive" tool (Visser, "Making Intellectual Property Laws," 212; Wendland, "Intangible Heritage and Intellectual," 100)—restrictions on who may contribute to the database would ameliorate this problem.

41. Anderson, "The Making of Indigenous," 348.

42. Solomon, "Intellectual Property Rights," 10; quoting from the language of the WAI 262 claim.

43. See also van Meijl, this issue.

44. Finger, "Introduction and Overview," 6.

45. Finger, "Introduction and Overview," 18.

46. Rose, *Authors and Owners*, 114.

47. Strathern and Hirsch, "Introduction," 7.

48. Coombe, "Protecting Cultural Industries," 608.

49. Brown, "Can Culture Be Copyrighted?" 196.

50. See, for example, UNESCO, Convention on the Protection, and "UNESCO's Universal Declaration."

51. WIPO, *Reproduction of Document WIPO/GRTKF/IC/9/4*, 6.

52. UNESCO, Convention for the Safeguarding, article 2(1), 2(2).

53. Coombe, "Comment to M. Brown's," 207.

54. Christen, "Gone Digital: Aboriginal Remix," 334.

55. Coombe, "Rights and Significant Differences."

56. Visser, "Making Intellectual Property Laws," 208.

57. See, for example, Lessig, *The Future of Ideas*, Litman, *Digital Copyright*, and Vaidhyanathan, *Copyrights and Copywrongs*.

58. Coombe, *Cultural Rights and Intellectual*, 1.

59. United Nations General Assembly, United Nations Declaration, Article 11.

60. UNESCO, Convention on the Protection, Preamble.

61. Brown, *Who Owns Native Culture?* 91.

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